

Law Reform Commission of Western Australia

Aboriginal Customary Laws

Project 94

BACKGROUND PAPERS

(January 2006)

Law Reform Commission of Western Australia

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foreword

In December 2000 the Law Reform Commission of Western Australia received a reference to investigate the potential for recognition of Aboriginal customary laws in Western Australia. The Commission's terms of reference were wide-ranging and called for expert comment on a great number of discrete areas of law. As part of the research and consultation phase of the reference the Commission advertised a call for papers on matters relating to the practice and recognition of Aboriginal customary law and its interaction with Australian laws, particularly the laws of Western Australia. A total of 15 Background Papers were commissioned from highly regarded authors with particular expertise in their relevant field.

The Background Papers were published individually by the Commission throughout 2003–2005 and are now reproduced in this volume. Topics covered by the papers include Aboriginal women's issues; Aboriginal customary law and family law; Aboriginal customary law and the criminal justice system; the provision of Aboriginal interpreter services; Indigenous cultural and intellectual property; and Indigenous human rights and international law. A detailed case study of a north-west Aboriginal community was also commissioned. Opinions expressed in the Background Papers are those of their individual authors and are not necessarily endorsed by the Commission.

Heather Kay
Executive Officer
January 2006

Terms of Reference

Recognising that all persons in Western Australia are subject to and protected by this State's legal system; and there may be a need to recognise the existence of, and take into account within this legal system, Aboriginal customary laws:

The Law Reform Commission of Western Australia is to enquire into and report upon Aboriginal customary laws in Western Australia other than in relation to Native Title and matters addressed under the *Aboriginal Heritage Act 1972* (WA).

Particular reference will be given to:

1. how those laws are ascertained, recognised, made, applied and altered in Western Australia;
2. who is bound by those laws and how they cease to be bound; and
3. whether those laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis, and in particular whether:
 - (a) the laws of Western Australia should give express recognition to Aboriginal customary laws, cultures and practices in the administration or enforcement of Western Australian law;
 - (b) the practices and procedures of the Western Australian courts should be modified to recognise Aboriginal customary laws;
 - (c) the laws of Western Australia relating to the enforcement of criminal or civil law should be amended to recognise Aboriginal customary laws; and
 - (d) whether other provisions should be made for the identification and application of Aboriginal customary laws.

For the purposes of carrying out this inquiry, the Commission is to have regard to:

- matters of Aboriginal customary law falling within state legislative jurisdiction including matters performing the function of or corresponding to criminal law (including domestic violence); civil law (including personal property law, contractual arrangements and torts); local government law; the law of domestic relations; inheritance law; law relating to spiritual matters; and the laws of evidence and procedure;
- relevant Commonwealth legislation and international obligations;
- relevant Aboriginal culture, spiritual, sacred and gender concerns and sensitivities;
- the views, aspirations and welfare of Aboriginal persons in Western Australia.

Peter Foss QC MLC
2 December 2000

background paper 1

The approach of Australian courts to Aboriginal customary law in the areas of criminal, civil and family law

Victoria Williams*

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* Victoria Williams was admitted as Barrister and Solicitor of the Supreme Court of Western Australia in May 1993 and holds a Master of Laws with distinction. From 1995 to 2001 Victoria worked as counsel in the Criminal Unit at the Aboriginal Legal Service of Western Australia (Inc) and as a solicitor in all jurisdictions. Victoria also performed the roles of Assistant Manager and Research Officer at the Aboriginal Legal Service. Victoria is currently working as a sole practitioner in the area of criminal law. She continues to undertake work for the Aboriginal Legal Service and has recently been involved in the training of court officers and the preparation of various submissions on behalf of the organisation.

Introduction

This paper is intended to provide a broad summary of the approach of Australian courts to Aboriginal¹ customary law in the areas of criminal law, civil law and family law. Because this paper was produced to inform the Law Reform Commission of Western Australia's Aboriginal customary law reference, the primary focus of the paper is the development of the common law position on customary law in Western Australia. However, there are instances where there is no Western Australian precedent or where the law has been shaped by decisions of courts in other states or territories or by the High Court. This paper therefore refers extensively to relevant cases in all Australian jurisdictions.

The research supporting this paper spans a period of over two decades of judicial consideration of Aboriginal customary law. The author has taken care to ensure that all reported and unreported cases that are publicly available have been included. In addition, the author has referenced a number of cases that take the form of sentencing remarks or transcripts of proceedings. Of these, a portion is publicly available via the internet;² however, in Western Australia these cases are only available upon request and with the consent of the relevant court. Because such a request requires prior knowledge of relevant proceedings, there will be some unreported cases that may have dealt with issues of Aboriginal customary law which have not been included.

The paper is presented in four parts, each part consisting of a summary of the area of law followed by a digest of relevant cases. Part I deals with criminal law and summarises the decisions of Australian courts in the areas of bail, procedure and sentencing where Aboriginal customary law has been at issue. Part I also investigates the use of defences which have relied on Aboriginal customary law. Part II, which deals with civil law, examines cases where Aboriginal customary law has been asserted in relation to coronial and burial matters. Part III addresses issues relating to Aboriginal customary law in matters of family law and the placement of children.

Whilst not specifically addressed to issues of Aboriginal customary law, Part IV examines the related area of Aboriginality and sentencing and provides a general summary of the important principles developed by Australian courts in this area. The case digest following this final section is presented in chronological order to emphasise the development of the common law in this area.

It is important to note that since the Terms of Reference for the Law Reform Commission's Project No 94 exclude the subject of native title, the law in that area has not been separately examined in this paper. However, there are cases where the law of native title has proved relevant as a defence to a criminal charge and those cases are dealt with in Part I.

It will be clear from the above that Aboriginal customary law impacts upon many areas of western or 'white man's' law. As a consequence, some of the cases discussed in this paper are illustrative of several different principles. Therefore, there are instances where a case is referred to a number of times, under different headings, to support discussion of those principles.

Part I: Criminal law

Bail

The cases that consider Aboriginal customary law and bail can be divided into two main categories. The first category concerns cases that have looked at whether the defendant needs to be protected from any future traditional punishment or 'payback'. The second deals with cases where the defendant has been released in the knowledge that they will undergo some form of traditional punishment.

Only one Western Australian case has been identified which expressly considered the relevance of traditional punishment to the question of bail.³ The *Bail Act 1982* (WA) requires the court to take into account—when considering whether to release a defendant on bail—whether the defendant needs to be held in custody for his or her own protection.⁴ In *Unchango v The Queen*⁵ the defendant made an application for bail in relation to a charge of murder. The proposal was

1. References to Aboriginal peoples in this paper are intended to refer to both Aboriginal and Torres Strait Islander peoples where applicable.
2. For instance, transcripts of sentencing remarks from the Supreme Court of the Northern Territory may be found at <http://www.nt.gov.au/ntsc/doc/sentencing_remarks>.
3. The author acknowledges that there may be other unreported cases that consider this question which have not been located.
4. *Bail Act 1982* (WA) Part C, Schedule 1, cl 1(b).
5. [1998] WASC 186.

that she would stay at a spiritual centre if released on bail. In releasing the defendant the court took into account the assurances from the staff at the centre that there was no risk of any payback occurring while she would be staying with them.

A similar provision was considered by the Supreme Court of the Northern Territory in *Barnes v The Queen*.⁶ In that case the defendant wished to be released to undergo traditional punishment but bail was refused because the evidence established that the likely traditional punishment was so severe that it would constitute an unlawful act. The court could not be seen to condone a criminal act and had to take into account the need to protect the defendant under the *Bail Act 1982* (NT). However, in *R v Jungarai* ⁷ the same court granted bail on the basis that the defendant willingly requested to undergo traditional punishment in order to restore stability to the community. The court stated that it neither condoned nor disapproved of the traditional punishment but was simply taking it into account. Whether or not such punishment would amount to a criminal act was considered by the court to be irrelevant. Jungarai was determined before the current legislation⁸ in the Northern Territory which requires that the court take into account whether the defendant is in any danger of physical injury.

More recently it was held that a defendant could be released on bail to undergo traditional punishment but that decision was based on the fact that there was no evidence to suggest that the punishment would constitute a criminal act.⁹ There was in fact no evidence at all about the nature of the traditional punishment, only that the defendant was worried about being available for any punishment that may take place.

The balance of authority suggests that a court will generally only release a defendant on bail for the purpose of undergoing traditional punishment as long as the evidence does not suggest that the punishment would amount to a criminal act. If the punishment would constitute a criminal act then the *Bail Act 1982* (WA) would override any other consideration and demand that the person is kept in custody for their own protection. Where the proposed traditional punishment does not amount to a criminal act (because the recipient does, and is legally able to, consent to the punishment) then it is arguable that the recipient does not require protection.

Case digest – Bail

Unchango & Ors v The Queen [1998] WASC 186

Court: Supreme Court of Western Australia

Date: 12 June 1998

Judge: Templeman J

Facts: The defendant was a tribal Aboriginal woman who was charged with murder. The alleged offence occurred in the context of a sexual assault upon her by the deceased. She applied for bail in the Supreme Court.

It was proposed that if the defendant was granted bail she would reside at the Mirringi Centre which was a spiritual centre run by the Sisters of St Joseph. The court was assured by a letter from the coordinator of the centre that there was no risk of payback while the applicant was at their centre.

Decision: The judge considered all the relevant matters and decided to grant the defendant bail.

In granting bail the judge considered (as required under the *Bail Act 1982* (WA)) whether the defendant needed to be held in custody for her own protection. The judge decided that because of the assurance from the centre and because the centre was in an area which was not visited by the particular group of Aboriginal people who would be likely to inflict any payback that there was little possibility of the defendant being harmed.

R v Jungarai (1981) 9 NTR 30

Court: Supreme Court of the Northern Territory

Date: 23 June 1981

Judge: Forster CJ

Facts: The defendant was charged with murder and made an application for bail to the Supreme Court. The victim had died as a result of being stabbed in the heart and it was conceded by defence counsel that the defendant would be convicted at the very least of manslaughter.

6. (1997) 96 A Crim R 593.

7. (1981) 9 NTR 30.

8. *Bail Act 1982* (NT) s 24 (1)(b)(iv).

9. *Ebatarinja v The Queen* [2000] NTSC 26.

The court heard evidence from three members of the defendant's family who, along with the defendant and the victim, were described as full blood Aboriginal natives. Evidence was also taken from a non-Aboriginal anthropologist. The evidence established that under Aboriginal law the defendant was held responsible for the death and must be punished. There was a strong probability that the punishment would consist of a single spearing in the leg followed by banishment to the bush for a period to be fixed by community elders. It was almost certain that until that spearing took place the community would be very ill at ease and there would probably be serious trouble for others in the community.

The defendant was willing to undergo traditional punishment.

Decision: The judge granted bail with a recognisance of \$500 and a similar surety despite the fact that persons charged with murder are rarely granted bail. Aboriginal tribal punishment was considered to be an important factor in this case.

The judge highlighted some of the difficulties in taking evidence in these circumstances by noting that some of the witnesses were shy and had difficulty speaking English and that some of the evidence was of a confidential nature.

The judge stated that this case should not be regarded as precedent for any case where similar facts are simply asserted from the bar table. Credible evidence must be heard because Aboriginal law and customs vary from place to place. The judge also made it clear that he was neither condoning nor disapproving of the conduct and commented that whether the punishment would amount to a criminal offence was irrelevant.

***Barnes v The Queen* (1997) 96 A Crim R 593**

Court: Supreme Court of the Northern Territory

Date: 13 October 1997

Judge: Bailey J

Facts: The defendant was charged with the murder of his nephew and applied for bail on the basis that he should return to his community for the purposes of traditional punishment.

Two witnesses were called to support the application. The evidence established that under traditional Aboriginal law before European settlement the defendant would have been killed as punishment for his crime. His punishment had been discussed by the community and it was decided that approximately 10 members of his family would spear his legs about four to five times, punch him to the face and chest with fists, inflict blows to his head and back with large heavy wooden boomerangs and that similar boomerangs would be thrown at him (he would have a small shield for protection). It was accepted by the witnesses that he could die or suffer permanent injury as a result of the punishment.

The applicant gave evidence that he was willing to undergo the punishment.

Decision: The judge refused bail. He distinguished the case of *R v Jungarai* on the basis that the proposed punishment was not as severe and that the case was decided before the passage of the *Bail Act 1982* (NT). Under the *Bail Act* a court has to take into account whether the applicant is in danger of physical injury or in need of physical protection.

Bailey J stated that '[w]hatever the context, it would be quite wrong for a judge to structure his judgment to facilitate an unlawful act' (p 596). In this case the nature of the punishment was such that the defendant could not consent to the punishment and the court could not facilitate a crime.

***Ebatarinja v The Queen* [2000] NTSC 26**

Court: Supreme Court of the Northern Territory

Date: 4 May 2000

Judge: Mildren J

Facts: The defendant was charged with one count of aggravated dangerous act causing death whilst under the influence. The victim was his defacto wife and he had indicated that he would be pleading guilty once the defence and Crown had negotiated the facts.

He applied for bail on the basis that he wished to undergo traditional punishment. He believed that the punishment would consist of spearing to the legs or thighs. He was concerned that if he didn't undergo traditional punishment his family would be punished or the elders of the community would use Aboriginal magic to kill him. It was stated that '[h]e believes that once the elders have sung him they will send a snake to find him wherever he may be and once the snake finds him he will get very sick until he dies' [7].

However, the evidence indicated that no decision had yet been made by the victim's family as to whether and what type of traditional punishment would be carried out on the defendant.

Decision: Mildren J considered that the issue of traditional punishment is relevant to bail under the *Bail Act 1982* (NT) in three respects:

1. Determining whether the defendant ought to be free for any lawful purpose;
2. Determining whether the defendant is in danger of physical injury or in need of physical protection; and
3. Considering whether the defendant is likely to commit an offence on bail.

As it was not clear what type of punishment would be inflicted upon the defendant there was no evidence that he would be unlawfully assaulted. It was accepted that if the defendant were released on bail this may actually cause the victim's family to make a decision.

There was evidence that the defendant was suffering anxiety because of his fears about Aboriginal magic. There was no doubt that those beliefs were honestly held. There was a chance that his health may be affected if he was not released.

The judge stated that he accepted 'that courts ought not to grant bail in order to facilitate an unlawful act'; however, in the present case there was no evidence that an unlawful act was likely to occur [17]. The judge therefore granted bail.

Procedure

General

In *Walker v The State of New South Wales*¹⁰ Mason CJ of the High Court held that Aboriginal customary law had been extinguished by the passage of criminal legislation. In other words, the criminal law of each Australian state applies equally to Aboriginal and non-Aboriginal people. While the courts have taken Aboriginal customary law into account in criminal cases they have done so because it was a relevant fact and not because the courts have recognised Aboriginal customary law as a separate, legitimate system of law.

Suppression of names

In the Northern Territory case *R v B*¹¹ the court took into account cultural beliefs about the publication of the deceased victim's name and as a result suppressed the deceased's name. The relevant legislation provided that the court could suppress details if the publication of those details would offend against the public decency. The court held that because of the high proportion of Aboriginal people in the Northern Territory a significant portion of the public would be offended.

Interestingly, many judges in Western Australia do not refer to the deceased's name during the proceedings out of respect for this aspect of Aboriginal culture. However, there is no formal or legislative recognition of this policy.

Rules of evidence

Generally, if a defendant lies to the police or to the courts about the circumstances of the alleged offence then, in the absence of a reasonable explanation for the lie, the jury may infer that the lie is evidence of that person's consciousness of guilt. In *Lofty v The Queen*¹² the court held that the defendant's fear of retribution from members of his Aboriginal community was a reasonable explanation for his lie about his wife's whereabouts. He had lied about where she was because he feared 'payback' which he said would be inflicted upon him under Aboriginal law regardless of whether he was criminally responsible for her death under white man's law.

Evidence of customary law

A number of the cases that appear in other sections of this paper also consider the degree of evidence which is required before a court can rely on Aboriginal customary law. The majority of these cases support the view that credible or expert evidence is required before courts can take into account Aboriginal customary law. However, in practice some cases appear to have considered customary law issues in some way without any expert evidence being presented to the court. The courts in Western Australia appear to be less strict in relation to the evidence that is required before customary law will be taken into account. However, in *R v Gordan*¹³ Wheeler J indicated that in order to take into account traditional punishment, evidence about the nature of that punishment would generally be required.¹⁴

Cases from the Northern Territory and other jurisdictions have developed principles about not only the requirement for evidence to be presented but also the issues which that evidence should address. The following principles can be extracted from those cases:

10. (1994) 182 CLR 45.
 11. (1992) 111 FLR 463.
 12. (1999) NTSC 73.
 13. [2000] WASCA 401.
 14. *Ibid* [22].

1. Expert/credible evidence is required in order for Aboriginal customary law to be taken into account

In *R v Jungarai*¹⁵ the court heard evidence from members of the defendant's family as well as from a non-Aboriginal anthropologist. In taking into account what was said about the proposed traditional punishment the court stressed that in the future it would not be enough for similar facts to simply be asserted from the bar table. As Aboriginal laws and customs vary from place to place there must be credible evidence presented in every case.

The leading case on this issue, *R v Minor*,¹⁶ confirmed that statements from the bar table will not be sufficient to establish the relevance of customary law and that there must be expert evidence about traditional punishment before it can be taken into account.

In *Munugurr v The Queen*¹⁷ the original sentencing judge took into account information contained in a letter from the Chairman of the defendant's community. The appeal court held that the judge was wrong to have given such weight to the information contained in the letter and should have advised defence counsel that further information was required.¹⁸ At the very least there ought to have been affidavits or statutory declarations which should have first been served upon the Crown. The Crown could then indicate whether it required any witnesses to be cross-examined.¹⁹ The court also recommended that where possible, courts should sit at the relevant community to hear any oral evidence because Aboriginal witnesses are more comfortable giving evidence in their own communities.²⁰

These principles were followed in *Parmbuk v Garner*²¹ which held that evidence is required from those who are fully acquainted with the language and customs of the relevant community.

2. It is preferable to have evidence from a representative group rather than just one person

In *R v Wilson*²² the judge commented that in relation to traditional matters it is preferable to hear evidence from a representative group rather than only one person.

3. It is necessary to have evidence about the nature of the traditional punishment as well as evidence that it was carried out in accordance with traditional law

In *Mamarika v The Queen*²³ the court stressed that there needs to be evidence to show that not only some form of punishment occurred but confirmation that it was done in accordance with the traditional laws of the relevant community. Other cases have emphasised that it is not sufficient to claim that traditional punishment has or will take place without evidence of what will actually occur.²⁴

However, it is noted that in *Ebatarinja v The Queen*²⁵ the court, in releasing the defendant on bail, took into account the fact that the defendant wanted to be available for any traditional punishment that his community might impose. It did so without any evidence about the nature of the proposed punishment.

Informing the court about customary law issues

In practice there has been a number of different ways in which the courts have been informed about customary law issues. Set out below are the varying methods which have been used and some case examples of each method.

1. Evidence given specifically during the sentencing proceedings

The only Western Australian case in this paper where evidence was called in relation to traditional punishment specifically during the sentencing process was *The Police v Z*.²⁶ In that case the Children's Court heard detailed evidence from two elders from the defendant's community as well as from his father.

15. (1981) 9 NTR 30.

16. (1992) 59 A Crim R 227, 228 (per Asche CJ).

17. (1994) 4 NTLR 63.

18. Ibid [25].

19. Ibid [22].

20. Ibid [23].

21. [1999] NTSC 108.

22. (1995) 81 A Crim R 270.

23. (1982) 42 ALR 94.

24. *R v Gordan* [2000] WASCA 401; *Parmbuk v Garner* [1999] NTSC 108.

25. [2000] NTSC 26.

26. *The Police v Z* (Unreported, Children's Court of Western Australia, No 3698/2001, O'Brien J, 24 April 2002).

There are numerous cases in the Northern Territory where evidence has been called to inform the court at sentencing.²⁷ In *Pascoe v Hales*²⁸ the court heard evidence from an anthropologist as well as taking into account evidence originally presented to the magistrate from an elder of the defendant's community. The evidence was in relation to the defendant's explanation for an offence of sexual penetration of a child under the age of 16 years. The explanation was that the defendant was entitled to have sexual relations with the victim under Aboriginal customary law. Although this case was overturned on appeal there was no dispute with the evidence supporting the defendant's explanation for the offence. The sentence was overturned on the basis that the court could not allow extensive mitigation for the offence rather than any dispute about the validity of the relevant customary law

2. Written statement handed to the court at sentencing

In *R v Miyatatawuy*²⁹ the court took into account the material contained in a written statement from the defendant's husband who was also the victim of the offence. The statement contained information about the traditional punishment which the defendant had undergone and the wishes of their community which were considered.

3. Evidence given at the trial subsequently taken into account during sentencing

In *R v Njana*³⁰ the defendant was sentenced in relation to an offence of manslaughter after he had been convicted after a trial. During the trial the court heard evidence from a police officer about the traditional punishment which the defendant was subjected to following the offence. At sentencing the judge took into account that evidence.

4. Submissions or information given by defence counsel as well as reference to written statements prepared for the trial or other written material

In *R v Jackman*³¹ the sentencing judge referred to the traditional punishment which the defendant had undergone. The information about the details of the punishment came from defence counsel and crown counsel. In addition, defence counsel relied on statements from numerous witnesses. While the judge did not attach significant mitigatory weight to the traditional punishment this decision does not appear to result from any lack of evidence.

In *R v Thompson*³² the judge took into account that the defendant would be subject to traditional punishment once released from custody. The judge heard the details of the proposed punishment from defence counsel as well as from witness statements and information in a pre-sentence report.

5. Submissions or information given by defence counsel and accepted by Crown counsel

During the sentencing proceedings in *R v Rictor*³³ the court heard details of the traditional punishment from defence counsel. Counsel for the Crown expressly accepted that the punishment had taken place and the judge took it into account during the sentencing. It is likely, however, that the Crown readily accepted that traditional punishment had occurred because a police officer had been present when the punishment took place.

In *R v Peipei*³⁴ the sentencing judge noted that the information about the traditional punishment had been presented by defence counsel from the bar table and was only prepared to accept it because Crown counsel had verified the information.

6. Submissions or information given by defence counsel

In *R v Friday*³⁵ the sentencing judge took into account, amongst other things, the fact that the defendant may be punished by her family. This information was presented by defence counsel.

In *R v Churchill*³⁶ the judge referred to the possibility that the defendant would receive payback. However, on appeal the Court of Criminal Appeal noted that there was considerable doubt that any payback would occur.³⁷ Nonetheless, the court did not interfere with the original sentence.

27. See for example *Jadurin v The Queen* (1982) 44 ALR 424; *R v Minor* (1992) 59 A Crim R 227; *R v Wilson Jagamara Walker* (1994) 68(3) Aboriginal Law Bulletin 26; *R v Wilson* (1995) 81 A Crim R 270; *R v Sampson* (Unreported, Supreme Court of the Northern Territory, SCC 9824061, Angel J, 26 March 2001); *R v Sambo* (Unreported, Supreme Court of the Northern Territory, SCC 9814997, Riley J, 24 July 2001); *R v Pollard* (Unreported, Supreme Court of the Northern Territory, SCC 20116064, Angel J, 23 August 2002); and *R v Corbett* (Unreported, Supreme Court of the Northern Territory, SCC 20200373, Angel J, 16 April 2003).

28. *Pascoe v Hales* (Unreported, Supreme Court of the Northern Territory, SCC 20112873, Gallop AJ, 8 October 2002).

29. (1996) 135 FLR 173.

30. *R v Njana* (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998).

31. *R v Jackman* (Unreported, Supreme Court of Western Australia, No 250/2002, Murray J, 15 May 2003).

32. *R v Thompson* (Unreported, Supreme Court of Western Australia, No 199/2000, Roberts-Smith J, 20 February 2001).

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

34. *R v Peipei* (Unreported, Supreme Court of the Northern Territory, SCC 20014404, Riley J, 24 July 2001).

35. *R v Friday* (Unreported, Supreme Court of Western Australia, No 146/1999, Templeman J, 13 October 1999).

36. *R v Churchill* (Unreported, Supreme Court of Western Australia, No 160/1998, Scott J, 9 December 1999).

37. *R v Churchill* [2000] WASCA 230, [18].

In *R v Gordan*³⁸ the sentencing judge had taken into account the fact that there was a strong possibility that the defendant would face traditional punishment. On appeal Wheeler J was the only judge who referred to the issue of traditional punishment. She stated that while it may not be necessary in every case, there was no evidence of the nature of the traditional punishment that the defendant would face and as a result she did not take it into account when she indicated what the appropriate sentence would be.³⁹

Case digest – Procedure

***R v B* (1992) 111 FLR 463**

Court: Supreme Court of the Northern Territory

Date: 17 December 1992

Judge: Mildren J

Facts: The defendant was a 14 year old Aboriginal boy who was charged with manslaughter. The victim was a 17 year old boy from the same community. The defendant applied to prevent the publication of the deceased victim's name because the community did not want the name to be published.

Decision: The only power to prohibit the publication of the deceased victim's name had to be based upon the view that the publication of his name would be likely to 'offend against public decency'.⁴⁰

The judge took judicial notice of the fact that it is extremely offensive to most Aboriginal Territorians and contrary to most tribal customs to speak of a dead person by their name. He held that to publish the name would be quite offensive to a significant section of the Northern Territory's community bearing in mind that the Aboriginal population represents approximately 22 per cent of the total population.

***Lofty v The Queen* [1999] NTSC 73**

Court: Supreme Court of the Northern Territory (Court of Criminal Appeal)

Date: 20 July 1999

Judges: Martin CJ, Mildren and Riley JJ

Facts: The appellant had been convicted after trial of the murder of his wife. He stabbed her four times with a knife after hearing that she was intending to leave him and go away with another man. A relationship with this man would be viewed as particularly dangerous in Aboriginal eyes. He relied upon provocation as his defence (see section on provocation below for further discussion of this point).

The appellant had been asked by some members of his community where his wife was and he had replied that she had gone away. The Crown intended to rely on this evidence at trial as evidence of his consciousness of guilt. The appellant had explained in his record of interview that he didn't tell anyone she was dead because they would all 'fight me'. Defence counsel submitted that there was another reason for his lie other than consciousness of guilt, namely that under Aboriginal law it did not matter how she met her death, by accident or otherwise, retribution would be exacted upon him.

The appellant appealed against the conviction.

Decision: The Court of Criminal Appeal found that the trial judge had directed the jury that because there was a reason for the appellant's lie they should put the evidence of the lie aside as it would not assist them. The appellant's counsel had submitted that the evidence should have been ruled inadmissible but the court held that the directions were adequate and favourable to the accused.

***Walker v The State of New South Wales* (1994) 182 CLR 45**

Court: High Court of Australia

Date: 16 December 1994

Judge: Mason CJ

Facts: The plaintiff had been charged with a criminal offence which allegedly occurred at Nimbin, New South Wales – a place which was said to be within the area of the Bandjalung 'nation' of Aboriginal people. The plaintiff's statement of claim

38. [2000] WASCA 401.

39. Ibid [22].

40. The phrase 'offend against public decency' was taken by the court from the *Evidence Act 1939* (NT) s 57(1)(a).

alleged that the common law is only valid to Aboriginal people to the extent that it is accepted by them and that in relation to statute law, the state can only legislate in a manner which affects Aboriginal people with their consent.

The defendant made an application to the High Court that the statement of claim did not disclose a reasonable cause of action. The plaintiff's counsel also argued that Aboriginal customary law survived colonisation and therefore the criminal statutes of New South Wales did not apply to Aboriginal people.

Decision: It was held that the legislature of New South Wales has the power to make laws for the peace, welfare and good government of that state in all cases whatsoever and that therefore the plaintiff's proposition must be rejected.

The Chief Justice stated that: 'It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle' (p 49).

He further observed that even if Aboriginal customary law had survived British settlement it had been extinguished by the passage of criminal statutes of general application. English criminal law did not (and Australian criminal law does not) accommodate an alternative body of law operating alongside it (p 50).

***R v Watson* (1986) 69 ALR 145**

Court: Supreme Court of Queensland (Court of Criminal Appeal)

Date: 28 August 1986

Judges: McPherson, Derrington and Dowsett JJ

Facts: The appellant was convicted at trial of the murder of his partner as a result of a knife wound to her abdomen. At trial he testified that he had only meant to cut her on the arm to make her return with him to their home. He was intoxicated at the time.

He was convicted by the jury of murder. He appealed against his conviction on the basis that the evidence about the practice of domestic discipline in his community was wrongly excluded by the trial judge. The evidence he had sought to adduce established that it was common among a large section of his Aboriginal community for men to discipline their female partners with the infliction of a knife wound.

Decision: It was held that the evidence was properly excluded. The jury were able to determine the intention of the defendant in this case without recourse to any expert testimony.

McPherson J stated that even if it could be said that this custom had the effect that every woman in the community had given her consent in advance to physical cutting as a form of discipline it would not matter as under the law of Queensland a person cannot consent to bodily harm (p 148). McPherson J also held that there is no law in Queensland which allows a husband to discipline his wife.

Dowsett J observed that '[i]t is just as much a matter of criminal intent to punish somebody by cutting with a knife prompted by reasons of discipline or punishment as it is to wound a person in the course of a robbery' (p 166).

Sentencing

There are two ways in which courts have taken Aboriginal customary law into account when sentencing offenders. The most common and well known is the situation when an Aboriginal person has been (or will be) subjected to traditional punishment by their own community in addition to facing punishment from the general criminal justice system. However, there have also been a number of cases where the court has heard evidence or information about customary law as part of the explanation or reason for the offending behaviour. It will appear from the discussion below that the courts have been far more reluctant to give substantial mitigation as a result of these explanations than they have in cases where the defendant had been subjected to traditional punishment.

Traditional punishment

General principles

In practice there has been a number of different ways in which the courts have been informed about customary law issues. Set out below are the varying methods which have been used and some case examples of each method.

The main justification expressed by courts for taking into account traditional punishment for Aboriginal offenders stems from the High Court decision in *Neal v The Queen*.⁴¹ This decision provides that the courts are required to take into account all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group.⁴² The fact that an Aboriginal offender has suffered traditional punishment is a fact which exists only by reason of his or her membership of the Aboriginal race.

In *R v Minor*⁴³ the court also referred to view of the Australian Law Reform Commission in its 1986 report⁴⁴ on Aboriginal customary law that traditional punishment should be taken into consideration because a person should not be punished twice for the same offence.

The courts have generally stressed that by taking traditional punishment into account they are not sanctioning the behaviour.⁴⁵ It was stated in *R v Minor* that the court was obliged to take into account traditional punishment even if that punishment was unlawful.⁴⁶ In a more recent case in South Australia, which concerned a non-Aboriginal person who suffered a physical revenge attack from the victim's friends, it was stated that tribal punishment is to be distinguished from other illegal acts which cannot affect the sentence which a person must receive.⁴⁷

There are two important cases which have differing opinions as to whether it is permissible to take into account purported traditional punishment which has not been undertaken fully in accordance with the traditional laws of the relevant community. In *Mamarika v The Queen*⁴⁸ the court was not satisfied that the alleged tribal punishment had in fact been undertaken in accordance with tribal law because there had been no community meeting of the elders to discuss the appropriate punishment and a number of the men who inflicted the punishment were affected by alcohol. It appeared that what occurred was an angry reaction by the deceased victim's friends. The court in *Mamarika* held that it could not take the punishment into account as customary law; however, the attack which the offender suffered could still be taken into account as something which the offender had suffered.⁴⁹

In contrast it was stated by Asche CJ in *R v Minor*⁵⁰ that if an 'attack' is no more than a vendetta it cannot be taken into account in sentencing.⁵¹ In most subsequent cases it appears that the courts have only taken into account payback where it appears that it was a legitimate example of traditional punishment.

An examination of the cases establishes that the courts have taken into account both past and future traditional punishment. In some instances the offender had already suffered the punishment and the court was informed about what took place.⁵² In other cases the court had been advised about the possibility or likelihood of future punishment taking place when the offender was released from custody.⁵³

Nature of the punishment

While the general perception in the community may be that Aboriginal traditional punishment takes the form of a physical 'attack' upon the offender, the cases reveal that there are various types of traditional punishment and some involve no physical punishment at all. The types of traditional punishment that have been taken into account by the courts in sentencing an offender are:

41. (1982) 42 ALR 609.

42. See *Jadurin v The Queen* (1982) 44 ALR 424; *R v Minor* (1992) 59 A Crim R 227; and *R v Rictor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002).

43. (1992) 59 A Crim R 227, 238 (per Mildren J).

44. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, Report No 31 (1986).

45. See for example *R v Minor* (1992) 59 A Crim R 227; *R v Wilson Jagamara Walker* (1994) 68 (3) *Aboriginal Law Bulletin* 26; *R v Poulson* (2001) 122 A Crim R 388; *R v Thompson* (Unreported, Supreme Court of Western Australia, No 199/2000, Roberts-Smith J, 20 February 2001); and *R v Peipei* (Unreported, Supreme Court of the Northern Territory, SCC 20014404, Riley J, 8 July 2002).

46. (1992) 59 A Crim R 227, 240 (per Mildren J).

47. *R v Gooley* (1996) 66 SASR 380, 383.

48. (1982) 42 ALR 94.

49. *Ibid* 97.

50. (1992) 59 A Crim R 227.

51. *Ibid* 228.

52. See for example *R v Miyatatawuy* (1996) 135 FLR 173; *R v Njana* (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998); *R v Sampson* (Unreported, Supreme Court of the Northern Territory, SCC 9824061, Angel J, 26 March 2001); *R v Poulson* (2001) 122 A Crim R 388; *R v Rictor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002); and *R v Corbett* (Unreported, Supreme Court of the Northern Territory, SCC 20200373, Angel J, 16 April 2003).

53. See for example *R v Minor* (1992) 59 A Crim R 227; *R v Friday* (Unreported, Supreme Court of Western Australia, No 146/1999, Templeman J, 13 October 1999); *R v Churchill* [2000] WASCA 230; *R v Gordon* [2000] WASCA 401; *R v Thompson* (Unreported, Supreme Court of Western Australia, No 1999/2000, Roberts-Smith J, 20 February 2001); *R v Pollard* (Unreported, Supreme Court of the Northern Territory, SCC 20116064, Angel J, 23 August 2002); and *R v Wayne* (Unreported, Supreme Court of the Northern Territory, SCC 20204710, Bailey J, 5 December 2002).

1. Spearing

In many of the cases reviewed the punishment involved spearing to the leg and sometimes additional forms of physical punishment.⁵⁴ Of particular note is *R v Rictor*⁵⁵ as the punishment in that case was affected by the intervention of a police officer who was watching the spearing take place. The initial punishment which was to be inflicted was spearing twice to the leg. After this was done a police officer went over to the offender and assisted him to his feet. Once the community members realised that he could walk he was set upon again and speared another 10 times. This was said to be because the purpose of such punishment is to disable the person so they cannot walk or get off the ground. This concept of disablement was also seen in *Jadurin v The Queen*⁵⁶ where it was submitted by defence counsel that the offender would be attacked with boomerangs, nulla nullas and spears and that the injury would be likely to cause permanent crippling.

2. Physical beating

There are some cases in which the traditional punishment consisted of a physical 'attack' without spearing while others involved both spearing and some other form of physical punishment.⁵⁷ In *R v Corbett*⁵⁸ the punishment consisted of the offender sitting on the ground whereupon he was struck three times with a stick, the last time knocking him unconscious.

In *The Police v Z*⁵⁹ the Court heard evidence about the nature of the punishment which would take place. The defendant would be hit approximately 10 times to the back, legs and possibly his head with nulla nullas. The evidence from an elder revealed that in the defendant's community they no longer used spearing as a form of traditional punishment as they recognised that it could cripple the person and that many of the community's members had been leaving out of fear of being speared. It appears therefore that in this particular community the traditional law has been altered to adapt to the changing circumstances of that community and their members' wishes.

3. Banishment

In some cases the offender is required to undergo physical punishment and in addition is then banished from the community for a specified period of time. There are other cases (not in Western Australia) where the traditional punishment consists only of banishment and where courts have taken that into account as a mitigating factor.⁶⁰

In *R v Njana*⁶¹ the punishment was spearing, being struck with nulla nullas and in addition the defendant and his family were banished from the community permanently. In that case the judge queried why the offender was banished for life when the purpose of traditional punishment is said to be the healing of the community and restoration of peace. Defence counsel submitted that in this case the banishment was part of the punishment.

In *R v Miyatatawuy*⁶² the offender and her husband (the victim) were banished to a dry community outstation for two years where they overcame a number of their problems. The court took this into account as mitigation and described the traditional punishment as akin to a supervised good behaviour bond which the offender had successfully completed. Similarly, in *Atkinson & Anor v Walkely*⁶³ the court took into account as mitigation the fact that the offenders had been banished to an outstation for six months. In *Ogle v Mahoney*⁶⁴ the court recognised that the banishment of an Aboriginal person from their community was a significant deterrent.

54. Some case examples involving spearing are *Jadurin v The Queen* (1982) 44 ALR 424; *R v Minor* (1992) 59 A Crim R 227; *R v Wilson Jagamara Walker* (1994) 68 (3) *Aboriginal Law Bulletin* 26; *R v Wilson* (1995) 81 A Crim R 270; *R v Njana* (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998); *R v Sampson* (Unreported, Supreme Court of the Northern Territory, SCC 9824061, Angel J, 26 March 2001); *R v Poulson* (2001) 122 A Crim R 388; *R v Thompson* (Unreported, Supreme Court of Western Australia, No 199/2000, Roberts-Smith J, 20 February 2001); *R v Peipei* (Unreported, Supreme Court of the Northern Territory, SCC 20014404, Riley J, 8 July 2002); *R v Rictor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002).

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

56. (1982) 44 ALR 424.

57. Some case examples involving other forms of physical punishment are *Jadurin v The Queen* (1982) 44 ALR 424; *R v Thompson* (Unreported, Supreme Court of Western Australia, No 199/2000, Roberts-Smith J, 20 February 2001); *R v Rictor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002); *The Police v Z* (Unreported, Children's Court of Western Australia, No 3698/2001, O'Brien J, 24 April 2002); *R v Jackman* (Unreported, Supreme Court of Western Australia, No 250/2002, Murray J, 15 May 2003); and *R v Corbett* (Unreported, Supreme Court of the Northern Territory, SCC 20200373, Angel J, 16 April 2003).

58. *R v Corbett* (Unreported, Supreme Court of the Northern Territory, SCC 20200373, Angel J, 16 April 2003).

59. *The Police v Z* (Unreported, Children's Court of Western Australia, No 3698/2001, O'Brien J, 24 April 2002).

60. Some case examples involving banishment are *Jadurin v The Queen* (1982) 44 ALR 424; *Atkinson & Anor v Walkely* (1984) 27 NTR 34; *R v Miyatatawuy* (1996) 135 FLR 173; *Ogle v Mahoney* (Unreported, Supreme Court of Queensland, Court of Appeal, CA No 132/1997, White, McPherson and Davies JJA, 5 August 1997); and *R v Njana* (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998).

61. *R v Njana* (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998).

62. (1996) 135 FLR 173.

63. (1984) 27 NTR 34.

64. *Ogle v Mahoney* (Unreported, Supreme Court of Queensland, Court of Appeal, CA No 132/1997, White, McPherson and Davies JJA, 5 August 1997).

4. Meeting

In a few cases it appeared that the traditional punishment consisted of a meeting where the relevant issues were resolved.⁶⁵ For instance, in *Munugurr v The Queen*⁶⁶ there was a public meeting where the offender and the victim agreed to accept mutual responsibilities to each other and to not breach the peace in the future.

5. Repercussions for other family members

In some cases it has been suggested that if the offender did not make him or herself available for traditional punishment then the family would be subject to traditional punishment instead. However, in other cases the family were punished in addition to the punishment of the offender.

In *Jadurin v The Queen*⁶⁷ the court was informed that if the defendant did not submit to punishment then there would be repercussions for his family. However in *R v Njana*⁶⁸ both the defendant and his family were permanently banished from the community even though the defendant had already undergone traditional punishment. Similarly, in *R v Thompson*⁶⁹ the court was informed that the defendant and her mother would be hit with fighting sticks and that her brothers would be speared in the thigh.

6. Reprimand

There were two recent cases in the Northern Territory where the traditional punishment consisted of a type of reprimand. In *R v Sambo*⁷⁰ the court was told that a 17 year old was reprimanded by a traditional elder and had since remained out of trouble.⁷¹

All of the Western Australian cases reviewed involved some form of physical punishment. It is not known whether this is because of the differing nature of traditional punishment throughout Western Australia or because of a possible reluctance of the courts and/or defence counsel to consider non-physical types of punishment the same way as the more common forms of traditional punishment.

Community's views

In a number of cases the court has been informed about the views of the Aboriginal community to which the offender belonged. It has been held that the court can take into account the views of the community in relation to sentence so long as those views do not prevail over the proper sentence.⁷²

In *Robertson v Flood*⁷³ the appeal court was informed about a meeting which had been held at the defendant's community. The view of the community was that the defendant should serve the original three month sentence of imprisonment which had been handed down by the magistrate. The court held that the appropriate sentence was two months imprisonment and that although it was permissible to consider the views of the community those views could not result in a sentence which was harsher than was appropriate.

While the view of the relevant community may well be an accepted sentencing consideration the views of the victim are not. In *R v Miyatatawuy*⁷⁴ the court read a statement from the victim of the offence (the offender's husband) about the traditional punishment which had taken place and the resolution of the matter from the community's point of view. The court held that the views of the victim are not relevant but in this case it was not the views of the victim that were being considered but the views of the relevant community of which the victim just happened to be a member.

Purpose of traditional punishment

The general purpose of traditional punishment is usually expressed in terms of community healing. In *R v Minor*⁷⁵ it was

65. See for example *Robertson v Flood* (1992) 111 FLR 177; *Munugurr v The Queen* (1994) 4 NTLR 63; *R v Miyatatawuy* (1996) 135 FLR 173 and *R v Martin* (Unreported, Supreme Court of the Northern Territory, SCC 20105973, Angel J, 31 July 2002).

66. (1994) 4 NTLR 63.

67. (1982) 44 ALR 424.

68. *R v Njana* (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998).

69. *R v Thompson* (Unreported, Supreme Court of Western Australia, No 199/2000, Roberts-Smith J, 20 February 2001).

70. *R v Sambo* (Unreported, Supreme Court of the Northern Territory, SCC 9814997, Riley J, 24 July 2001).

71. See also *R v Nelson* (Unreported, Supreme Court of the Northern Territory, SCC 20209886/20210064, Riley J, 25 October 2002).

72. See *R v Minor* (1992) 59 A Crim R 227; *Robertson v Flood* (1992) 111 FLR 177.

73. (1992) 111 FLR 177.

74. (1996) 135 FLR 173.

75. (1992) 59 A Crim R 227, 228 (per Asche CJ).

stated that to be considered as traditional punishment rather than a revenge attack it must be shown that the punishment has been of positive benefit to the peace and welfare of the relevant community.

In *R v Wilson Jagamara Walker*⁷⁶ the evidence about traditional punishment established that it would heal the rift between the two rival Aboriginal communities who had been involved in the offence. In *R v Sampson*⁷⁷ the court heard that since the traditional punishment had taken place the community now regarded the matter as settled. Recently in *R v Corbett*⁷⁸ the court heard detailed evidence about the nature of payback and that it was a practice of healing with the purpose in the circumstances of that case of restoring the relationship between the offender and the victim. The court also heard that since the punishment took place the offender and the victim had been on friendly terms.

Importantly, in many of the cases (especially in Western Australia) there is no specific reference to any evidence of the positive benefit of the traditional punishment to the community.

Where traditional punishment becomes part of a court order

There are two cases where the courts have imposed sentences upon a defendant and structured the sentence to attempt to ensure that the proposed traditional punishment takes place. In *Munugurr v The Queen*⁷⁹ the proposed punishment was a public meeting at the offender's community. The court imposed a 4½ year sentence but suspended the sentence after the offender had served three months upon him entering into a bond with a condition that he attended the meeting. The court noted the difficulty in enforcing such an order and ordered that the matter be brought back to court if the meeting was not held within a reasonable time.

In *R v Wilson Jagamara Walker*⁸⁰ the proposed punishment was spearing and the judge imposed a suspended sentence with a bond which contained a condition that the offender return to his community where the punishment would take place. The judge also ordered that the court be told whether the punishment did in fact occur. There is the potential for similar orders to be made in Western Australia if a 'speciality' Aboriginal court was to be set up under the new provisions of the *Sentencing Act 1995* (WA).⁸¹

Reason for the offending behaviour

In a number of cases the court has been given an explanation for the offending behaviour which relied upon some aspect of Aboriginal customary law. In the majority of these cases the court has not accepted the explanation for the offence. The courts appear to take into account traditional punishment far more readily than they take into account customary law explanations for criminal behaviour.

Examples where courts have taken Aboriginal customary law into account as an explanation for an offence

There are two South Australian cases where customary law was taken into account to explain and mitigate the offence of arson. In *R v Shannon*⁸² the defendant lit a fire in order to provide a barrier between himself and his father who he believed had threatened him with the 'kadaitcha' men. The Supreme Court took into account the cultural circumstances and reduced the sentence as a result. In *R v Goldsmith*⁸³ the court took into account the fact that the defendant set fire to the house where his friend had died because of his cultural belief that in doing so he would allow his friend's spirit to rest in peace.

More recently in *R v Corbett*⁸⁴ the Supreme Court of Northern Territory acknowledged that the behaviour of the victim towards the defendant was provocative. The court had been told that when the victim put his arm over the defendant's wife's shoulder, this was considered highly provocative, as it was against the local Aboriginal law for a man to touch another man's wife. While the court referred to the provocative nature of the conduct it did not specifically describe it in terms of being culturally provocative but because of the manner in which the explanation was put before the court it could be inferred that it was accepted that the conduct was culturally provocative.

76. (1994) 68 (3) *Aboriginal Law Bulletin* 26.

77. *R v Sampson* (Unreported, Supreme Court of the Northern Territory, SCC 9824061, Angel J, 26 March 2001).

78. *R v Corbett* (Unreported, Supreme Court of the Northern Territory, SCC 20200373, Angel J, 16 April 2003).

79. (1994) 4 NTLR 63.

80. (1994) 68 (3) *Aboriginal Law Bulletin* 26.

81. Section 4 of the *Sentencing Act 1995* (WA) provides for the establishment of 'speciality' courts in Western Australia to deal with prescribed classes of defendants. The Drug Court in Western Australia is one such example. See also the discussion of specialised Aboriginal courts below in Part IV.

82. (1991) 57 SASR 14.

83. (1995) 65 SASR 373.

84. *R v Corbett* (Unreported, Supreme Court of the Northern Territory, SCC 20200373, Angel J, 16 April 2003).

Examples of instances where the court has not accepted the customary law explanation for an offence

In some cases the failure to take customary law into account as mitigation appears to result from the manner in which the case was put to the court rather than because of a complete rejection of the explanation. In other cases the court has simply rejected the explanation or held that the explanation cannot provide any significant mitigation for the offence.

Of the cases reviewed, there are three which deal with offences involving violence against Aboriginal women by Aboriginal men. Any explanation which seeks to justify this type of conduct on the basis that it is part of Aboriginal customary law has been rejected by the courts. In *Jadurin v The Queen*⁸⁵ it was submitted on behalf of the defendant that it was not unusual for Aboriginal men to beat their wives if they do not obey their husbands. The court rejected the argument that this behaviour was part of customary law. In *R v Bulmer*⁸⁶ the court rejected the proposition that it was part of Aboriginal customary law for men to discipline their wives and children with a knife.

In *Ashley v Materna*⁸⁷ the defendant had assaulted his sister. The explanation given was that her husband had sworn at her in the presence of the defendant and this was forbidden under customary law. The court rejected this outright and held that in the absence of any evidence that the reaction of the defendant was obligatory under customary law and of any evidence of the consequences of not 'punishing' his sister, the court could not elevate such conduct to the category of customary law. Importantly, the court held that in any event it could not be considered customary law because the defendant was intoxicated at the time.⁸⁸ The approach in these three cases appears to be consistent with the cases which deal generally with the sentencing of Aboriginal men who commit violence offences against Aboriginal women. The predominant view appears to be that such conduct must be deterred (see Part IV below).

It has also been noted in some cases that to constitute customary law the behaviour must be more than simply conduct which Aboriginal people engage in. In *R v Herbert*⁸⁹ it was held that mere habits or behaviours of the relevant Aboriginal people does not equate to customary law.⁹⁰ Similarly, in *R v Brand*⁹¹ the court stated that behaviour which resulted from ill-feeling between the Aboriginal victim and the Aboriginal defendants (who were described as semi-tribal) was insufficient to describe the conduct as Aboriginal customary payback.

In *Janima v Edgington*⁹² the court did not consider the obligation of a traditional Aboriginal son to his father as any different to anyone's desire to carry out the wishes of their parents. Similarly, in *R v Owen Bara*⁹³ the court rejected the argument that the defendant committed a series of offences with other Aboriginal young people as a result of some type of cultural 'peer' pressure. There was no description in either of these cases of the consequences to the respective defendants if they had not behaved in the manner that they did.

The recent Northern Territory case *Hales v Jamilmira*⁹⁴ dealt with the offence of sexual intercourse of a child under the age of 16 years. The justification for the offence by the defendant was that the victim was his promised wife under customary law and that he was entitled to have sexual intercourse with her under the local customary law. The court did not reject the notion that the behaviour was permissible under customary law; rather the court held that the protection of young girls was more important and that the offending behaviour could not be condoned. Riley J also highlighted that there was nothing to suggest that the defendant had to behave in the manner that he did but rather that he chose to do so.⁹⁵ In other words there was no evidence that he could not have waited until the victim had reached the age of 16 years.

It appears from the principles in these cases that to be categorised as customary law and to be taken into account in mitigation of sentence the behaviour must be explained in terms of a customary law obligation with significant consequences if not carried out. The fact that there are very few cases where a customary law explanation has been accepted as mitigation for the offence is consistent with the principle expressed recently by Martin CJ in *Hales v Jamilmira*⁹⁶ that there is a distinction between taking into account the customary law which leads to an offender being

85. (1982) 44 ALR 424.

86. (1986) 25 A Crim R 155.

87. *Ashley v Materna* (Unreported, Supreme Court of the Northern Territory, No JA1/1997, Bailey J, 21 August 1997).

88. See also *R v Moreen* (Unreported, Supreme Court of the Northern Territory, SCC 20012617, Martin CJ, 3 May 2001) where it was held that conduct which occurs when the parties are both drunk cannot be taken into account as customary law.

89. (1983) 23 NTR 22.

90. See also *Jadurin v The Queen* (1982) 44 ALR 424.

91. [1998] WASCA 279.

92. *Janima v Edgington* (Unreported, Supreme Court of the Northern Territory, No 36/1995, Mildren J, 6 September 1995).

93. *R v Owen Bara* (Unreported, Supreme Court of the Northern Territory, SCC 20016855/20020942, Bailey J, 30 July 2001).

94. [2003] NTCA 9.

95. *Ibid* [32].

96. *Ibid* 28 (per Martin CJ).

punished in accordance with both the general criminal law and the law of the Aboriginal community and circumstances where customary law gives rise to the commission of an offence. The court held that the latter does not allow for as much mitigation as the former.

Case digest – Sentencing (traditional punishment)

***R v Lindsay Njana* [1998] Unreported, No 162/1997**

Court: Supreme Court of Western Australia

Date: 13 March 1998

Judge: Scott J

Facts: The defendant was charged with the wilful murder of his 14 year old girlfriend. He was convicted after a trial of manslaughter. The defendant, who was 19 years' old at the time of the offence, had been sniffing petrol for about two hours prior to the severe and brutal beating of the victim. He had also been a chronic sniffer of petrol over the two years prior to the offence.

The defendant had no prior convictions and had spent 13 months in custody prior to sentencing.

During the trial, evidence had been given from a police officer about the traditional punishment which was administered to the defendant after the offence. The community elders had decided how the punishment would be inflicted and it took place on the football oval. The defendant waited without protest for his punishment to begin. He was speared in the upper thigh by the deceased victim's father, her uncle, and then her brother and then by each of his own brothers. After this the defendant was struck with nulla nullas by other members of the community. The punishment took place in an orderly fashion with each person only being allowed to strike him twice. The police officer who witnessed the event gave evidence that he was powerless to stop it and if the police had intervened they too would have been injured. The punishment was described as sustained and quite severe by the defendant's counsel.

In addition to this the defendant and his family had been permanently banished from the community and there was evidence that if the defendant returned to that community he would be killed (pp 47–50).

Decision: During the sentencing submissions the judge queried why the defendant was not welcomed back to the community after the traditional punishment had been completed as he understood that the purpose of such punishment was to restore peace to the community and act as a healing process. Counsel for the defendant agreed that would usually be the case but submitted that in this case the banishment was part of the traditional punishment (p 50).

In deciding the appropriate sentence the judge took into account a number of mitigating factors including that the defendant had undergone traditional punishment of spearing, being knocked unconscious from nulla nullas and being banished from the community. He also referred to the fact that he had brought disgrace to his family (p 62).

The defendant was sentenced to four years' imprisonment backdated to when he first went into custody and he was made eligible for parole.

***R v Friday* [1999] Unreported, No 146/1999**

Court: Supreme Court of Western Australia

Date: 11 & 13 October 1999

Judge: Templeman J

Facts: The defendant, a 19 year old Aboriginal woman, was charged with murder but pleaded guilty to manslaughter. The victim was the defendant's mother. Both the defendant and the deceased had been arguing and were drunk. The deceased hit the defendant and then the defendant grabbed a knife from the kitchen to protect herself and when the fight continued the deceased was stabbed. The plea of guilty was made on the basis that the defendant did not intend to kill her mother or cause her grievous bodily harm.

Decision: The defendant was sentenced to an Intensive Supervision Order for a period of two years. The judge took into account a number of factors in arriving at this sentence. They were:

1. The defendant's plea of guilty;
2. The defendant's obvious remorse;
3. The defendant's young age;
4. The defendant's difficult upbringing including the circumstances of alcohol abuse and violence;
5. The fact that the defendant had been in custody already for nine months which was equivalent to a sentence of two years and three months; and
6. That the defendant *may* be punished by her family if she returned to her community.

***R v Mary Anne Churchill* [2000] WASCA 230**

Court: Supreme Court of Western Australia (Court of Criminal Appeal)

Date: 28 August 2000

Judges: Kennedy ACJ, Anderson and Wheeler JJ

Facts: The respondent was sentenced to 3½ years' imprisonment with parole for manslaughter. The respondent was an Aboriginal woman who, while under the influence of alcohol, had stabbed an Aboriginal male with whom she had had a relationship.

The Crown appealed against the leniency of the sentence.

Amongst other things the trial judge had referred to the possibility that she may receive payback from the relatives of the deceased when deciding on the appropriate sentence. The trial judge had been informed about this by defence counsel.

Decision: Kennedy ACJ (with whom Anderson and Wheeler JJ agreed) stated that: 'There was a suggestion that, on her release from custody, the respondent will receive a beating from the relatives of the deceased by way of payback, but there appears to be considerable doubt as to whether this is in fact a likelihood' [18].

His Honour also referred to the general principles as expressed in *R v Fernando*.⁹⁷ While expressing the view that the sentence was lenient it was not manifestly so and therefore the appeal was dismissed.

***R v Gordan* [2000] WASCA 401**

Court: Supreme Court of Western Australia (Court of Criminal Appeal)

Date: 15 December 2000

Judges: Kennedy, Anderson and Wheeler JJ

Facts: The defendant was a 45 year old Aboriginal man who had pleaded guilty to the manslaughter of his defacto wife. The victim died from internal injuries after a violent domestic attack. The defendant had a long record for violence, including a previous offence of manslaughter against a former partner.

The judge sentenced the defendant to seven years' imprisonment without parole. While the sentencing judge noted that the penalty had to act as a deterrent in order to protect Aboriginal women he also took into account that the defendant was prepared to face tribal punishment and that there was a 'strong possibility' that he would face severe tribal punishment once released.

The Crown appealed on the basis that the sentence was manifestly inadequate.

Decision: Kennedy J and Anderson J dismissed the appeal because although the sentence imposed was lenient it could not be described as manifestly so.

In dissent, Wheeler J allowed the appeal and substituted a sentence of nine years' imprisonment without parole. In relation to the issue of tribal punishment Wheeler J commented that while it may not be necessary in every case there was no evidence in this case nor even any assertion by the defendant as to the nature of the tribal punishment [22]. In her Honour's decision regarding the appropriate sentence the issue of tribal punishment was not referred to.

***R v Thompson* [2001] Unreported, No 199/2000**

Court: Supreme Court of Western Australia

Date: 19 & 20 February 2001

Judge: Roberts-Smith J

Facts: The defendant was originally charged with murder but pleaded guilty to manslaughter. The deceased was her defacto husband. Both the deceased and the defendant were drinking and eventually the defendant wanted to go to sleep. The deceased pestered her to stay awake and continue to drink with him. In doing so he pushed, prodded and hit the defendant (but not seriously) while she was very sleepy and drunk. A knife which they had been using earlier for eating was next to the mattress and the defendant picked it up and poked or pushed it into her husband to stop him from annoying her. The evidence suggested that the defendant did not realise that she had connected with him. The knife had in fact struck him in the leg and severed his femoral artery. He died shortly afterwards. Once the defendant realised what she had done she was extremely distressed, crying and asked to be beaten.

The defendant had repeatedly indicated that she wished to go back to the community to take her tribal punishment. There was reference to the issue of tribal punishment in the pre-sentence report and in a statement of one of the police officers involved in the case. Defence counsel also stated that:

97. (1992) 76 A Crim R 58.

Ms Thompson will certainly be subject to traditional punishment. It has been adverted to in the pre-sentence report and she has instructed me quite plainly, after me pursuing the issue, that she certainly will be. She's willing to be punished and in fact she's somewhat anxious to have the punishment dealt with as soon as possible' (p 15).

Defence counsel then went on to describe the nature of the punishment: namely, that she and her mother would be beaten with fighting sticks and that her brothers would be speared in the thigh.

Decision: The judge accepted that the defendant's desire to undergo tribal punishment was an indication of her remorse.

After referring to a number of case authorities the judge stated that:

To return to the present case I note and accept that Thompson not only intends but is determined to present herself to the community for traditional punishment and I accept that it will be inflicted as described by Mr Tyers not only on her but on her mother and three brothers; that is to say, the expectation is that she and her mother will be hit with fighting sticks and her three brothers will be speared in the thigh (p 31).

The judge noted in particular, case authority for the proposition that a sentencing judge can take into account future payback punishment and that in doing so a judge is not sanctioning unlawful violence.⁹⁸

Taking into account the exceptional nature of this offence and her personal circumstances including the prospect of traditional punishment, the judge imposed a sentence of 15 months' imprisonment, suspended for two years.

***R v Damian Rictor* [2002] Unreported, No 34/2002**

Court: Supreme Court of Western Australia

Date: 18 & 30 April 2002

Judge: McClure J

Facts: The defendant was originally charged with murder but pleaded guilty to manslaughter after a preliminary hearing. The deceased and the defendant were close friends who lived at a community together. The defendant had been seeing a particular girl who was considered 'wrong way skin group' and therefore the community strongly disapproved of their relationship and the deceased was one of the strongest opponents. The defendant and the deceased had both been drinking prior to the incident. Someone told the defendant that the deceased had in fact been seeing the girl and a fight started as a result. The fight continued and eventually the defendant hit the deceased a number of times with a sharp object and a tree branch.

After realising that his friend had died the defendant left the community and hid in the bush for several days. When a group of people from his community later found him in the bush he was immediately set upon and punched and hit with nulla nullas and iron bars (p 20).

Subsequent to this attack the defendant was subjected to traditional punishment. It consisted of spearing twice to his leg. A police officer was present and intervened to assist the defendant to his feet and help him to the car. Once the community members saw that he could walk he was set upon again and speared a further 10 times by different members of the community. Counsel for the defendant stated that 'one of the purposes of traditional punishment is to disable to the point that the person cannot walk nor get off the ground' (p 20). In addition to the spearing the deceased's mother hit the defendant with an iron bar and it was submitted that, unlike the spearing, this was not done in accordance with traditional law. Counsel also suggested that if he returned to the community and behaved in a culturally appropriate manner then that would be the end of the matter and he would receive no further punishment.

The Crown accepted that the traditional punishment had taken place.

Decision: In delivering her sentencing remarks McClure J stated that:

Following the commission of the offence you were speared in the legs on a number of occasions by persons entitled under Aboriginal law to inflict punishment upon you. There was a total of 12 wounds, more than expected because of the well-intentioned intervention of a member of the police force assisting you in the belief that the punishment was at an end (p 51).

The judge took this into account as one of the mitigating factors and commented that this was because the court was required to take into account those factors which exist only by reason of the defendant's membership of a particular group. The defendant was sentenced to five years' imprisonment backdated to 26 April 2001 and was made eligible for parole.

98. *Minor* (1992) 59 A Crim R 227.

***The Police v Z* [2002] Unreported, No 3698/2001**

Court: Children's Court of Western Australia

Date: 24 April 2002

Judge: O'Brien J

Facts: This case involved the sentencing of a 17 year old Aboriginal boy from a country area.⁹⁹ The defendant pleaded guilty to a charge of manslaughter as well as two charges of assault occasioning bodily harm.

The incident occurred after a disagreement and the victim was punched and kicked by the defendant. The victim died some time after the attack. The defendant was intoxicated at the time of the incident. The defendant had prior convictions for violent offences. He had spent about three months in detention prior to sentencing.

Evidence was called on behalf of the defendant in relation to the proposed traditional punishment that the defendant would undergo once released from any sentence imposed by the court. The evidence came from relatives and elders of the defendant's community.

The evidence established that the defendant's father and uncles had already been subjected to traditional punishment as a result of the defendant's actions. They had been hit with nulla nullas on their backs and their legs by three community members.

The evidence confirmed that the defendant would also have to undergo similar traditional punishment at a later time. He would have to have the punishment regardless of the sentence imposed by the court. It was stated that the defendant would not be speared. He would be hit with nulla nullas about 10 times to the back and legs and probably to the head. There would be two elders standing on either side of him to make sure that the punishment did not go too far.

Evidence was heard that in the defendant's community they no longer used spearing as a form of traditional punishment because they realised that they could cripple a person and because a number of people had been frightened and had left the community.

It was also stated that if the defendant did not undergo the traditional punishment there could be serious trouble between the defendant's family and the family of the deceased. The defendant expected to be punished and would remain anxious about it the longer it was delayed.

Decision: The judge took into account a number of factors associated with the defendant's Aboriginality including his alcohol problem (which she accepted was a result of his socio-economic circumstances) and the fact that he had already spent three months in detention in Perth away from his family, culture and traditions. It was noted by the judge that she was obliged to take the defendant's Aboriginality into account because of s 46(2)(c) of the *Young Offenders Act 1994* (WA).¹⁰⁰

In relation to the issue of traditional punishment the judge stated that she was satisfied that it would be administered to the defendant. She held that the court cannot 'condone unlawful conduct on the part of anyone, even if it constitutes tribal punishment, but to recognise tribal punishment is not to sanction it' (p 7). The judge took into account as mitigation the fact that the defendant would receive tribal punishment and sentenced him to 16 months' detention backdated to reflect the time already spent in custody.

***R v Jackman* [2003] Unreported, No 250/2002**

Court: Supreme Court of Western Australia

Date: 15 May 2003

Judge: Murray J

Facts: The defendant pleaded guilty to one charge of manslaughter and one charge of grievous bodily harm. The deceased was the defendant's father and the other victim was her mother. The incident occurred while the family was attending a 'sorry camp' after the death of the defendant's grandmother. The defendant's parents began to chastise her and abuse her in relation to her relationship with a man who was considered to be the 'wrong way skin group'. After an angry exchange where the defendant had threatened her mother, she jumped into a car with the intention of leaving but ended up losing control of the vehicle. She hit both her parents, killing her father. She pleaded guilty on the basis that her driving was criminally negligent.

Immediately after the accident—that is, as soon as she got out of the car—the defendant was attacked by an angry mob and the police had to be called. The court was told about this by both the Crown counsel and defence counsel. The judge also had numerous witness statements as part of the brief which referenced this incident.

99. All references to the defendant's name or identifying features in this case have been excluded in accordance with statutory prohibitions on publishing the names and particulars of juvenile defendants. The author has thus substituted the letter "z" for the defendant's name.

100. Section 46(2)(c) of the *Young Offenders Act 1994* (WA) provides that the court is to 'consider any information about the offender or the offence that may assist the court to decide how to dispose of the matter, and in particular...(c) the cultural background of the offender'.

Defence counsel referred to the attack upon the defendant and advised the court that the mob that attacked her had knives, sticks and star pickets. Counsel acknowledged that at first appearance the attack did not seem to be consistent with traditional punishment but relied upon the statements of numerous witnesses to submit that it was in fact traditional payback. These witnesses in their written statements claimed that the attack was part of tribal law.

Defence counsel also advised the court that he had spoken to a non-Aboriginal male who was the administrator of the Warburton community and who was married to an Aboriginal woman. This man had indicated that traditional punishment by the mother's family had taken its course.

Counsel further advised that he had spoken to the Aboriginal Legal Service court officer who had family connections in the Wiluna area and explained that the defendant would still suffer traditional punishment from her father's family and it would be quite severe, possibly consisting of a spearing to the leg. Counsel told the court that he had endeavoured to obtain written confirmation from members of these communities but had been unable to do so.

Decision: The judge referred to the fact that the defendant had received punishment from her mother's family who were present and that this could be regarded as traditional punishment. He also accepted that the defendant would be subject to future payback from her father's family.

However, the judge held that while the past and future punishment may be regarded as mitigation their capacity to reduce the sentence was limited. He further stated: '[I] cannot reduce the punishment that would be proper and proportionate to that by reason of what might happen to you within your own particular Aboriginal community in due course or by reference to what has happened to you in the context of that community to the point where what I do inadequately reflects the seriousness of the offences that you have committed' (p 55).

The defendant was sentenced to a total of four years' imprisonment with eligibility for parole and backdated to 5 July 2002.

***Mamarika v The Queen* (1982) 42 ALR 94**

Court: Federal Court (Northern Territory)

Date: 4 June 1982

Judges: Northrop, Toohey and Sheppard JJ

Facts: The appellant was an Aboriginal man from a remote community who had been convicted of the manslaughter of a close relative who was described as his 'brother'. The offence occurred after they and others had been drinking and an argument had developed. The appellant bumped the deceased's vehicle and the deceased tried to punch him. The appellant retrieved a fishing knife from the car and stabbed the deceased in the leg and neck.

After the incident the appellant was attacked by several men from his community who were armed with spears. The appellant had a number of wounds and was taken to hospital.

The appellant's community wrote a letter signed by 20 members to say that they did not want the appellant to be sent to prison but that he should serve his sentence at an outstation for three years or more. The appellant pleaded guilty to manslaughter and was sentenced to 7½ years' imprisonment with a non-parole period of two years.

The appellant appealed against the severity of the sentence primarily on the ground that the sentencing judge did not pay sufficient regard to tribal punishment and to the wishes of his community.

The Crown accepted that the injuries had been inflicted in accordance with tribal custom but did not concede that the injuries had been inflicted according to tribal law. This was because there had been no time for a community meeting or meeting of the elders to determine the appropriate punishment and some of the men who were involved had been drinking.

Decision: The court issued a *per curiam* judgment. In relation to the injuries sustained by the appellant they stated that if the 'attack' was to be regarded as a 'reflection of the customary law of an Aboriginal community or tribal group, we are of the opinion that there should be evidence before the court to show that this was indeed the case and that what happened was not simply the angry reaction of friends of the deceased' (p 97).

However, the fact that the appellant suffered the injuries as a result of his involvement in the offence is still a matter which could be taken into account (p 97). Because of the injuries that he suffered and the time that he had already spent in custody (since 15 December 1981) the judges held that he had already suffered severe punishment. They held that to release him now and place him under supervision and exclude him from his community for three years would reflect the appropriate penalty for the offence.

The appellant was effectively placed upon a form of a suspended sentence as from 1 August 1982.

***Jadurin v The Queen* (1982) 44 ALR 424**

Court: Federal Court (Northern Territory)

Date: 27 October 1982

Judges: St John, Toohey and Fisher JJ

Facts: The appellant was convicted of the manslaughter of his wife. The incident occurred after they had both been drinking. There was an argument and he assaulted her with a piece of wood causing a number of injuries. Later, once they were at home in bed his wife got out of bed and this angered the appellant. He struck her on the back with a piece of piping and this caused her liver to rupture. The appellant had no previous convictions.

The appellant was sentenced to four years' imprisonment with a non-parole period of 12 months. He appealed against the severity of the sentence.

The appellant's counsel submitted that the sentencing judge had failed to take into account that he had undergone (and was likely to further undergo) traditional punishment. The appellant's father gave evidence to the court that payback from the local community had already been completed using a boomerang and that the appellant did not suffer any major injury.

However, his father stated that the appellant would still have to face punishment from the deceased's family when he finished his sentence. It would consist of the appellant being surrounded and on a cue those present would be allowed to let fly with boomerangs, nulla nullas and spears. The resulting injury was said to be likely to require evacuation and cause permanent crippling. It was also possible that he would be banished from the area for two or three years instead of, or as well as, the above. There was also evidence from a member of the appellant's community that there would be a men's ceremony in a couple of months and he would get a hiding from everyone which would include being burnt by fires. The evidence also established that if he did not submit to this punishment or was unavailable for it there would be repercussions for his family.

Decision: In relation to the tribal punishment the court followed the decision in *Mamarika v The Queen*¹⁰¹ by stating that it was something which should be taken into account without giving any sanction to what had occurred. To do so is to recognise certain facts which exist only by reason of the offender's membership of a particular group.¹⁰²

In this case the court held that the sentencing judge had adequately taken the traditional punishment into account.

***Atkinson & Anor v Walkely* (1984) 27 NTR 34**

Court: Supreme Court of the Northern Territory

Date: 15 February 1984

Judge: Leary J

Facts: The two appellants were sentenced in relation to an offence of indecent assault. Atkinson was sentenced to 20 months' imprisonment with a non-parole period of 10 months and Williri was sentenced to 16 months' imprisonment with a non-parole period of seven months. They appealed against the severity of their sentences.

The offences occurred at an Aboriginal community and the victim was 13 years' old. After the offence occurred, the community council ordered the banishment of both offenders to an outstation for a period of 12 months. After about five to six months they were then allowed to return. There had been threats to the offenders from members of the complainant's family. There had not been any physical punishment.

The magistrate stated that the community had taken a very lenient view of the offence but that their view could not prevail over the view of the community at large which would regard the offences as serious.

Decision: In handing down his decision on appeal Leary J commented that the banishment was very likely to have been 'regarded as an aid to preserving peace in the community' and it was 'also intended as a form of punishment of the prisoners, and to mark the community's disapproval of their conduct' (pp 35–36). He held that the magistrate had not taken into account the fact that both the defendants had been banished from their community in fixing the appropriate sentence. The judge also stated that the community did regard the offences as serious and that was borne out by the fact that both offenders were banished.

The sentences were reduced to 16 months' imprisonment with a non-parole period of seven months for Atkinson and 12 months' imprisonment with a non-parole period of five months for Williri.

101. (1982) 42 ALR 94, 97.

102. See the comments of Brennan J in dissent in *Neal v The Queen* (1982) 42 ALR 609, 626.

R v Berida [1990] Unreported, No 9003230

Court: Supreme Court of the Northern Territory

Date: 5 April 1990

Judge: Angel J

Facts: The defendant pleaded guilty to manslaughter. The defendant and the victim were members of separate clans which had been involved in a long standing conflict. The defendant was also married to the victim's sister and there were problems between the two as a result. At the time of the killing there was an argument and a scuffle and the defendant eventually stabbed the victim through his rib cage. Others, who were nearby, then grabbed the defendant and punched and kicked him. He was also beaten with sticks and rocks.

The defendant was removed from the settlement by the police for his own protection.

The judge referred to the fact that there was a real risk of payback and that the personal safety of the defendant would remain a real issue for some time. He also noted that he would probably not be able to return to his home for a long time and perhaps never.

Decision: The judge sentenced the defendant to seven years' imprisonment and after serving three years of the sentence the balance would be suspended subject to certain conditions.

R v Minor (1992) 59 A Crim R 227

Court: Supreme Court of the Northern Territory (Court of Criminal Appeal)

Date: 13 January 1992

Judges: Asche CJ, Martin and Mildren JJ

Facts: The respondent pleaded guilty to two charges of manslaughter, one charge of unlawfully causing grievous bodily harm and one charge of aggravated assault. The sentencing judge imposed a head sentence of 10 years' imprisonment and ordered that the respondent could be released on a bond after serving four years.

The offences occurred during a brawl between two Aboriginal family groups. There was a degree of provocation for the offences. The respondent had only a minor record of convictions.

The sentencing judge heard evidence that the respondent would receive payback by way of spearing to the leg and that it was important for the community's healing that the punishment took place.

The Crown appealed against the sentence upon a number of grounds including that the judge was wrong in taking into account the fact that the respondent would receive payback because:

- The court was sanctioning unlawful violence;
- The interests of the community to which the respondent belonged were an irrelevant consideration.

Decision: Mildren J (with whom Asche CJ agreed) held that the payback was properly taken into account in fixing the sentence. He stated that: 'The reason why payback punishment, either past or prospective, is a relevant sentencing consideration is because considerations of fairness and justice require a sentencing court to have regard to "all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice"¹⁰³ (p 238).

He also referred to the view of the Australian Law Reform Commission that it should be taken into account so that a person is not punished twice for the same offence (p 240).

In this case the majority held that there was no evidence that the punishment was unlawful because a 'victim' can authorise an assault as long as there is no intention to kill or cause grievous bodily harm. There was also no evidence that a single spearing to the leg would be likely to cause grievous bodily harm. Further, even if the spearing was unlawful the principles referred to above required the court to take it into account. However, the majority held that the court could not structure its sentence to actually facilitate an unlawful act.

The court is entitled to take into account the interests of the community to which the offender belongs. The court can take into account the wishes of that community so long as they do not prevail over the proper sentence.

It was also stated by Asche CJ that statements from the bar table about traditional punishment will be of little use. They must be accompanied by expert evidence. Further, he commented that if payback is no more than a vendetta it cannot be taken into account. It must be shown to be of positive benefit to the peace and welfare of the particular community (p 228).

103. Neal (1982) 149 CLR 305, 326 (per Brennan J).

***Robertson v Flood* (1992) 111 FLR 177**

Court: Supreme Court of the Northern Territory

Date: 29 October 1992

Judge: Mildren J

Facts: The appellant pleaded guilty to two charges of assaulting a police officer and other minor offences. In relation to the assaults he was sentenced by a magistrate to a total of three months' imprisonment. The appellant had been released on bail pending the appeal after serving about five weeks in detention.

The appellant was 17 years' old and he was from a remote community near Tennant Creek. He had been initiated when he was 15 years' old. The community was a dry community but had regular problems from members who drank alcohol in nearby towns and from the resulting domestic violence. The community had established a night patrol to deal with these issues.

On appeal to the Supreme Court new evidence was presented. The judge heard evidence from members of the appellant's family and the community. In particular there was evidence that as the appellant had undergone initiation he was required to take full responsibility for his actions and was considered equal to an adult in all respects. Once initiated if a man does something wrong then, amongst other things, his family will have a meeting to decide what should be done. In this case the appellant's family had held a meeting and they had decided that he should complete the sentence of imprisonment handed down by the magistrate.

Decision: The judge referred to a number of issues. One matter he considered was the views of the community that the appellant should be sent back to prison. The judge stated that 'it is appropriate for the court to take into account the special interests of the community of which the offender is a member, and to take into account the wishes of the community so long as they do not prevail over what might otherwise be a proper sentence' [35]. In other words the court cannot impose a harsher penalty than what is appropriate because the offender's community demands it.

The appellant was sentenced to a total of two months' imprisonment.

***R v Wilson Jagamara Walker* (1994) 68(3) *Aboriginal Law Bulletin* 26 (case note)**

Court: Supreme Court of the Northern Territory

Date: 10 February 1994

Judge: Martin CJ

Facts: The defendant and the victim were each members of rival Aboriginal groups. At the time of the incident both groups had been drinking heavily. The defendant was on his way home when he heard one of his friends calling for help. He went to his assistance and found that his friend was being attacked by a member of the rival group. He killed his friend's attacker by stabbing him to the neck. He pleaded guilty to manslaughter

The court heard evidence that the defendant would be likely to suffer traditional punishment by spearing to each of his legs. The evidence established that this punishment would heal the rift between the two groups. The court was also told that two other people involved in the incident had already suffered payback.

Decision: The judge held that taking into account the potential customary law punishment did not mean that the court was condoning the conduct.

He sentenced the defendant to three years' imprisonment backdated to the date when he first went into custody. The sentence was suspended immediately upon the defendant entering into a two-year good behaviour bond. It was a condition of the bond that he return to his community and be subject to the supervision of the Director of Correctional Services and that he obey all reasonable directions.

The judge requested that the Director report back to him as to whether the customary law punishment took place. He noted that the Director could seek to amend the conditions of the bond if necessary.

***Munugurr v The Queen* (1994) 4 NTLR 63**

Court: Supreme Court of the Northern Territory (Court of Criminal Appeal)

Date: 11 February 1994

Judges: Martin CJ, Angel and Mildren JJ

Facts: The applicant had pleaded guilty to one charge of grievous bodily harm and two charges of assaulting a police officer. He was sentenced to a total of 4½ years' imprisonment with a non-parole period of 12 months.

He was a 46 year old Aboriginal man from Arnhem Land who was married with four children. He was the Secretary of the Lanhupuy Homelands Association which encouraged, amongst other things, the development of Aboriginal communities which follow traditional culture.

His youngest son had just been initiated and he was obliged to pass on traditional and cultural skills to his son. He was also an important participant in the traditional ceremonies of his community.

The applicant had parental responsibility for his 15 year old nephew. His nephew had died in a drunken brawl outside a hotel. As a result of this incident about 50 members of the community met to discuss in the traditional way the death of this boy. A man who was present began shouting abuse which was culturally upsetting to the applicant. The applicant intervened to stop a fight between this man and another person. The applicant eventually armed himself with a machete and struck the man. Two police officers were also assaulted in the process.

The applicant had a previous conviction for grievous bodily harm which had resulted in a suspended sentence. The background to that offence was that the applicant had believed that the victim was intending to harm his brother. He complied with the suspended sentence.

There was a letter from the community signed by the chairman and the town clerk, which indicated that there had been a reconciliation ceremony and that they did not want the applicant to be imprisoned because of the impact upon his son and the community's traditional ceremonies. It also stated that he would be dealt with in the traditional manner if he returned to the community.

The sentencing judge imposed a sentence of 4½ years' imprisonment with a non-parole period of 12 months.

Decision: The court held that the sentencing judge fell into error by failing to inquire further into the issues raised by the letter. They held that the judge should have informed the defence counsel that further information was necessary or otherwise he would have to give the matters raised by the letter little weight [25].

The court stated that the effect on the applicant's family is not relevant unless there are exceptional circumstances and in this case no such circumstances existed. The court did, however, consider that his role in the community and as part of the Association was an important factor which should have been taken into account [19].

The wishes and views of the community are relevant as long as they do not prevail over what is the appropriate penalty [20].

Information should have been put before the court at least by way of affidavit or statutory declaration. The Crown should be served with these statements so they can decide if they require any witnesses to be present for cross-examination [22].

Where evidence needs to be given orally it is desirable for courts to sit in the relevant community not only to save expense but because Aboriginal witnesses are more comfortable giving evidence in their own communities [23].

After obtaining further evidence the court discovered that the traditional punishment proposed was for the applicant to attend a public meeting to seal the peace. There would not be any actual physical punishment but the applicant and the victim would accept mutual responsibilities to each other not to breach the peace in the future.

The court held that the head sentence of 4½ years' imprisonment was appropriate but that it should be partially suspended. The applicant should spend three months in prison and then be released upon a bond with a condition that he attend the meeting [37]–[39].

The court noted the difficulty of enforcing such an order but stated that the director should bring the matter back before the court if the meeting was not held within a reasonable time [36].

Joshua v Thomson (1994) 119 FLR 296

Court: Supreme Court of the Northern Territory

Date: 27 May 1994

Judge: Kearney J

Facts: The appellant was sentenced to a total of eight months' imprisonment for two damage offences and two offences of unlawfully using a motor vehicle.

One ground of appeal was that the sentencing magistrate placed too much emphasis on apparent community attitudes without a proper evidential basis for this. It was suggested that the magistrate through his local knowledge believed that the appellant's community wanted the appellant sentenced to prison.

Decision: It was held that the magistrate was obliged to inform counsel of any opinion that he held in relation to the views of the local community before relying on them in sentencing. Because the magistrate had relied on the community's view and had not allowed counsel an opportunity to address those views there was an error. It was important to ensure accuracy before relying on the views of the community.

***R v Wilson* (1995) 81 A Crim R 270**

Court: Supreme Court of the Northern Territory

Date: 5 October 1995

Judge: Kearney J

Facts: The defendant pleaded guilty to the manslaughter of his wife. The Crown accepted the plea on the basis of provocation. The defendant had found the deceased in bed having intimate relations with their 22 year old mentally handicapped son.

There was evidence from three people that the defendant would have to undergo traditional punishment in the form of spearing to the thigh.

Decision: The court held that when it comes to traditional matters of Aboriginal law it is preferable that the evidence comes from a representative group than from one person (p 275). The judge took into account that the defendant would probably receive traditional punishment but commented that the court 'strongly deprecates such acts of physical violence' (p 276).

The defendant was sentenced to six years' imprisonment with a non-parole period of three years.

***R v Miyatatawuy* (1996) 135 FLR 173**

Court: Supreme Court of the Northern Territory

Date: 24 October 1996

Judge: Martin CJ

Facts: The defendant pleaded guilty to a charge of unlawfully causing bodily harm to the victim (who was also her husband). She had committed this offence whilst subject to a bond for an earlier assault against him. The offence involved stabbing him in the chest and both parties had been under the influence of alcohol at the time.

The defendant had fallen pregnant to the victim in 1977; however, they were precluded from marrying under Aboriginal traditional rules. They spent a number of years apart although she would frequently leave her community to be with him. She would then be taken back to her community by her family. In 1981 they both moved to Darwin and this is when they commenced drinking alcohol which caused strain in the relationship. Eventually the relationship was accepted and they were permitted to marry.

The victim provided a written statement to the court asking that she not be sent to prison. It stated that if she was imprisoned their marriage would be destroyed in the eyes of the Aboriginal community. He also explained that she had already been dealt with under Aboriginal customary law. There had been several meetings between the community members over a long period of time. She was required to face all those concerned under distressing conditions. They had also both spent two years at a dry community outstation and they had successfully dealt with their alcohol problems.

Decision: The court decided that although in *Walker v New South Wales*¹⁰⁴ it was held that Aboriginal customary criminal law was extinguished by the passage of criminal statutes of general application, the facts arising from this case due to the defendant's Aboriginality remain a relevant consideration for sentencing.

Most of the time the courts look at physical punishment which has or may be inflicted upon the defendant but that is not always the case. Martin CJ said: 'An obligation undertaken or to be undertaken to others which may assist in the restoring of peace between the affected communities may also be significant' (p 177).

The court held that in this case the defendant had been subjected to discipline and had 'suffered a penalty analogous to that undertaken by entering into a supervised bond to be of good behaviour and [had] not failed in her obligation' (pp 177–78).

The wishes of the victim of an offence are not relevant. In this case it was the wishes of the relevant community which were considered and the victim just happened to be a member of that community.

The defendant was placed on another bond in the sum of \$1000 to be of good behaviour for 18 months.

***Parmbuk v Garner* [1999] NTSC 108**

Court: Supreme Court of the Northern Territory

Date: 14 October 1999

Judge: Bailey J

Facts: The appellant (who was a juvenile) was sentenced by a magistrate to 12 months' imprisonment to be suspended after six months for numerous property and traffic offences.

104. (1994) 182 CLR 45.

One ground of the appeal was that the learned magistrate did not pay sufficient regard to the possibility that the appellant would be subject to traditional punishment by his family or members of his community.

The only evidence before the magistrate about this issue was contained in a pre-sentence report which stated that the appellant was 'worried about the prospect of receiving traditional punishment' [7].

Decision: The judge stated that the issue had not been raised by defence counsel and that there was no evidence before the court about the form that any traditional punishment may take [20].

The judge held that the information in this case fell far short of the criterion suggested in the cases of *Munugurr v The Queen*¹⁰⁵ and *R v Minor*¹⁰⁶ which require that there be reliable evidence from those who are fully conversant with the language and customs of the relevant community. The magistrate was correct to give the matter little or no weight [21–22].

***R v Sampson* [2001] Unreported, SCC 9824061**

Court: Supreme Court of the Northern Territory

Date: 26 March 2001

Judge: Angel J

Facts: The defendant pleaded guilty to an offence of causing the death of his brother by a dangerous act. The offence occurred after his brother had abused the defendant's wife. He initially hit the deceased on the head with a stick and punched him in the face. When the deceased continued to abuse his wife, the defendant struck him in the head with an empty flour tin and punched him again. He then pushed the deceased who fell backwards onto the concrete floor hitting his head. The evidence established that the cause of death was not the impact of the deceased falling on the floor and was possibly caused by a punch.

The defendant had only a minor record. It was accepted that the deceased had been highly provocative. The defendant had been dealt with under Walpiri customary law and had been speared three times to the upper thigh by three different elders. The court heard evidence about this from an elder. There was evidence also that as far as the Walpiri people were concerned the matter was settled.

Decision: The judge held that he was entitled to take into account the payback that was inflicted because of section 5(2)(s) of the *Sentencing Act 1995* (NT) which provides that in sentencing the court must take into account 'all relevant circumstances'. The judge also referred to various case authorities in support of this point.

He also stated that the fact that the Walpiri community considered that the matter had been finalised by the infliction of tribal punishment was a 'highly relevant circumstance when coming to apply white law to traditional Aboriginal people such as the prisoner' (p 3).

The defendant was sentenced to three years' imprisonment suspended forthwith for a period of three years.

***R v Poulson* (2001) 122 A Crim R 388**

Court: Supreme Court of the Northern Territory

Date: 11 May 2001

Judge: Thomas J

Facts: The defendant pleaded guilty to an offence of causing death by a dangerous act. He had struck the victim to the head and body with a nulla nulla. The offence occurred after a fight with a number of different people. The victim died the next day after refusing medical treatment from the hospital.

There had been a meeting between the families and the defendant had undergone traditional punishment. It consisted of being struck to the head with a nulla nulla and a ritual spear to the right leg on two occasions. He was also struck on the back and shoulders. He did not suffer any serious injuries.

There was evidence from the victim's wife and other women that the traditional punishment had restored peace between the families; however, they still wished for the defendant to be punished according to white man's law.

Decision: The judge stated that the 'court does not condone or in any way sanction the exercise of physical violence upon the accused' (p 392). However, it was accepted that it was an important process for the families and the fact that the agreed punishment had avoided any further trouble was a relevant factor in sentencing.

The court held that the defendant's participation in the traditional punishment had gone a long way to making reparation for the offence although it was noted that the relatives of the victim still wished for him to be punished by the court.

The defendant was sentenced to 1½ years' imprisonment to be suspended after serving four months and to be of good behaviour for two years.

105. (1994) 4 NTLR 63.

106. (1992) 59 A Crim R 227.

R v Sambo [2001] Unreported, SCC 9814997

Court: Supreme Court of the Northern Territory

Date: 24 July 2001

Judge: Riley J

Facts: The defendant pleaded guilty to one offence of aggravated assault and one offence of aggravated unlawful entry. He entered a house and threatened the occupant with a knife but was overpowered. He was between 17 and 18 years of age at the time of the offence but was 20 years' old at the time of sentencing. He had failed to appear in court.

The defendant had no record and he had remained out of trouble since the offences took place. The court heard from an elder of his community who gave evidence that he had brought up the defendant and that this was the first time he had done something wrong. He told the court that the defendant had been spoken to strongly and he had since behaved himself.

Decision: In sentencing the defendant the judge referred to the fact that the defendant lived a traditional life and had been reprimanded in the traditional sense as part of the mitigating factors. In addition the defendant was young and had never been in trouble before and had remained out of trouble since the offence.

The defendant was sentenced to 2½ years' imprisonment to be suspended after serving four months.

Nabobbob v The Queen [2001] NTSC 42

Court: Supreme Court of the Northern Territory

Date: 4 June 2001

Judge: Bailey J

Facts: The applicant had been declared an habitual criminal which required him to be detained indefinitely after serving his sentence of six years. He had been in custody for about 12 years' and applied for conditional release.

In support of his application a number of his extended family provided affidavits in support of his release. It was proposed that he would reside at a dry community outstation for at least three years with various conditions including that he obey the lawful and reasonable instructions of a senior community elder. These family members considered that the applicant had spent sufficient time in prison and should now be released to live in his own country with the support and guidance of his family.

A probation officer provided a report to the court which indicated that those people in the community who were not related to the applicant were opposed to his release and many of his family who supported his release did not actually want him living near them.

Decision: The judge said that he was satisfied that there was strong family support for the applicant but noted that it would be surprising if it were otherwise in the context of Aboriginal traditional family obligations.

The judge also noted that despite this support there had been very little contact over the last 12 years between the applicant and his family. As well, the applicant had shown little attempt at rehabilitation while in custody and he had caused various problems for correctional staff. The judge stated that: 'I have little or no confidence that the senior elders of the applicant's own community are likely to fare any better if the applicant was to be released into their care and guidance' [87].

The judge further commented: 'In the absence of any evidence from the applicant that he would submit to the guidance and directions of community elders, I am not persuaded that the family members would have any substantial moral authority or influence over the applicant' [93].

The application was refused.

R v Peipei [2002] Unreported, SCC 20014404

Court: Supreme Court of the Northern Territory

Date: 8 July 2002

Judge: Riley J

Facts: The defendant pleaded guilty to the manslaughter of a female with whom he was having a relationship. He was 17-years-old at the time and the victim was about 16-years-old. The relationship was viewed as a 'wrong way' relationship under Aboriginal custom. The victim had had a child during the relationship but the identity of the father was not known. The defendant had accepted her as his daughter.

On the day of the incident the victim had sworn at the defendant and thrown a stone at him in front of others. Soon after in a fit anger the defendant picked up a stick and struck her with extreme force a number of times to the head. When she stopped breathing he unsuccessfully tried to resuscitate her and then left her in the bushes. He returned to the area the next day and tried to put her into the back of the truck but was unable to do so. He then declined to tell anyone out of fear of retribution and even death from her relatives.

Since being released on bail the defendant had undergone traditional punishment by way of spearing three times to his legs. There was no evidence before the court as to whether he had suffered any serious or permanent injury. He had also agreed to live for some time elsewhere and the resolution included arrangements for the care of the deceased's daughter.

The defendant was a first offender.

Decision: The judge noted that the information about the traditional punishment had come from the bar table but because the Crown counsel indicated that it had been checked and verified the judge was prepared to accept that it was correct.

The judge stated that he did not condone physical punishment but accepted that the customary resolution of the matter has been of benefit to the victim's family, the defendant and the community in which he lived (p 3). He also stated that the traditional punishment had gone a long way towards making reparation for the offence.

The defendant was sentenced to imprisonment for eight years with a non-parole period of four years.

***R v Martin* [2002] Unreported, SCC 20105973**

Court: Supreme Court of the Northern Territory

Date: 31 July 2002

Judge: Angel J

Facts: The 19 year old defendant pleaded guilty to an offence of an aggravated unlawful dangerous act. In the course of a fight with the victim's husband the victim hit the defendant with a can. The defendant then punched the victim in the stomach. She was very ill at the time with cancer and cirrhosis of the liver and this was known to the defendant. She died later that day as a result of the injuries to her stomach. She died because her liver was softer than usual.

The defendant attended a sorry camp after the incident and the court was told there was no issue of payback. In traditional terms the family had resolved the matter and the defendant was welcomed back into his community.

Decision: The judge considered that the fact that he had attended a sorry camp was a 'very significant feature' in this case (p 3). The judge stated that by attending the sorry camp the offender had demonstrated remorse and shown maturity by facing the deceased's family.

Taking into account those matters as well as his youth, lack of a violent record and the unusual circumstances he was placed on a sentence of three years' imprisonment suspended for three years.

***R v Nelson* [2002] Unreported, SCC 20209886 / 20210064**

Court: Supreme Court of the Northern Territory

Date: 25 October 2002

Judge: Riley J

Facts: The defendant pleaded guilty to assault, deprivation of liberty and assault causing bodily harm. The offences were committed against two different Aboriginal women and on both occasions the defendant was affected by alcohol and was away from his community.

There was a letter signed by the elders of his community requesting that the court release the defendant so he can be available for men's business. The defendant's mother and mother-in-law were at the court and they both agreed that the defendant should remain at the community and stay away from Tennant Creek.

Counsel for the defendant submitted that he should be released on a suspended sentence so that he could return to his community and undergo traditional procedures which would include being spoken to about his past offending and the inappropriateness of his conduct.

Decision: The judge took into account what had been said about his traditional community duties but decided that the seriousness of the offence coupled with the fact that he had a serious record meant that he must serve some time in prison. The sentence imposed was two years' imprisonment to be suspended after having served 10 months.

R v Pollard [2002] Unreported, SCC 20116064

Court: Supreme Court of the Northern Territory

Date: 23 August 2002

Judge: Angel J

Facts: The defendant pleaded guilty to manslaughter. The victim was an Aboriginal woman who was unknown to the defendant. She was walking alone when the defendant approached her. His attention towards her was unwanted and she swore at him and told him to go home. The defendant became very angry as he was an initiated man and it was inappropriate for her to swear at him. The defendant attacked the deceased by punching her and hitting her repeatedly in the face with his boots (which he had been carrying). He admitted to the police that he had done the wrong thing and he said that he had not meant to kill her.

The defendant was a traditional man aged 21 years and he had been in custody since the arrest. The court heard evidence that the defendant would suffer payback but the evidence was not clear as to the form and severity of the punishment. There was no evidence in relation to the effect of any sentence upon the nature of the payback.

Decision: The judge noted that his time so far in custody had been onerous because he had not had any visitors and he was under threat of payback of an unspecified type from his family and the victim's family.

The judge stated that in sentencing the defendant he had taken into account 'in a general way' that the defendant would have to face payback (p 5). The sentence imposed was eight years' imprisonment with a non-parole period of five years.

R v Dhurrkay [2002] Unreported, SCC 20011848

Court: Supreme Court of the Northern Territory

Date: 1 August 2002

Judge: Bailey J

Facts: The defendant pleaded guilty to sexual intercourse without consent. The victim was the wife of the defendant's cousin. The defendant and the victim had been friends for some time but they had never had sexual relations. The offence was particularly violent.

The defendant expressed remorse at his conduct and acknowledged that it would cause him to go to prison, lose the victim's friendship, and bring shame to his family and possibly payback.

It was suggested to the court that the defendant's family were of the view that he should be sent to Echo Island and be subjected to traditional punishment. The pre-sentence report submitted that his prospects of rehabilitation would be improved further by cultural guidance.

The defendant had never been in trouble before and had stayed out of trouble since the offence.

Decision: Despite the strong mitigating factors (described above) the offence was extremely serious and the defendant was sentenced to a term of five years' imprisonment with a non-parole period of 3½ years.

R v Wayne [2002] Unreported, SCC 20204710

Court: Supreme Court of the Northern Territory

Date: 5 December 2002

Judge: Bailey J

Facts: The defendant pleaded guilty to one count of causing death by a dangerous act. A victim impact statement presented to the court indicated that the defendant may be subject to some form of payback. The defendant indicated that he was willing to undergo any future payback.

Decision: The judge noted that it is not appropriate to take into account the possibility of payback but the fact that the prisoner was willing to undergo any future payback demonstrated his genuine remorse.

The judge imposed a sentence of 2½ years' imprisonment to be suspended for two years after having served six months. The defendant was further required to attend counselling and supervision for 12 months.

***R v Alfred Corbett* [2003] Unreported, SCC 20200373**

Court: Supreme Court of the Northern Territory

Date: 16 April 2003

Judge: Angel J

Facts: The defendant pleaded guilty to a charge of causing bodily harm with intent to cause grievous bodily harm. The maximum penalty for this offence was life imprisonment. The victim of the offence was the defendant's adoptive brother. The victim has propositioned the defendant's wife at a time when the defendant had been drinking heavily. The defendant became extremely angry when he saw the victim with his arm over his wife's shoulder and he ended up stabbing him eight times.

The defendant was 29 years' old and had no record of convictions. He spent two months in custody on remand prior to sentencing and this was his first time in custody.

There was evidence that that defendant had voluntarily presented himself for traditional punishment after the incident. He sat on the ground and was hit three times with a large stick, the last hit knocking him unconscious. The evidence highlighted that the punishment was not in the form of retribution but done for the purpose of restoring the relationship between the defendant and the victim. The practice of payback was a practice of healing. In this case the defendant and the victim had been on friendly terms since the payback occurred.

Decision: The sentencing judge took all mitigating factors into account and held that a term of actual imprisonment was not required, 'particularly bearing in mind that all is settled in the Aboriginal way with payback' (p 4). The defendant was sentenced to three years' imprisonment, suspended for three years.

***R v Gooley* (1996) 66 SASR 380**

Court: Supreme Court of South Australia (Court of Criminal Appeal)

Date: 23 April 1996

Judges: Doyle CJ, Williams and Millhouse JJ

Facts: The appellant was a non-Aboriginal 25 year old male who pleaded guilty to unlawful sexual intercourse. He was badly beaten after the offence by associates of the victim and then beaten again whilst in custody.

Decision: Doyle CJ (with whom Williams J agreed) stated that generally the illegal act of another person cannot affect the sentence which an offender must receive. However, Doyle CJ expressed a qualification to this rule in circumstances of Aboriginal traditional punishment:

The conduct of the victim's friends or family cannot reduce the appropriate sentence, in my opinion. To allow it to do so would be to allow private revenge or punishment to replace punishment by the State. In my opinion, tribal punishment of Aborigines is in a different category (pp 382–83).

***R v Moran* [1999] NSWSC 874**

Court: Supreme Court of New South Wales

Date: 24 August 1999

Judge: James J

Facts: The defendant was charged with an offence of failing to provide information which may assist in the prosecution of persons whom he knew had committed the serious offence of murder.

The court heard evidence from elders of the defendant's community that the defendant respected his elders and would abide by tribal law as well as the law of the land. The elders were so confident in him that they were prepared to act as surety for him.

Decision: The judge placed the defendant on a recognisance in the sum of \$1000 for a period of three years to be of good behaviour. The judge dispensed with the need for a formal surety because of the role of the Aboriginal elders and in particular because there was a man in the community who had been through the law who would supervise him.

***Ogle v Mahoney* [1997] Unreported, CA No 132/1997**

Court: Supreme Court of Queensland (Court of Appeal)

Date: 5 August 1997

Judges: White, McPherson and Davies JJA

Facts: The applicant had pleaded guilty before a magistrate to two counts of assault occasioning bodily harm and one count of assault occasioning bodily harm with a weapon. One of the offences involved his defacto and the other two offences were committed against men at his community. The offences occurred while the applicant was under the influence of alcohol. The offence against his defacto was particularly serious as it involved kicking her while she was on the ground. He had no prior convictions and was 19 years' old.

Before the magistrate, the applicant's lawyer had sought a wholly suspended sentence on the basis that the applicant had been punished by being banished from his country for two months and that he had been forgiven by all three complainants. He was sentenced to a total of 12 months' imprisonment suspended after serving three months with a suspension period of two years. The applicant sought leave to appeal against this sentence.

Decision: In granting leave to appeal, White JA (with whom McPherson and Davies JJA agreed) stated that the penalty which the applicant had already suffered included one month in custody and banishment from his own community and that this was a significant punishment and satisfied the requirements for deterrence. The court allowed the appeal and amended the sentence to a wholly suspended sentence.

Case digest – Sentencing (explanation for the offence)

***R v Brand* [1998] WASCA 279**

Court: Supreme Court of Western Australia (Court of Criminal Appeal)

Date: 9 October 1998

Judges: Malcolm CJ, Wallwork and Murray JJ

Facts: The two defendants, Ruth and Barbara Brand, each pleaded guilty to assault occasioning bodily harm. The defendants were sisters. The complainant and the defendants were Aboriginal women and they were known to the each other. The assault was extremely serious and included striking the complainant repeatedly to the head, arms and back with a broom handle, a rake handle, a wooden crutch and a saucepan. There was also a juvenile female involved in the offence. One of the three poured a pan full of boiling food and water over the complainant. She was hospitalised for four weeks. Neither of the adult defendants took direct responsibility for the burns. They were dealt with on the basis that they were equally responsible for the injuries as it was considered that the burning was a probable consequence of the nature of the assault; that is, an assault where all parties grabbed anything nearby to attack the complainant.

The sentencing judge placed the defendants on a community based order and took into account, amongst other things, the fact that they were traditional tribal Aboriginal women and that there had been a long standing ill-feeling between them and the complainant. It appeared that the complainant had had a sexual relationship with a man who was regarded in a tribal context to be Ruth Brand's husband and Barbara Brand had been attacked and beaten by the complainant in the past.

The Crown appealed against the leniency of the sentence.

Decision: Malcolm CJ and Murray J allowed the appeal and imposed a sentence of two years' imprisonment with eligibility for parole.

Malcolm CJ held that the sentencing judge's discretion had miscarried and stated that: '[T]he mere fact that the applicants were living in a tribal or semi-tribal culture with a background of ill-feeling was an insufficient basis on which to decide not to impose a custodial sentence' (p 10).

He also noted that there was no attempt to justify the attack under Aboriginal law or custom or to compare the nature of the attack and what would have been allowable under Aboriginal law or custom.

Murray J stated that although there may be factors associated with an offender's Aboriginality which would mitigate the seriousness of the offence or the offender's culpability this was not such a case (p 9).

***R v Davey* (1980) 2 A Crim 254**

Court: Federal Court (Northern Territory)

Date: 13 November 1980

Judges: Bowen CJ, Muirhead and Evatt JJ

Facts: The respondent had pleaded guilty to manslaughter and was sentenced to a three year suspended term of imprisonment. The incident occurred during a violent and drunken dispute between the respondent and his wife. The victim, another Aboriginal male, had interfered in the argument and the respondent struck him to the head with a piece of timber.

Evidence from an Aboriginal elder was presented to the sentencing court to the effect that comments made by the victim to the respondent were provocative to an Aboriginal person and that the community regarded the trouble as the victim's fault. There was also additional evidence presented through depositions. The Crown did not object to the evidence which was presented and did not cross-examine the witness about the issues.

The Crown appealed against the leniency of the sentence claiming that the judge erred in placing too much weight on the tribal issues. In support of this the Crown also argued that the respondent had been significantly involved with the European community.

Decision: In dismissing the appeal Muirhead J (with whom Bowen CJ and Evatt J agreed) observed that: 'In the exercise of its criminal jurisdiction the Supreme Court of the Northern Territory concerns itself with many Aboriginal people. Of these, a number live under tribal culture and tradition and come from areas remote from the court. The court has for many years now considered it should, if practicable, inform itself of the attitude of the Aboriginal communities involved, not only on questions of payback and community attitudes to crime, but at times to better inform itself as to the significance of words, gestures or situations which may give rise to sudden violence or which may explain situations which are otherwise incomprehensible. The information may be made available to the court in a somewhat informal and hearsay style' (p 257).

In this case although the evidence which had led the sentencing judge to conclude that there was some type of traditional provocation was meagre, the crown did not challenge that evidence. It was therefore a hypothesis reasonably open to the judge on the evidence before him.

Muirhead J further commented: '[A]ssociation with white people does not necessarily erase deep rooted customary fears or beliefs, nor does it eradicate the sense of what is, or what is not, acceptable or appropriate.'

In dismissing the appeal, the court concluded that the sentencing judge did not err in taking these matters into account and that the sentence was not *manifestly* inadequate.

***Jadurin v The Queen* (1982) 44 ALR 424**

Court: Federal Court (Northern Territory)

Date: 27 October 1982

Judges: St John, Toohey and Fisher JJ

Facts: The appellant was convicted of manslaughter and the victim was his wife. The incident occurred after they had both been drinking. There was an argument and he assaulted her with a piece of wood causing a number of injuries. Later, once they were at home in bed, his wife got out of bed and this angered the appellant. He struck her on the back with a piece of piping and this caused her liver to rupture. The appellant had no previous convictions.

The appellant was sentenced to four years' imprisonment with a non-parole period of 12 months. He appealed against the severity of the sentence.

Decision: The court commented that the suggestion, on behalf of the appellant, that in Aboriginal society it is not unusual for women to be beaten if they do not obey their husbands, does no more than describe something that happens from time to time. It does not establish that such conduct is an accepted part of Aboriginal society. The court therefore held that they should approach the matter on the basis that the appellant beat his wife in anger when they were drunk and that this caused her death.¹⁰⁷

¹⁰⁷ See further details of this case above pp 10–12.

***R v Herbert & Ors* (1983) 23 NTR 22**

Court: Supreme Court of the Northern Territory

Date: 24 August 1983

Judge: O'Leary J

Facts: Three female Aboriginal defendants were convicted of murder. The offence occurred in a disused beer garden at a hotel. The victim was a physically handicapped man who was known to the defendants. They had all been drinking heavily prior to the killing. They struck the victim to the head with an iron bar at least eight times.

The judge dealt with them on the basis that the attack was triggered by offensive words spoken by the victim to one of the defendants.

Section 6(1c) of the *Criminal Law Consolidation Act 1876* (NT) provided that where an Aboriginal person is convicted of murder the judge may impose such penalty having regard to the circumstances of the case as appears just and proper. In all other cases the penalty for murder is mandatory life imprisonment.

Further, s 6A of the above Act provided that when determining the nature and extent of the penalty to be imposed, where an Aboriginal person is convicted of murder, the court shall receive and consider any evidence in relation to any relevant native title law or custom and its application to the facts of the case and any evidence which may be tendered in mitigation.

Decision: It was held that the above statutory provisions conferred a wide discretion on the court. The intention of the legislature was to ensure that the court does take into account any relevant native title law or custom and to ensure that the sentencing of Aboriginal people is carried out by reference to the special problems of Aboriginal people.

In this case there was no native title law or custom which had contributed to the offence. The words 'native title law or custom' do not include the 'mere habits or patterns of behaviour that one might expect from an Aboriginal person in certain circumstances', as for example, in this case an Aboriginal woman 'reacted to an insult offered to her by hitting the person concerned over the head in the way an Aboriginal woman would do when fighting' (p 30). The judge stated that:

Apart from anything else, I was told that Aboriginal women do not hit to kill; they hit to wound. And they do not hit with heavy iron pipes; they hit with fighting sticks, which are of light wood. Further, fights in traditional Aboriginal communities are well-controlled; they are stopped before anyone gets really hurt (p 30).

The defendants were sentenced to 12 years' imprisonment with a non-parole period of 5½ years. This was done not because of any native law or custom but because the judge took into account other factors which existed because they were Aboriginal.¹⁰⁸

***Janima v Edgington* [1995] Unreported, No 36/1995**

Court: Supreme Court of the Northern Territory

Date: 6 September 1995

Judge: Mildren J

Facts: The appellant was sentenced to six months' imprisonment for driving whilst under disqualification. He had prior convictions for similar offences.

His counsel submitted that he drove because he received a phone call from his father who was stranded. Others accompanied the appellant but they apparently did not know how to drive. The appellant was sober. It was further submitted that the appellant was a traditional Aboriginal who felt a strong personal obligation to collect his father. The sentencing magistrate's comments inferred that he did not believe that the excuse was a reasonable one.

Decision: In dismissing the appeal, Mildren J agreed with the magistrate and noted that there was no evidence presented to the court about the father's predicament and whether the appellant had tried to find another driver who was entitled to drive. The judge stated:

Most people feel a moral compulsion to carry out the wishes of their parents. The fact that the appellant is an aboriginal who lives on a small remote community is of small weight in this regard. He is a 27-year-old literate man with at least a basic level of education who was fully aware of the wrongfulness of, and consequences of, his actions. Every member of this community must realise they have a duty to refuse requests of their elders which would cause them to break the law [30].

108. The Crown appealed against the leniency of the sentences imposed upon the defendants in this case. The Full Court of the Federal Court (comprising Forster, Toohey and Fitzgerald JJ) dismissed the appeal: see *R v Sampson, Wurrailiya and Herbert* (1984) 53 ALR 542.

***Ashley v Materna* [1997] Unreported, JA1/1997**

Court: Supreme Court of the Northern Territory

Date: 21 August 1997

Judge: Bailey J

Facts: The appellant had pleaded guilty before a magistrate to one offence of aggravated assault. The circumstances of aggravation were that the victim was female, that she had suffered bodily harm and that she was threatened with a weapon. The magistrate sentenced the appellant to 18 months' imprisonment with a non-parole period of nine months.

The appeal was based on the contention that the magistrate had failed to give due weight to the cultural context in which the offence was committed.

The appellant had struck the victim without warning to the top of her head with a stick. She suffered a massive fracture to the skull. The victim was the appellant's sister and the evidence established that he had attacked her because her husband had said something (sworn) to her in the presence of the appellant. According to Aboriginal customary law the husband was not supposed to swear at his wife in the presence of her brother. Evidence suggested that nowadays the reaction of the appellant to his sister would only occur when the person had been drinking.

The magistrate stated in his reasons that while this conduct may be justified under Aboriginal law the court cannot take that into account except in the most minor way.

It was submitted by the appellant's counsel that a sentencing court should give weight to Aboriginal customary law as a mitigatory factor when it is relevant to the offender's motives for the offence and not just for consequences that he or she may suffer as a result of customary law or how a community may wish to deal with the matter.

Decision: The judge held that the finding by the magistrate that the appellant had acted in accordance with his understanding of customary law was a generous finding. The judge stated that he was not prepared to accept as part of customary law something which occurred while the aggressor was intoxicated.

The best the evidence could establish was that the appellant's conduct was in the past permissible under Aboriginal customary law but was now obsolete. There was also no evidence that the appellant was obliged to react in the way that he did. The judge stated that:

In the absence of evidence as to the obligatory nature of the alleged law and the consequence for non-compliance, elevation of a morally indefensible practice to the status of 'customary law' to which courts could or should have regard would be to invite ridicule of the courts and make a mockery of the fundamental principle that all people stand equal before the law (p 9).

The appeal was dismissed.

***R v Moreen* [2001] Unreported, SCC 20012617**

Court: Supreme Court of the Northern Territory

Date: 3 May 2001

Judge: Martin CJ

Facts: The defendant pleaded guilty to one charge of aggravated assault. The defendant had been drinking with a group of people which included the female victim. The defendant went home. Some time later the victim attended a camp fire outside the defendant's house. The victim spoke to the defendant's wife and told her that the defendant had been having an affair with another woman. It was accepted that this was not true. After the defendant's wife had abused the defendant and locked him out of the house he went over to speak to the victim. He then picked up a chair and struck the victim three times. She suffered serious injuries.

There was evidence that in Aboriginal culture if a man found out about such a thing being said he would feel ashamed and the woman in the position of the victim would suffer punishment at the hands of older people. Also the victim was not entitled to speak to the defendant's wife about those matters.

However, the evidence also established that the defendant should not have spoken to the victim and Aboriginal customary law does not allow for situations where the parties are drunk. Punishment under customary law should not be inflicted when the person administering it is affected by alcohol.

Decision: It was held that because the defendant and the victim were both drunk the defendant could not rely on the victim's alleged breach of customary law as an explanation for the offence. What occurred did not amount to provocation under customary law or under the Criminal Code of the Northern Territory. The judge referred to the prevalence of violence in Aboriginal communities and in particular of Aboriginal men beating their wives or other women.

The defendant was sentenced to three years' imprisonment with a non-parole period of two years.

***R v Owen Bara* [2001] Unreported, SCC 20016855 / 20020942**

Court: Supreme Court of the Northern Territory

Date: 30 July 2001

Judge: Bailey J

Facts: The defendant pleaded guilty to five offences of aggravated unlawful entry, four charges of stealing and one charged of unlawful use of a motor vehicle. The defendant was 29 years' old and committed the offences in the company of young adults aged between 18 and 20 years. The offences were committed on the spur of the moment in order to obtain alcohol.

The defendant's counsel argued that the defendant's involvement in the offences was a result of cultural pressure or persuasion from the co-offenders. (Note that there was no detailed explanation of the nature of the alleged cultural pressure.)

Decision: The judge stated that he was not persuaded that any alleged pressure amounted to substantial mitigation and commented that the defendant was 'old enough and strong enough to make his own decisions' (p 3). He was sentenced to 18 months' imprisonment with a non-parole period of 10 months.

***R v Lee* [2001] Unreported, SCC 20106980**

Court: Supreme Court of the Northern Territory

Date: 29 November 2001

Judge: Mildren J

Facts: The defendant pleaded guilty to one count of sexual intercourse without consent. The victim was the defendant's auntie and before the offence she called him son in the Aboriginal way.

It was submitted on behalf of the defendant that he planned to accept any payback.

Decision: The judge stated that the defendant's behaviour: '[W]as not only a serious crime according to Northern Territory law but a markedly offensive one, in terms of traditional Aboriginal values as well' (p 3).

The judge also said that he was not persuaded that any payback would in fact occur. He did however accept that the defendant's willingness to accept any payback was an indication of remorse. The defendant was sentenced to 5½ years' imprisonment with a non-parole period of 46 months and seven days.

***R v Mason* [2002] Unreported, SCC 9927192**

Court: Supreme Court of the Northern Territory

Date: 19 December 2002

Judge: Bailey J

Facts: The defendant pleaded guilty to the manslaughter of his girlfriend. The offence occurred following an argument between the two about jealousy issues. Both parties had been drinking. The attack against the victim was particularly brutal consisting of hair pulling, punching, kicking and stomping on her stomach and chest. The defendant left her at the scene and returned the next day to find her dead.

Initially defence counsel had intended to call evidence to show that in addition to the defendant others had been involved in the killing and in particular there was a suggestion that the 'kadaicha' (sorcerers) were involved in the death. That course was abandoned and the defendant accepted that he was solely responsible for the victim's death.

Nevertheless the pre-sentence report indicated that members of their community including family of the deceased did not believe that the defendant killed the deceased and that the defendant may have been an unwitting tool of sorcerers.

Decision: The judge accepted that such beliefs were held by the community; however, the defendant had admitted that he did kill the deceased and that he had intended to hurt her (p 5). The judge did not interpret the claim about sorcerers to mean that the defendant was trying to escape responsibility because he had volunteered to the police that he had killed the deceased.

The defendant was sentenced to 10 years' imprisonment with a non-parole period of five years.

***Pascoe v Hales* [2002] Unreported, SCC 20112873**

Court: Supreme Court of the Northern Territory

Date: 8 October 2002

Judge: Gallop AJ

Facts: The appellant was a 49 year old Aboriginal male. The offence involved having sexual intercourse with the 15 year old victim who was his promised wife under Aboriginal customary law. Later on the same day the victim attempted to leave the outstation in a vehicle and the appellant became upset. That is when he fired the shot gun. After the gun was fired the victim returned to the appellant's side out of fear for herself and her friends.

Evidence was given before the magistrate by a relative of the appellant that under traditional law the parents make the decision about when the promised girl will go to her husband and that this usually occurs once she has reached puberty. The witness stated that these types of traditional marriages are still being practised.

The appellant was sentenced to 13 months' imprisonment to be suspended after serving four months for two offences of sexual intercourse with a female under the age of 16 years. He was also sentenced to two months' imprisonment to be served concurrently for discharging a firearm. The appellant had pleaded guilty.

The appellant appealed against the severity of the sentence on the basis that the magistrate failed to give sufficient weight to the customary or traditional law as it applied to this case. The Crown conceded that the sentence was excessive for the offence of carnal knowledge.

The Crown also consented to additional anthropological evidence being obtained by the appeal court. The anthropologist gave evidence that sexual relations between an older man and his promised wife is not considered deviant in Burarra society and it is 'the cultural ideal, sanctioned and underpinned by a complex system of customary law and practice' (p 7).

Decision: The evidence before the magistrate was such that there was some force to what the appellant had said, namely that he had some customary law rights to the 15 year old girl.

Gallop AJ stated that he was surprised the appellant had ever been charged but noted that it was probably his conduct of firing the gun that led to the police attention. He referred to the fact that in Western Australia, South Australia and Victoria it is a defence to a charge of this nature that the accused was married to the child. He said that it was interesting to note that in some parts of Australia that defence would be available if traditional law was applied.¹⁰⁹

In allowing the appeal, the judge held that the magistrate had erred when stating that there had been an element of compulsion which prompted the victim to submit as that went beyond the agreed facts before him. It was stated that Aboriginal law is relevant in the sentencing process and the judge held that the sentence was manifestly excessive.

He sentenced the appellant to 24 hours' imprisonment for the offence of carnal knowledge to be served concurrently with a term of 14 days' imprisonment for the firearm offence.

***R v Emitja* [2003] Unreported, SCC 20210488**

Court: Supreme Court of the Northern Territory

Date: 6 March 2003

Judge: Bailey J

Facts: The defendant pleaded guilty to an offence of causing grievous bodily harm. There had been an ongoing feud between the defendant's family and another Aboriginal family arising out of the death of the defendant's younger brother. Two members of the other family were considered to be responsible for the death and neither of these men had faced punishment under Aboriginal law. Only one of them had been charged and was convicted by a court of a relatively minor offence.

On the night in question the defendant had been drinking with others when they decided to seek revenge against members of the family responsible for the death of the defendant's brother. There had also been an incident the night before when members of this family had assaulted one of the defendant's relatives.

When the defendant's group approached the other group those people who were responsible ran off. The victim, who was a cripple, could not escape and was attacked by the defendant and others. The defendant inflicted the life threatening stab wounds.

It was submitted by the defendant's counsel that the defendant was acting out of extreme emotions and an honestly held sense of grievance and that his emotions were culturally appropriate. It was not submitted that he was acting in accordance with Aboriginal customary law.

^{109.} For instance, s 321(10) of the *Criminal Code (WA)* provides that is a defence to a charge of sexual penetration of a child over the age of 13 years and under the age of 16 years that the accused was lawfully married to the child.

Decision: It was held that the law cannot sanction this type of conduct but that the defendant's sense of grievance was still important to the background of the offence.

The judge referred to the fact that the defendant was remorseful and now wanted the feud settled in the proper way.

The defendant was sentenced to 4½ years' imprisonment and there was an order that the sentence be suspended after he had served 12 months. He would be subject to the suspended sentence for four years.

***Hales v Jamilmira* [2003] NTCA 9**

Court: Supreme Court of the Northern Territory (Court of Criminal Appeal)

Date: 15 April 2003

Judges: Martin CJ, Mildren and Riley JJ

Facts: The Crown appealed the decision of Gallop AJ in *Pascoe v Hales* (above) on the basis that the sentences imposed for the offences of carnal knowledge and discharging a firearm were manifestly inadequate and that the learned judge placed too much weight on the cultural factors surrounding the respondent's conduct.

As Gallop AJ had received new evidence he undertook a fresh sentencing exercise and therefore the appeal would have to determine whether he made an error in his sentencing discretion.

Decision: In allowing the Crown's appeal against sentence, Martin CJ observed that the purpose of punishing consensual sexual intercourse with a girl under the age of 16 years is to protect the girls against themselves and deter men from taking advantage of young girls [8].

After considering the evidence and an extract from the Australian Law Reform Commission's customary law report he stated that he was satisfied that the respondent was truthfully reflecting the position that he saw the victim as his promised wife and that he had rights to touch her body according to Aboriginal custom and culture [24].

Martin CJ further held that the fact that the respondent was 'participating in a culturally encouraged practice which was part of a far more complex scheme of things and not simply related to his sexual gratification' was a mitigating factor [25].

He also noted that the offence does not seem to be prevalent in Aboriginal communities and is decreasing. After considering all relevant matters Martin CJ stated that:

Personal and general deterrence must feature as significant factors in sentencing for an offence such as this. I am of the opinion that notwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of 16 from sexual intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community. To hold otherwise would trivialise the law and send the wrong message not only to Aboriginal men, but to others in Aboriginal society who may remain supportive of the system which leads to the commission of the offence [26].

He later commented that:

Aboriginality of itself, therefore, is neither an aggravating nor a mitigating factor, but facts which exist only by reason of the offender being Aboriginal may be. There may be many circumstances which arise only as a result of an Aboriginal being involved in the cultural affairs of his race which can be taken into account as a circumstance surrounding the commission of an offence. Here, however, the cultural environment permits the commission of the offence and the court can no more condone that element of Aboriginal customary law than it condones assaults in the context of payback. There is a distinction between taking into account the custom which leads to an offender being punished in accordance with both the law of the Territory and by the Aboriginal community, and circumstances such as this where the custom gives rise to the commission of the offence. In my view the latter circumstance does not permit mitigation to the same degree as may be available in the former [28].

In Martin CJ's view the sentences imposed were completely disproportionate to the seriousness of the offending. However, because of double jeopardy Martin CJ imposed 12 months' imprisonment for the sexual offence with an order that it be suspended after serving one month. In relation to the firearms charge he indicated that he would have increased the sentence but because he was in the minority on that point he didn't go any further with that matter.

Riley J also allowed the Crown's appeal against sentence in relation to the offence of carnal knowledge. He held that the offence was at the lower end of the scale for offences of this nature; however, it was made more serious by virtue of the fact that the respondent chose to offend. There was no reason offered as to why he could have not waited until the victim was 16 years' old. Riley J observed that the respondent: '[M]ay have been under some cultural pressure to proceed as he did, but it was not suggested that he was under any cultural imperative to proceed as he did, when he did' [32].

In other words, the respondent was able to comply with the law of the Northern Territory and with obligations imposed upon him under customary law. He deliberately chose not to do so. The respondent had further acknowledged that he had proceeded on the basis that he thought he would not be caught. Riley J held that:

Whilst proper recognition of claims to mitigation of sentence must be accorded, and such claims will include relevant aspects of customary law, the court must be influenced by the need to protect members of the community, including women and children, from behaviour which the wider community regards as inappropriate.

He agreed with the orders suggested by Martin CJ.

In his dissent in this case, Mildren J stated that there were a number of important matters to consider, namely:

1. The victim in this matter was 15 years and three months at the time of the offence and was considered by her grandmother (who had the responsibility of this matter) to have sufficient sexual maturity to live with the respondent. The nearer the victim is to 16 years and the more mature she is the less serious the offence will be;
2. Despite the age of the respondent it is not a case of an older man using his position to influence the victim. It was a case where cultural pressures were acting upon the will of both the victim and respondent as well as her family;
3. Had the respondent and the victim been tribally married there would have been no offence committed even if she was less than 16 years of age because under the Criminal Code (NT) husband and wife are defined to include in the case of Aboriginal people 'persons living in a husband and wife relationship according to tribal custom'.¹¹⁰ There was evidence that they were close to that situation;
4. The fact that this offence was committed because of social pressures which have been brought to bear as a result of cultural factors is a relevant mitigatory factor. (Mildren J noted that the other two judges agreed with this point);
5. Wherever there is a conflict between the law of the land and Aboriginal customary law the former must prevail. However, social pressures which relate to customs may be relevant to moral blame and therefore to sentencing.

The weight to be given to the effect of customary law or cultural factors by a sentencer will vary according to the circumstances. Those circumstances will include the strength of the customary law in the area in which the offender lives and the degree of punishment or social ostracism the offender is likely to suffer should he or she refuse to conform to the rules of the community in which he or she lives [52].

He also noted that the evidence in this case showed that arranged marriages within the Burarra community while slowly dying out were far from dead. Mildren J held that the sentence imposed was not so inadequate as to demonstrate an error.

Postscript: On 11 July 2003 it was reported in *The Australian* newspaper that the Aboriginal and Torres Strait Islander Commission had refused to allow the North Australian Aboriginal Legal Aid Service to fund an appeal to the High Court by Jackie Pascoe Jamilmira. The reason was that they found the case to be 'morally repugnant' and that the rights of women and children should come first.

***R v Alfred Corbett* [2003] Unreported, SCC 20200373**

Court: Supreme Court of the Northern Territory

Date: 16 April 2003

Judge: Angel J

Facts: The defendant pleaded guilty to a charge of causing bodily harm with intent to cause grievous bodily harm. The maximum penalty for this offence is life imprisonment. The victim of the offence was the defendant's adoptive brother. The victim had propositioned the defendant's wife at a time when the defendant had been drinking heavily. The defendant became extremely angry when he saw the victim with his arm over his wife's shoulder and he stabbed him eight times.

The defendant was 29 years' old and had no record of convictions. He spent two months in custody on remand prior to sentencing and this was his first time in custody.

There was evidence presented to the court that it is forbidden in Alyawarre law for a man to touch another man's wife. The conduct of the victim was highly provocative and in such circumstances it was inevitable that there would be some reaction.

Decision: The sentencing judge took all mitigating factors into account and held that a term of actual imprisonment was not required. He was sentenced to three years' imprisonment suspended for three years. The judge appeared to accept that the behaviour of the victim was highly provocative, but he did not specifically say that it was provocative because of customary law.

^{110.} *Criminal Code Act 1983 (NT)* ss 1 and 126.

***R v Eugene Patrick* [2003] Unreported, SCC 20210464**

Court: Supreme Court of the Northern Territory

Date: 16 April 2003

Judge: Angel J

Facts: The defendant pleaded guilty to causing grievous bodily harm and aggravated assault. The incident arose out of a longstanding feud between two families which included the circumstances of the death of a member of one of the families. The defendant and others commenced the attacks upon members of the other family to seek revenge for this death. When asked by the police why he attacked the victims he said that it was for payback.

Decision: In sentencing, the judge noted that counsel had properly conceded that this case had nothing to do with customary law or traditional punishment. He described it as a drunken revenge attack. The defendant was sentenced to five years' imprisonment suspended for four years after having served 18 months.

***R v Shannon* (1991) 57 SASR 14**

Court: Supreme Court of South Australia

Date: 26 September 1991

Judges: Olsson and Duggan JJ, Zelling AJ

Facts: The appellant had pleaded guilty to one offence of arson and one offence of assaulting a police officer. He was sentenced to five years' imprisonment with a non-parole period of 15 months. He appealed against the severity of his sentence on the basis that the judge had imposed the maximum sentence and therefore did not take into account the plea of guilty and the mitigating circumstances that arose because of the appellant's culture.

The incident arose after the appellant had been drinking alcohol and arguing with his father. His father had threatened him with the 'Kadaitcha' men and the appellant believed that he was to be punished by them. By lighting a fire the appellant thought that this would form a barrier between himself and any danger. When the police officers attempted to apprehend him the appellant attacked two officers; however, there was evidence to suggest that as the police were shining a torch into his face and coupled with his disturbed state of mind at the time, he did not appreciate that they were in fact police officers.

Decision: All three judges agreed that the head sentence should be reduced to three years and that the non-parole period should remain the same. In doing so they all took into account the cultural circumstances.

Zelling AJ stated that:

It is very unfortunate that the learned sentencing judge was not given a comprehensive view of the impact of such a threat on an Aborigine. The need for the help of trained persons such as anthropologists to be given to the court in such situations is stressed in many recent publications on the topic (p 19).

He further stated that: 'In some cases, in order to do justice, it may be necessary to accord standing to the Aboriginal community to bring forward its collective point of view' (p 19).

***R v Goldsmith* (1995) 65 SASR 373**

Court: Supreme Court of South Australia (Full Court)

Date: 27 October 1995

Judges: Mullighan, DeBelle and Nyland JJ

Facts: The appellant pleaded guilty to an offence of arson and was sentenced to four years' imprisonment with a non-parole period of two years. The sentence was suspended. The appellant appealed against the severity of the sentence.

The appellant set alight a mattress inside the house in which he was living and the fire spread destroying the building. There was no one present at the time. Earlier there had been a fire in the same house which killed a close friend of the appellant. He had nothing to do with the earlier fire. The appellant was suffering post traumatic stress disorder.

In addition, the appellant held a spiritual and cultural belief that the restless spirit of his friend continued to reside in the house and he lived in fear of the house. His reason for setting fire to the house was so that his friend's spirit could rest in peace.

Decision: Mullighan J (with whom DeBelle and Nyland JJ agreed) stated that the sentencing judge had not given sufficient weight to the unusual features of the case or the appellant's belief and reason for committing the offence [376].

The sentence was decreased to two years' imprisonment with a non-parole period of 12 months, wholly suspended.

***R v Helmhout & Anor* [2000] NSWSC 651**

Court: Supreme Court of New South Wales

Date: 22 June 2000

Judge: Bell J

Facts: The two defendants (who were brothers) were convicted after trial of murder. The incident had occurred following the funeral of their older brother and whilst both defendants were under the influence of alcohol. The victim was a friend of the brother who had died and was there to pay his respects. He had also lent one of the defendants a suit to wear.

The victim began to talk about the brother who had died and continually referred to his name despite being told to stop by one of the defendants. This led to that defendant punching him several times. Later that defendant attempted to strangle him with a belt and with a piece of cord and it was at that time that the other defendant joined in.

Following the death of the victim the defendants committed some degrading acts including kicking him, sitting on him whilst smoking a cigarette and leaving his body with his pants pulled down.

Both brothers were Aboriginal.

Decision: The judge accepted that the precipitating circumstance leading to the attack was the repeated references to the defendants' brother by name in breach of Aboriginal customary law.

The evidence suggests that it is contrary to Aboriginal custom to refer to the dead by name. In his intoxicated state Pieter Helmhout appears to have killed the deceased over this perceived lack of cultural sensitivity [23].

However, the judge specifically held that it was not a matter of mitigation. He sentenced the defendants to 18 years' imprisonment each with a non-parole period of 13½ years.

***R v Bulmer & Ors* (1986) 25 A Crim R 155**

Court: Supreme Court of Queensland (Court of Criminal Appeal)

Date: 3 September 1986

Judges: Connolly, McPherson and Derrington JJ

Facts: A number of Aboriginal defendants were sentenced for a series of violent offences. They were each given sentences which the Attorney General considered to be extremely lenient. The Attorney General appealed against the sentences and the appeals were heard together.

The sentencing judge's reports indicated that the main reason for the lenient sentences was the Aboriginality of the defendants.

Decision: Connolly J (with whom McPherson J agreed) held that the sentences were completely out of line with sentences commonly imposed for offences of this nature, even on Aboriginal offenders.

In addition, in the three cases that involved Aboriginal male offenders it appeared that each of them believed that they had the right to use a knife as a means of disciplining either a child or a woman. The judge commented that '[i]t is becoming apparent that some such notion may be quite widespread amongst people of Aboriginal and Torres Strait Island descent' (p 158).

In relation to this, reference was made to the case of *Watson*.¹¹¹ In that case evidence was tendered and rejected about a custom of inflicting cuts on women as a disciplinary measure. The court had held that no such custom could be recognised in the application of the Criminal Code (Qld).

It was further stated that: 'If this type of crime of violence does indeed reflect the view that it is legitimate to discipline women and children in this fashion then, far from calling for leniency in sentencing, it represents an attitude which the courts must be vigilant to discourage' (p 158).

^{111.} [1986] (Unreported, Supreme Court of Queensland Court of Criminal Appeal, No 171/1986).

Defences

There is no distinct or separate customary law defence under Australian law; however, Aboriginal customary law has been used to support or explain defences under the general criminal law.

Consent

Under the Western Australian *Criminal Code*¹¹² the absence of consent must be proved for any offence of which an assault is an element. In *R v Judson*¹¹³ a number of defendants were charged with assault occasioning bodily harm arising from an incident where a young Aboriginal girl was subject to traditional punishment. The offence involved the girl being hit with sticks and a crowbar. The defendants were acquitted by a jury after defence counsel had submitted that the victim had consented to the assault. Defence counsel relied on evidence which showed that the 'attack' was consistent with the relevant traditional law in order to show that the victim had consented or alternatively that the defendants held an honest but mistaken belief that she had consented.

Duress

In *R v Warren, Coombes and Tucker*¹¹⁴ the court held that Aboriginal customary law could be used to explain why the defence of duress applied in the circumstances. In effect, the evidence established that if the defendants had not punished the victim they would have been traditionally punished themselves. However, the court rejected evidence from the defendants that their actions were performed under customary law primarily because they had been drinking alcohol. Importantly, this case is authority for the proposition that to refer to Aboriginal customary law as part of the reason why a particular defence is available does not amount to arguing that certain conduct is lawful because it is lawful under Aboriginal customary law.

Provocation

There are two cases which have held that it is permissible to take into account the cultural context of certain behaviour when assessing the defence of provocation. In *Jabarula v Jambajimba*¹¹⁵ the court held that in determining what an ordinary person would have done for the defence of provocation an ordinary person can be defined with reference to the Aboriginality and cultural characteristics of the accused person. In *Lofty v The Queen*¹¹⁶ the court held that it was proper to inform a jury that the conduct of the victim constituted a grave breach of Aboriginal customary law when assessing the gravity of the provocation.

Honest claim of right

Section 22 of the Criminal Code (WA) provides that:

Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by an offender is expressly declared to be an element of the offence.

But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.

There are no Western Australian cases which deal with the interaction of Aboriginal customary law and s 22 of the *Criminal Code*. However, the High Court case *Walden v Hensler*¹¹⁷ dealt with the equivalent provision under the Queensland *Criminal Code*. In that case the defendant had been charged with keeping protected fauna by shooting and taking a plain turkey home for food. He claimed that he believed that he was entitled to take the turkey as it was part of Aboriginal customary law. Brennan, Toohey and Gaudron JJ held that the defendant did have an honest claim of right but Brennan J found that the offence did not relate to property and the conviction against the defendant therefore remained.

¹¹² *Criminal Code* (WA) s 222.

¹¹³ *R v Judson & Ors* (Unreported, District Court of Western Australia, No POR 26/1995, O'Sullivan J & Jury, 26 April 1996).

¹¹⁴ (1996) 88 A Crim R 78, 81 (per Doyle CJ and Cox J).

¹¹⁵ (1989) 68 NTR 26.

¹¹⁶ [1999] NTSC 73.

¹¹⁷ (1987) 75 ALR 173.

There are three factors that must be satisfied for the defence to apply:

1. The offence must relate to property. The majority of the court in *Walden v Hensler* held that the section extends to more than just the offences which are defined under the relevant Codes as 'property offences'. This broad interpretation has been applied by subsequent Western Australian cases;¹¹⁸
2. The defendant must have had an honest belief or claim that he or she was entitled to do what he or she did; and
3. The defendant's belief must relate to a belief that they were entitled to do what they did under the law of the relevant state. It is not enough in this context that they believed that they were entitled to do what they did under Aboriginal customary law. The belief must include a belief that the relevant Aboriginal law was recognised by the general law of the particular state. In *Margarula v Rose*¹¹⁹ the defendant had been charged with trespassing after she was found protesting for Aboriginal rights on the top of a container at the Jabiluka mine site. She believed that she was entitled under Aboriginal law to protect her land. However, her defence of honest claim of right failed, amongst other things, because the evidence established that she knew that she would be arrested if found on the container. In *DPP Reference No 1 of 1999*¹²⁰ the court confirmed that the belief must be a belief in a right recognised by law even if the belief is unsoundly based.

Native title

The position before *Mabo (No 2)*

Prior to *Mabo (No 2)*¹²¹ there was no recognition at common law of any native title rights. Therefore, for a defendant to rely upon a traditional or native title right to do something it must have been based upon a statutory right or alternatively the defendant would have relied upon the defence of honest claim of right because he or she had a mistaken belief that the relevant Aboriginal law was recognised by the common law. In *Campbell v Arnold*¹²² the defendant relied upon a reservation in a pastoral lease which allowed for traditional hunting of certain animals for food or ceremonial purposes. The reservation was contained in the *Crown Lands Act 1978* (NT). The defendant had been charged with discharging a firearm. It was held that even though the defendant used a firearm as a method of killing he was entitled to do so under the reservation and it was held that the *Firearms Act 1979* (NT) is to be read subject to the background of the reservation which was granted to allow Aboriginal people to take wild animals on their own country.

The position after *Mabo (No 2)*

In *Mabo (No 2)* six members of the High Court held that the common law recognises a native title right of the indigenous inhabitants to their traditional lands where that right has not been extinguished.

In *Mason v Tritton*¹²³ the court conveniently sets out the requirements stemming from the decision in *Mabo (No 2)* to establish a native right (see case summary below). In *Mason* the defendant was charged with catching abalone over the prescribed amount. He failed to establish that he was doing so by virtue of a native title right because he did not provide any evidence that he intended to eat the abalone or give them to his family.

Whether or not a native title right will constitute a defence to a criminal charge will depend upon whether the defence can provide sufficient evidence to establish that what the defendant was doing was pursuant to a native title right and that the right had not been extinguished by legislation. In *Derschaw & Ors v Sutton*¹²⁴ the Supreme Court of Western Australia (Court of Criminal Appeal) held that in order to establish a native title right to fish the defendant must provide evidence of each of the facts necessary to establish native title. For such a defence to be effective the defendant needs to satisfy the evidential burden in order to give rise to a reasonable doubt.¹²⁵

The courts have also accepted the changing nature of Aboriginal traditional laws by allowing defendants to rely upon a native title defence even where the activity had not been undertaken strictly in the traditional manner. In *Campbell v*

118. See *Molina v Zaknich* (2001) 24 WAR 562.

119. [1999] NTSC 22.

120. [2000] NTCA 6.

121. *Mabo & Ors v Queensland (No 2)* (1992) 107 ALR 1.

122. (1982) 56 FLR 382.

123. (1994) 34 NSWLR 572.

124. (1996) 17 WAR 419.

125. *Ibid* 431.

*Arnold*¹²⁶ the fact that the defendant had used a firearm to hunt was not fatal to his claim that he was acting in a traditional manner. Similarly in *Trenerry v Rivers*¹²⁷ the fact that the defendant had employed a European fishing method did not preclude the native title defence. What was held to be important was the fact that he was fishing for food for his family.

Case digest – Defences (consent)

***R v Judson & Ors* [1996] Unreported, No POR 26/1995**

Court: District Court of Western Australia

Date: 25 April 1996

Judge: O'Sullivan J and a jury

Facts: The male defendant was charged with unlawful wounding and the five female defendants were each charged with assault occasioning bodily harm. The charges arose out of incident where the complainant, a 14-year-old Aboriginal girl, was subjected to traditional punishment under Aboriginal Martu law. The complainant had been on a truck when her grandfather had died. Under Martu law it was said that the complainant along with the others who were on the truck were to blame for the man's death and accordingly they would be punished.

The evidence established that the complainant attended and waited in a particular area expecting to undergo traditional punishment. She had already had traditional punishment at another location. She was hit with sticks and a crowbar and also speared to the leg. It was the spearing which gave rise to the charge of unlawful wounding.

When giving evidence the complainant said that she didn't agree with the attack but under cross examination she explained that she meant that she wasn't happy about it. There was some evidence that she had tried to run away during the attack. Also, one of the defendants admitted to using a crowbar to hit the complainant but she stated that she believed that a crowbar could be used under Martu tribal law. An independent witness gave evidence that after about 10 minutes a man called out for the punishment to finish, which it did.

According to the defence the main issue in relation to the charge of unlawful wounding was whether it was, in fact, the male defendant who had speared her. In relation to the charges of assault occasioning bodily harm the main issues were whether the complainant consented to the infliction of the punishment or whether the defendants were under an honest and reasonable but mistaken belief that she had consented. Counsel for the defendants did not claim that the defendants were not guilty because it was Aboriginal law. However, the fact that what had occurred was done under Aboriginal law was used to support the claim that the complainant was consenting or that there was a mistake by the defendants about that consent.

One defence counsel referred to the fact that the injuries suffered by the complainant were on her back which was consistent with the evidence that under Martu law it was only the back which was allowed to be hit.

In his summing up the judge specifically told the jury that they were not being asked to decide whether they approved or disapproved of Aboriginal law or the conduct of the defendants but whether or not the accused were guilty in terms of the legal principles which had been discussed.

Decision: The jury acquitted all defendants of all charges.

Case digest – Defences (duress)

***R v Gregory Warren, Anthony Ross Coombes and Percy Gordan Tucker* (1996) 88 A Crim R 78**

Court: Supreme Court of South Australia (Court of Criminal Appeal)

Date: 3 April 1996

Judges: Doyle CJ, Cox and Debelle JJ

Facts: The three appellants were each convicted of grievous bodily harm with intent to cause grievous bodily harm as well as other violent offences. The appellants were all members of one Aboriginal tribe living in Marree. For a long time there had been serious tension between their tribe and another tribe over claims to native title and customary title to land in the area.

The appellant's tribe were conducting a ceremony and members of the other tribe considered that it was inappropriate to do that on their land. To them it was offensive and provocative. When a member of this tribe approached the appellant's tribe with a warning letter the appellants and others set upon this man severely beating him.

126. (1982) 56 FLR 382.

127. [2000] NTMC 19.

The appellants' case at trial was that the victim had breached customary law and that he must be punished. If they did not punish him they would have to undergo the same punishment for failing to inflict traditional punishment. They relied on the defence of duress.

The trial judge stated that he had grave doubts that the defence of duress was available in the circumstances because of what was said in the case of *Walker v New South Wales*¹²⁸ to the effect that Australian criminal law does not accommodate two alternative bodies of law. In addition he held that he did not believe that the appellants had been acting in accordance with customary law but rather that the reason for the violent assaults was the combination of alcohol and a decision that it was time for a show of strength.

Decision: Doyle CJ (with whom Cox J agreed) held that the trial judge was wrong in stating that the defence of duress was not available (p 81). It was not suggested by the appellants that the laws of South Australia did not apply to the appellants nor that their conduct was lawful because it was lawful under Aboriginal customary law. The appellants were relying on a defence under the general law and customary law was the explanation for why they were under duress. Their defence did not depend upon showing that Aboriginal customary law was recognised by Australian criminal law or that it operated alongside it. However, as the trial judge had rejected the evidence of the defendants that was the end of the matter.

Case digest – Defences (provocation)

Jabarula & Ors v Jambajimba & Ors (1989) 68 NTR 26

Court: Supreme Court of the Northern Territory

Date: 9 June 1989

Judge: Kearney J

Facts: Four Aboriginal males were convicted of assault. They appealed on the basis that the learned magistrate made an error by rejecting the excuse of provocation.

Decision: It was held that when considering what an ordinary person would have done in terms of the excuse of provocation the ordinary person can be defined with reference to the Aboriginality and cultural characteristics of the accused and their circumstances such as living in a remote community. However, the ordinary person is sober and not unusually excitable or pugnacious.

Lofty v The Queen [1999] NTSC 73

Court: Supreme Court of the Northern Territory (Court of Criminal Appeal)

Date: 20 July 1999

Judges: Martin CJ, Mildren and Riley JJ

Facts: The appellant had been convicted after trial of the murder of his customary law wife. He stabbed her four times with a knife after hearing that she was intending to leave him and go away with another man. A relationship with this man would be viewed as particularly dangerous in Aboriginal eyes.

The appellant appealed against the conviction.

Decision: The trial judge had directed the jury that because there was a reason for his lie they should put the evidence of the lie aside as it would not assist them. The appellant's counsel had submitted that the evidence should have been ruled inadmissible but the court held that the directions were adequate and, if anything, favourable to the accused.

The court also held that the trial judge's directions in relation to provocation were adequate. The trial judge had specifically referred to the need to take into account the evidence that suggested that the knowledge of the proposed relationships between his wife and the other man constituted a grave breach of Aboriginal law, when assessing the gravity of the provocation.

^{128.} (1994) 69 ALJR 111.

Case digest – Defences (honest claim of right)

***Margarula v Rose* [1999] NTSC 22**

Court: Supreme Court of the Northern Territory

Date: 12 March 1999

Judge: Riley J

Facts: The appellant was convicted of trespassing unlawfully on enclosed premises at the Jabiluka mine site. The appellant had been at the top of a container with five others protesting for Aboriginal rights. She appealed against the conviction and the penalty of \$500.

Section 71 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) allows Aboriginal people to enter upon, use or occupy Aboriginal land to the extent that it is in accordance with Aboriginal tradition. Aboriginal tradition is defined in s 3 of that Act as:

The body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.

There was no dispute that the appellant was a traditional owner of the relevant land. She claimed that she had entered the land to object to a fence that had been constructed and to protect the land. She also asserted that she had a traditional right to protect her country.

The main issue was whether the appellant's entry and use of the relevant land was 'in accordance with Aboriginal tradition governing the rights of [the appellant] with respect to that land' [35].

Another issue was the question whether the appellant could rely upon a defence of honest claim of right on the basis that she had an honest belief that she was entitled to act as she did.

The learned magistrate found—and there was no challenge to the finding—that the protection of one's country in Aboriginal culture is a traditional right. However, he also found that the manner in which the appellant had used the land was not in accordance with Aboriginal tradition.

Decision: On appeal it was held that because there was an agreement between the traditional owners of the land and those undertaking the mining at the site which contemplated the types of activities that the appellant was objecting to, the traditional right to protect the land had already been taken care of.

The basis of her honest claim of right was that she was the traditional owner and was therefore entitled to be upon the land. Although the appellant had a belief that she was able to test some undefined rights in relation to entry upon the land the evidence established that she knew that she would be arrested for being on top of the container. Accordingly, it was found that she was not exercising an honest claim of right.

The appeal was dismissed.

***DPP Reference No 1 of 1999* [1999] NTSC 23**

Court: Supreme Court of the Northern Territory

Date: 12 March 1999

Judge: Martin CJ

Facts: The respondent was charged with assault and two offences of damage. He was an Aboriginal elder who was responsible for enforcing Aboriginal law in the land which his clan 'owned' pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The incident arose after a photographer took photographs of the land and some children of the respondent's clan. It was contrary to the relevant Aboriginal customary law to take the photographs without the permission of the respondent and the respondent had a special responsibility to protect the children including the preservation of their spiritual well being. It was also expected under Aboriginal customary law for the photographer in these circumstances to pay a penalty or make other amends.

The respondent initially demanded that the photographer give the children \$50 and when he refused there was a struggle and the respondent grabbed the camera and took out the film.

The learned magistrate dismissed the charges on the basis that the prosecution had not proved beyond a reasonable doubt that the respondent was not acting in the exercise of a right granted or recognised by law or in an honest claim of right.

The DPP applied to the Supreme Court for answers to a number of questions of law. There were only two questions which the court was prepared to consider and these were:

1. Can the right which the magistrate found as having being exercised by the respondent, correctly be categorised as a right giving rise to an honest claim of right under s 30(2) of the *Criminal Code* (NT)?
2. On the facts of this case, is s 26(1)(a) of the *Criminal Code* (NT) capable of authorising the behaviour of the respondent?

Decision: In relation to the first question s 30(2) of the Code provides that: 'A person is excused from criminal responsibility for an act or omission done or made with respect to, or for an event caused to, property in the exercise of an honest claim of right and without intention to defraud.'

After considering the relevant case law in relation to the defence of honest claim of right the judge held that:

Although it is not necessary that the right be a right recognised by law, I accept the submissions made on behalf of the director that Y could only succeed under s 30(2) of the *Criminal Code* if he honestly believed that the rights he asserted were recognised by the general law in force in the Territory sufficient to displace the operation of the criminal responsibility arising from the commission of the offences, even if that was not the correct legal position [42].

In this case the magistrate's findings did not refer to the belief of the respondent as to the recognition by the general law in force in the Northern Territory of the lawfulness of his claim of right.

In relation to the second question s 26(1)(a) provides that an act is authorised if it is done in the exercise of a right granted or recognised by law. The respondent claimed that the right he relied on was found in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

The judge stated that the 'common law and statutes recognise a form of native title which reflects the entitlement of Aboriginals, in accordance with their laws and customs, to their traditional lands' [48]. The conduct of the respondent was not included as part of these rights. Aboriginal people are subject to the laws of the Northern Territory. None of the rights which have been recognised by the common law or through statutes sanction the commission of criminal offences in pursuance of those rights.

The answer to both questions was therefore 'No'.

DPP Reference No 1 of 1999 [2000] NTCA 6

Court: Supreme Court of the Northern Territory (Court of Appeal)

Date: 22 June 2000

Judges: Mildren, Thomas and Bailey JJ

Facts: Appeal from the above decision.

Decision: In relation to question one (above) the court clarified that the decision of Martin CJ in the above case was intended to be limited to the application of s 30(2) *Aboriginal Land Rights (Northern Territory) Act 1976* to the facts of that case and should not be relied upon as a general statement of law.

The court also held that the defence of honest claim of right cannot apply to a charge of assault as it only applies to property offences under the *Criminal Code* (NT). The belief must be a belief in a right recognised by law even if the belief is unsoundly based. That was not the case here.

In relation to question two the court held that there is nothing in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) or the *Native Title Act 1993* (Cth) which recognises the right of an Aboriginal elder to enforce customary or traditional law on Aboriginal land. There is no dual system of law in the Northern Territory.

The court therefore dismissed the appeal and agreed that the answer to both questions was 'No'.

Walden v Hensler (1987) 75 ALR 173

Court: High Court of Australia

Date: 6 November 1987

Judges: Brennan, Deane, Dawson, Toohey and Gaudron JJ

Facts: The appellant was convicted by a magistrate of an offence of keeping protected fauna contrary to s 54 of the *Fauna Conservation Act 1974–1979* (Qld). The appellant was an Aboriginal elder. He was granted permission from the station owner for whom he worked to go hunting. He shot a plain turkey and took it home to eat. Plain turkeys were protected under the legislation but the appellant was unaware of this. He believed that he was entitled to do what he did. He had taken bush tucker with his father in the past and he believed that he was doing nothing wrong.

Although the magistrate accepted the evidence of the appellant he was convicted because the magistrate held that the defence under s 22 of the *Criminal Code* (Qld) did not apply. The Court of Criminal Appeal of the Supreme Court of Queensland also rejected the argument that the defence under s 22 applied.

Section 22 of the Code states that:

Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence. But the person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.

Decision: Brennan J held that the appellant did honestly claim the right to keep the birds specified in the charge. It does not matter that the claim is not one recognised in law. He stated that:

As the right claimed does not have to be a right recognised by the law of Queensland, the appellant's belief in his entitlement according to Aboriginal law and tradition to keep the carcass and the chick would have sufficed to raise an honest claim of right in the absence of any knowledge that the entitlement claimed had been overridden by the law of Queensland (p 179).

The real issue in this case was whether the offence was an offence relating to property and therefore whether s 22 was applicable. Brennan J held that the offence of keeping protected fauna was not an offence relating to property and s 22 did not therefore apply to it.

Deane J held that the defence of honest claim of right was not available to the appellant because what he asserted was simply that he was unaware that the relevant criminal law applied to outlaw the particular exercise of ownership or traditional hunting rights (p 189).

Dawson J held that s 22 did not apply because the offence created a general prohibition against keeping fauna which applied irrespective of any proprietary or other right (p 197).

In contrast, Toohey J held that the appellant did have an honest claim that he was entitled to take the turkeys. There was an honest claim that he was entitled to do what he did, it was a claim with respect to property, and it was a claim made in answer to a charge relating to property (p 204).

Gaudron J stated that the appellant's claim was founded on his membership of an Aboriginal community and the customs of that community. Her Honour asserted that that is a sufficient foundation for a claim of right as long as the claim is made by reference to some supposed operation of the law: '[a] right must mean a right in law, and not merely one which owes its existence to a moral order, religious code or other non-legal regimen' (p 208). Therefore the claim must be asserted on the basis that the customs of the Aboriginal community are recognised by the law. It does not matter that they are not in fact recognised by the law. In this case, her Honour found, the appellant's claim fell within s 22.

The appeal was dismissed. The majority (consisting of Brennan, Deane and Dawson JJ) held that the appellant could not rely on s 22 as a defence to the charge; however, the reasoning of each judge differed. Although Brennan, Toohey and Gaudron JJ all held that the appellant had an honest claim of right within the meaning of the section, Brennan J agreed with Deane and Dawson JJ that s 22 did not apply to the offence for which the appellant had been charged.

***R v Nona & Gesa* (1999) 4(22) *Indigenous Law Bulletin* 20**

Court: District Court of Queensland

Date: 12 April 1999

Judge: Healy DCJ

Facts: The three defendants had approached some commercial fishermen and told them to leave their area. One defendant had a crayfish spear which he pointed at one of the fishermen. The defendants took the fish from the fishermen's dinghies. Two of the defendants were charged with stealing with violence.

The commercial fishermen had a statutory licence to fish in the area. However, the defendants argued that they had an honest claim of right to the fish based upon the Torres Strait Treaty (1975) between Papua New Guinea and Australia and upon legislation enacted to protect traditional fishing by Torres Strait Islanders and their way of life.

The Crown argued, amongst other things, that because the defendants had sold the fish their intention was not to assert their traditional rights but to profit from the sale of the fish.

Decision: The judge held that the defendants were entitled to rely upon an honest claim of right as long as they honestly believed that they were entitled to protect the area even if the title conferring that right was not recognised at law. The judge also held that traditional fishing rights did not prevent the defendants from selling the fish obtained pursuant to those rights. The judge refused to allow the matter to go before a jury. The DPP nevertheless declined to withdraw the charges, leaving the matter open.

Case digest – Defences (native title)

***Sutton v Derschaw & Ors* (1995) 82 A Crim R 318**

Court: Supreme Court of Western Australia

Date: 15 August 1995

Judge: Heenan J

Facts: The respondents were present at Drovers' Rest near Port Hedland for the wake of an important Aboriginal man. Each respondent was charged with an offence of being in possession of fish taken in contravention of a notice from the Minister which prohibited all persons from taking fish from the relevant area.

The learned magistrate dismissed the charges on the basis that he was satisfied that the respondents were acting in pursuit of a native title right to fish in the area. The Crown appealed the decision.

Decision: In this case the evidence produced to the court did not support a claim of a native title right to fish or, in other words, the respondents did not produce sufficient evidence to raise a reasonable doubt. Therefore there was no discussion about whether a native title right to fish would afford a defence to the charge.

***Derschaw & Ors v Sutton* (1996) 17 WAR 419**

Court: Supreme Court of Western Australia (Court of Criminal Appeal)

Date: 16 August 1996

Judges: Franklyn, Wallwork and Murray JJ

Facts: Appeal from the above decision.

Decision: Franklyn J (with whom Murray J agreed) dismissed the appeal and held that there is an evidential burden upon an accused wishing to raise a defence to provide the evidentiary foundation for that defence.

A defence of native title fishing rights recognised at common law pursuant to the principles established in *Mabo (No 2)* requires evidence which goes to each of the facts necessary to establish native title. It is not necessary that the evidence be such as to establish the defence on the balance of probabilities, but it must be such as to raise a reasonable doubt as to guilt. To do that it must be sufficient to lay the foundation for the claim of native title fishing rights and consequently, to go to each of the elements necessary to make out that claim (p 431).

In this case the evidentiary burden was not made out.¹²⁹

Neither the decision of the Court of Criminal Appeal nor the decision of the single judge made any comments which would indicate that a defence based on native title could not apply to a criminal charge.

***Campbell v Arnold* (1982) 56 FLR 382**

Court: Supreme Court of the Northern Territory

Date: 30 March 1982

Judge: Forster CJ

Facts: The appellant was convicted before a magistrate of a charge of discharging a firearm on property occupied by another. The offence was contrary to s 94(1) of the *Firearms Act 1979* (NT). The appellant was in possession of two dead and cooked kangaroos and he admitted that he had shot them on the property of another person, namely Bond Springs.

It was a defence under s 94(3) that the defendant was authorised by or under another law in force in the Territory, to discharge the firearm. The pastoral lease which covered the relevant land contained a reservation which permitted Aboriginal inhabitants of the Northern Territory to take animals for food or for ceremonial purposes. This was permitted as long as it was done in accordance with Aboriginal tradition. The reservation was also made subject to any other law in force in the Territory.

It was accepted by both parties that the appellant was an Aranda man and the relevant land was Aranda land in accordance with Aboriginal tradition. It was also accepted that the kangaroos had been killed for food for the appellant and his family.

Decision: It was held that the right to take animals for food and ceremonial purposes included the right to kill by shooting.

^{129.} The elements of a native title right are outlined in *Mason v Tritton* (1994) 34 NSWLR 572; see case summary below pp 49–50.

It has been common knowledge for many years that in the process of adaptation of old Aboriginal ways many Aboriginal people have adopted firearms as a method of killing, being more efficient for many purposes than spears or boomerangs or other traditional weapons. Had the legislature intended that only traditional weapons and methods were permitted, it would have been easy enough for it to say so (p 384).

As the *Firearms Act* was assented to after the *Crown Lands Act 1978* (NT) (which provided for the reservation to the pastoral lease) the judge held that it appeared that the *Firearms Act* was passed against the background of permission for the appellant and people like him to take wild animals on their own country and must be read subject to that permission.

The appeal was allowed and the conviction quashed.

***Trenerry v Rivers* [2000] NTMC 19**

Court: Court of Summary Jurisdiction (Northern Territory)

Date: 3 July 2000

Judge: Lowndes SM

Facts: The defendant was charged with an offence against the Fisheries Regulations of being in possession of a gill net without the appropriate licence, permit or authority under the *Fisheries Act 1988* (NT).

The defendant did not know that it was illegal to possess the gill net without a licence. The evidence established that the defendant used the net to catch fish for the purposes of feeding his family and himself and that sometimes he gave fish away to other families. The defendant did not know whether fishing with a large mesh net was a traditional fishing method but he said that he learned the technique from his grandmother. It was accepted from the evidence that net fishing and spear fishing were traditional methods of fishing. There was also evidence that the most important aspect of traditional fishing was that you catch enough fish for your family and no more.

The *Fisheries Act* provides that it is a defence to a charge under that Act if the defendant proves on the balance of probabilities that the activity was done in the exercise of a right granted or recognised by law. It also states that nothing in the Act shall limit the right of Aboriginal people to continue to traditionally use the resources of an area. Thus the defendant's case was that under the *Fisheries Act* and pursuant to the *Native Title Act 1993* (Cth) he was entitled to possess and use a gill net without licence.

Decision: After outlining the principles in *Mason v Tritton*¹³⁰ and *Mabo (No 2)*¹³¹ the magistrate made some important observations about the changing nature of traditional laws and customs. The magistrate observed that there had been 'judicial acceptance of the fluid nature of traditional laws and customs and their susceptibility to processes of change, evolution or adaptation' [45]. The evidence established that fishing with a spear or a bush net was a traditional method of fishing among the defendant's Aboriginal group. The issue was whether the use of a gill net would affect the traditional rights. The magistrate stated that as a consequence of contact with European settlement the size of the nets had increased and that gill net fishing had been practised in the area for two generations [47].

In addition the critical objective of traditional fishing—namely, that Aboriginal people only take fish sufficient for the purpose of feeding themselves and their families—had been maintained. As well, the use to which the defendant put the gill net was consistent with traditional methods of fishing because he used the net as a drag net.

The magistrate held that he was:

[S]atisfied on the balance of probabilities that fishing with a gill net is an appropriate adaptation of a traditional method of fishing in the same way—and perhaps even more so than—as hunting with firearms is an accepted adaptation of a traditional method of hunting [50].

It was held that the defendant's conduct was done in the exercise of his traditional laws and customs.

***Mabo & Ors v Queensland (No 2)* (1992) 107 ALR 1**

Court: High Court of Australia

Date: 3 June 1992

Judges: Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ

Decision: It was stated by Mason CJ and McHugh J that six members of the court (Dawson J dissenting) were in agreement that the:

[C]ommon law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands' (p 7).

130. (1994) 34 NSWLR 572. See case summary below pp 49–50.

131. (1992) 175 CLR 1.

Some of the important aspects of this case for the purpose of relying on native title as a defence to a criminal charge are conveniently set out in *Mason v Tritton*.¹³²

***Yanner v Eaton* (1999) 166 ALR 258**

Court: High Court of Australia

Date: 7 October 1999

Judges: Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ

Facts: The appellant was charged with taking and keeping fauna without a permit contrary to the *Fauna Conservation Act 1974* (Qld). He used a traditional form of harpoon to catch two juvenile crocodiles. He ate some of the meat and froze the remainder. He kept the skins at his home.

He was acquitted by the magistrate on the basis that he was exercising a native title right. The magistrate found that the appellant's clan had a connection with the land and that that connection existed before the common law applied to Queensland. He further found that it was a traditional custom to hunt juvenile crocodiles for food and that the juveniles had a tribal totemic significance.

The case was appealed by the Crown to the Court of Criminal Appeal where the magistrate's decision was set aside. The appellant then appealed to the High Court.

Decision: The majority (Gleeson CJ, Gaudron, Kirby and Hayne JJ) agreed with the conclusion of the magistrate that the *Fauna Conservation Act* did not extinguish the appellant's native title rights under the *Native Title Act 1993* (Cth).

***Mason v Tritton* (1994) 34 NSWLR 572**

Court: Supreme Court of New South Wales (Court of Criminal Appeal)

Date: 30 August 1994

Judges: Gleeson CJ, Kirby P and Priestley JA

Facts: The appellant was charged under regulation 34(1)(c) and regulation 44(2) of the *Fisheries and Oyster Farms (General) Regulations 1989* (NSW). The offences related to possessing and shucking oysters in excess of the quantity permitted under the regulations. The appellant pleaded not guilty before the magistrate and relied upon a defence that he had a traditional and customary right to fish in the relevant waters. It was argued that the right to fish was based upon the principles enunciated in *Mabo (No 2)*.¹³³ It was also argued that the appellant had not been deprived of this right to fish by the regulations.

The appellant's case was that:

1. A traditional and customary right to fish existed in his Aboriginal community;
2. On the day of the alleged offence the appellant was exercising as an individual that right which flowed to him as a member of that Aboriginal community;
3. The regulation under which he was charged did not apply to him because it did not reveal a clear and plain intention to extinguish the native title of Aboriginal Australians.

Decision: Kirby P outlined the three issues to be determined in the appeal:

1. Whether a traditional and customary 'right to fish' is a native title capable of recognition and protection by the principles enunciated in *Mabo*;
2. Assuming the answer to (1) is yes, was there sufficient evidence proved in this case to give effect to that native title; and
3. Assuming (1) and (2) are established affirmatively, was that native title validly extinguished by the regulation (p 579).

Kirby P then conveniently summarised a number of principles derived from *Mabo (No 2)*:

1. There must be evidence that the claimant is both an indigenous person and a biological descendant of the indigenous clan or group who exercised traditional and customary rights in relation to the land claimed at the time when the Crown first asserted its sovereignty.

^{132.} (1994) 34 NSWLR 572. See case summary below.

^{133.} (1992) 175 CLR 1.

2. There must be evidence that the claimant and his or her clan or group have 'continued to acknowledge the laws and (so far as practicable) to observe the customs based in the traditions of that clan or group'.
3. Evidence of change to the indigenous community's traditional laws and customs is not of itself fatal to a claim for native title. Rather, the claimant will enjoy native title to the extent to which the tradition laws and customs are currently acknowledged and observed.
4. Evidence that the claimant had abandoned acknowledgment of traditional laws and customs will be fatal to the claim for native title because, then, the foundation of native title will have disappeared.
5. The alienation of land between differing indigenous clans or groups is 'dependent on the laws from which [native title] is derived' as '[n]ative title, though recognised by the common law, is not an institution of the common law and is not alienable by the common law (*Mabo* per Brennan J at 59)' (p 583).

Kirby P further set out the factors which must be proved to establish a successful common law claim for native title of the type asserted in this case:

1. That traditional laws and customs extending to the 'right to fish' were exercised by an Aboriginal community immediately before the Crown claimed sovereignty over the territory;
2. That the appellant is an indigenous person and is a biological descendent of that original Aboriginal community;
3. The appellant and the intermediate descendants had, subject to the general propositions outlined above, continued, uninterrupted, to observe the relevant traditional laws and customs; and
4. That the appellant's activity in fishing or conduct in fishing for abalone was an exercise of those traditional laws and customs (p 584).

In this case, Kirby P found that there was no evidence as to whether the appellant intended to eat the abalone himself or give them to his family and therefore, the appellant had not established as a matter of fact that he was exercising a customary right to fish for abalone on the relevant date.

Although it was not necessary to decide the issue, he made some comments in relation to the question whether the regulations extinguished native title. In *Mabo* it was held that in order to extinguish native title the exercise of power must reveal a clear and plain intention to do so. Native title will also be extinguished where acts or conduct of the Crown are inconsistent with the indigenous peoples' right to continue to enjoy native title. There is nothing in the provisions of the regulations or legislation or in the practical effect of their provisos to hold that native title has been extinguished. The regulation does however; regulate the enjoyment of native title.

Kirby P stated:

I do not take it to be the intent of the High Court in *Mabo* that successful claimants to a form of native title should then be able to remove themselves from the ordinary regulatory mechanisms of Australian society. In the particular context of this case, the control and the regulation of fishing activity applied to all those who fish, regardless of the fishing right which they severally purport to exercise (p 593).

Priestley JA (with whom Gleeson CJ agreed) set out the position at common law in relation to Aboriginal land rights and claims. Prior to *Mabo (No 2)* the law did not recognise such rights and claims. That decision held that the common law did recognise native title. As a result of this decision and the subsequent political debate the Commonwealth passed the *Native Title Act 1993*. This Act sets out that native title rights and interests include hunting, gathering or fishing rights and interests.

His Honour also held that there was insufficient evidence that the appellant when he was diving for abalone was doing so pursuant to a system of rules which he recognised and adhered to.

The appeal was dismissed.

***Dillon v Davies* (1998) 156 ALR 142**

Court: Supreme Court of Tasmania

Date: 20 May 1998

Judge: Underwood J

Facts: The applicant was charged with having a large number of undersized abalone contrary to the *Sea Fisheries Regulations 1962* (Tas). The applicant was convicted by a magistrate. The applicant argued that his taking of the abalone was not unlawful because it was done in exercise of his native title rights and interests under the *Native Title Act 1993* (Cth).

Decision: The court considered the provisions of the *Native Title Act* and discussed the requirements necessary to show a native title right. It was noted that to fall within the provisions of the *Native Title Act* and thereby be exempt from the Sea Fisheries Regulations (because of the exception relating to the exercise of native title rights) it is necessary to show that the right is one recognised under the common law (p 145).

In this case there was no evidence that the taking of the abalone was in the exercise of any traditional law or custom. There was no evidence as to who could exercise the right and whether any restrictions are placed by the traditional law on the right to fish. There was only evidence of a traditional activity as distinct from a traditional law or custom.

A traditional law or custom was described by the court as 'a recognisable set of rules observed by an identifiable group of people connected with a particular locality' (p 147). The evidence in this case established no more than that the taking of abalone was something that had been done by Aborigines for a very long time.

Part II: Civil law

Coronial matters

There are a few cases where Aboriginal people have attempted to prevent an autopsy from being carried out on a deceased relative because such an examination of the body would be contrary to the Aboriginal traditional or customary law of that particular family. The cases indicate that when such an application is made the court is required to balance the public interest in discovering the cause of death and the competing interest of the deceased's family to preserve the body for cultural reasons.

The cases, including two Western Australian cases,¹³⁴ indicate that where there are no suspicious circumstances the views of the family prevail. The principles from these cases are not specifically related to Aboriginal customary law and would appear to apply to any cultural or religious belief that was opposed to post-mortem examination. In *Green v Johnstone*¹³⁵ it was stated that the cultural and spiritual laws of the various cultural groups within Australia should be respected as long as they are lawful.

Burial matters

Aboriginal customary law and tradition has come into play in a number of cases where there has been a dispute about where the body of a deceased person should be buried.

Where the dispute is between the spouse and the family of the deceased the case law suggests that the views of the spouse will prevail.¹³⁶ In determining such cases the courts seem to have taken into account the fact that the claim of the spouse would be accepted as a stronger claim in non-Aboriginal society.

In a recently decided Victorian case,¹³⁷ the dispute over burial location was between the defacto of the deceased (who was also the mother of the deceased's children) and the deceased's siblings. All parties were Aboriginal. While recognising the significance of the cultural views of the deceased's siblings the court still gave precedence to the wishes of the defacto spouse.

In another case,¹³⁸ where the dispute was between the father and the ex defacto spouse of the deceased, the views of the father succeeded. In making that decision, the judge expressly took into account the cultural considerations of the father.¹³⁹

In *Calma v Sesar*,¹⁴⁰ where the dispute was between the mother and father of a deceased child, the question was determined primarily on the practicalities of the case, such as where the body was located and the burial arrangements that had already been made. In that case there was no discussion of how the issue would have been resolved under Aboriginal customary law and this may hold the clue as to how these types of disputes could be resolved.

134. *Ronan v The State Coroner* [2000] WASC 260; *Re the Death of Uchango Jnr* (Unreported, Supreme Court of Western Australia, Lib No 970416, Walsh J, 19 August 1997).

135. [1995] 2 VR 176.

136. See *In the Matter of the Estate of Bellotti* (Unreported, Supreme Court of Western Australia, Lib No 970594, Bredmeyer M, 7 November 1997); *Dodd v Jones* [1999] SASC 458.

137. *Dow v Hoskins* [2003] VSC 206.

138. *Jones v Dodd* [1999] SASC 125.

139. *Ibid* [51].

140. [1992] NTSC 17.

Case digest – Civil law (coronial matters)

Ronan v The State Coroner [2000] WASC 260

Court: Supreme Court of Western Australia

Date: 18 October 2000

Judge: Anderson J

Facts: The family of a deceased Aboriginal infant made an application to the court that no post-mortem examination be performed. The evidence suggested that the infant's death was probably caused by an adult accidentally covering the child whilst asleep in the same bed. There were no suspicious circumstances. The evidence presented in support of the application indicated that if an autopsy was held the infant's spirit would not rest and this would cause considerable distress to the family of the child.

Decision: It was held that the issue requires a balancing exercise between the public interest in knowing for certain the cause of death and the spiritual and cultural beliefs of the family. The judge held that although there was a public health issue concerning the risk of co-sleeping with infants, the spiritual and cultural beliefs outweighed the public interest in knowing the precise cause of death. The main reason for this decision was the lack of any evidence concerning suspicious circumstances.

Re The Death of Unchango (Jnr) [1997] Unreported, Lib No 970416

Court: Supreme Court of Western Australia (In Chambers)

Date: 19 August 1997

Judge: Walsh J

Facts: The applicant applied to the court for an order that no post-mortem examination be performed on his infant son's body. The infant had died at 12 days. The basis of the application was that such an examination is contrary to traditional law and custom of the applicant and the family of the deceased. The Coroner claimed that it was necessary to undergo the examination because it was the only way that the cause of death could be established. According to some of the medical evidence, 12 days old was very young for SIDS and it was possible that the death was caused by congenital disease, respiratory infection or by co-sleeping. At the time the police had investigated the issue of co-sleeping coupled with intoxication and ruled this out as a cause of death. The applicant stated to the court that if:

[T]he body of the child is cut up then that will mean that his spirit will not rest according to our belief. It is the Aboriginal belief also that the spirit will be roaming around and will not enter Dreamtime (p 7).

Decision: In making his decision Walsh J stated that there was a need to establish the cause of death in this case to assist authorities in reducing Aboriginal mortality rates. On the other hand it was necessary to take into account the views of the father and of the Aboriginal community in general. His Honour believed it to be beyond doubt that the cultural beliefs of the applicant are always relevant.

The judge considered that the evidence established that the death in the present case was the result of natural causes. He stated:

Whilst there is undoubtedly potential for a post-mortem report to reveal that death could well not have been caused by sudden infant death syndrome but by a natural cause such as infection, nonetheless that would not really advance the matter a great deal in circumstances such as this. One should take into account the very strong cultural beliefs held by the relatives and by the community at Kalumburu and the effect that the post-mortem would have on them by way of emotional trauma, particularly in view of the fact that it would prohibit, in their view, the spirit of the deceased remaining in the body and returning to the body and would leave the spirit roaming at large (p 12).

The judge ordered that no post-mortem examination be performed but stated that this was not a precedent and that each case must be dealt with on its own facts.

***Wuridjal v Northern Territory Coroner* [2001] NTSC 99**

Court: Supreme Court of the Northern Territory

Date: 9 November 2001

Judge: Riley J

Facts: A young Aboriginal girl died in circumstances that were suggestive of hanging. She was found sitting on a bed with a curtain tie around her neck. The plaintiff who was the senior next of kin of the deceased objected to the performance of an autopsy; however, the coroner needed to perform an autopsy in order to rule out foul play or intervention.

A senior lawman provided an affidavit to the court about the traditional law issues. He was the appropriate person to speak on behalf of the community to which the deceased and her family belonged. He raised a number of matters including:

1. The custom of the community meant that they were more concerned about spiritual matters than the cause of death even when the death was unexpected;
2. The body of the deceased had to be returned to the family's traditional country straight away for funeral ceremonies;
3. If the body was not returned then the spirit of the deceased may never be at rest and may haunt the family;
4. If the body is cut, the spirit of the deceased her family and the whole community will suffer;
5. The body had to be whole in order to be recognised by the spiritual ancestors;
6. The autopsy would be against the traditional law and custom of their community.

Decision: Most cases of this nature have to resolve a conflict between 'the decision of the Coroner that an autopsy is necessary and the competing wishes of family, relatives or friends of the deceased person generally based upon cultural or religious beliefs that are genuinely and strongly held' [10].

The judge stated that there was no doubt in this case that the views expressed were deeply and genuinely held. However, after weighing up the competing interests in this case the judge held that an autopsy must be performed because the level of suspicion in this case was such that the interests of the community in ascertaining the cause of death outweighed the interests of the family in preserving the body [18].

***Green v Johnstone* [1995] 2 VR 176**

Court: Supreme Court of Victoria (Practice Court)

Date: 22 February 1995

Judge: Beach J

Facts: The applicant was the father of a 10 day old baby girl who died in circumstances that suggested Sudden Infant Death Syndrome (SIDS). He objected to an autopsy being performed on the basis that 'Aboriginal cultural and religious law prohibits the mutilation of a body so as not to harm the spirit of the deceased' (p 177). In support of the application an affidavit was presented from an Aboriginal elder.

Counsel for the Coroner did not dispute this claim but objected to the application because of the need to establish the cause of death in such a young infant and in particular, because SIDS is rare in an infant of the deceased's age.

Decision: Beach J referred to the Royal Commission into Aboriginal Deaths in Custody¹⁴¹ and in particular agreed with the comments of Commissioner Elliot Johnson QC that:

It is highly desirable that as far as possible no obstacle be placed in the way of carrying out traditional rites and that relatives of a deceased Aboriginal person be spared further grief (p 178).

The judge also commented that the cultural and spiritual laws and practices of the various cultural groups within Australia's multi cultural society must be respected as long as they are lawful. It was held that no autopsy be performed; however, in arriving at that decision the judge commented that it may have been a different result if there had been any suspicious circumstances.

141. *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Vol 1, [4.6.24].

Case digest – Civil law (burial matters)

***In the Matter of the Estate of Bellotti* [1997] Unreported, Lib No 970594**

Court: Supreme Court of Western Australia

Date: 7 November 1997

Judge: Bredmeyer M

Facts: The deceased died in Perth leaving a widow (who was from the Nyoongah Aboriginal tribe) and six children. They were the respondents. The applicants were the brothers and sisters of the deceased who were from the Carnarvon area and were part of the Yamatji Aboriginal tribe.

The applicants sought an injunction to stop the deceased's widow from burying the deceased at Guildford because according to their tradition the deceased's blood relatives have a greater say than the widow regarding the place of burial. Also by their custom it was very important that the deceased be returned to the place that he was born. The court had been presented with a petition from 96 members of his community.

Scott J granted an injunction to the applicants and this was later overturned by Franklyn J who decided that the applicants did not have an arguable case and that the deceased's widow had the right to bury the deceased in Perth. The funeral was delayed for 10 days because of the injunction. This case concerned the amount of damages that would be payable by the applicants to the respondents.

Decision: The amount of damages did not include an amount for aggravated or exemplary damages because it was held that the application was not made fraudulently or maliciously. It was stated that the applicants sincerely believed that by their custom the deceased should be buried in Carnarvon.

***Calma v Sesar & Ors* [1992] NTSC 17**

Court: Supreme Court of the Northern Territory

Date: 27 March 1992

Judge: Martin J

Facts: The plaintiff was the mother and the defendant was the father of a deceased male. Both were Aboriginal. The deceased was born in Port Hedland and he died at the age of 22 years in Darwin.

The mother wanted her son to be buried in Darwin because that was where his body lay and there were many relatives of the deceased in Darwin. The father wished for the body to be buried in Port Hedland. He argued that that it was part of his culture that the deceased should be buried in his homeland. In addition the deceased's paternal grandfather gave evidence that it would be disrespectful to him for the deceased to be buried in the same vicinity as his 'alleged killer'. There were deep divisions between the mother and her family and the father and his family.

Decision: The judge could not find any authority for a case like this where there are two parents with apparently equal rights to bury their son. The deceased had not left a will and therefore there was no executor. Accordingly both parents would have equal rights to apply for letters of administration. As a decision had to be made expeditiously the judge held that because the body was in Darwin and proper arrangements had been made for the burial to occur there then the wishes of the mother should prevail in this case.

***Dodd v Jones* [1999] SASC 458**

Court: Supreme Court of South Australia

Date: 22 October 1999

Judge: Doyle CJ

Facts: The plaintiff was the defacto wife of the deceased of nine years' standing and the defendant was his father. The body of the deceased was in the custody of the Coroner until the dispute about where the deceased would be buried had been resolved.

The plaintiff wished for the deceased to be buried in Port Augusta where they had lived for some years with their two children. The defendant wanted his son to be buried at Oodnadatta which was where he and his family came from. It was noted that the defendant was Aboriginal but did not live in the traditional Aboriginal style. He claimed that under Aboriginal culture and possibly law, as the head of the family, he had the right to decide the place of burial. Also the defendant claimed that it was of great cultural and religious significance that the deceased be buried at Oodnadatta.

Decision: Doyle CJ agreed with a description of the defendant's claim as one 'derived from an organised system of beliefs and cultural practices, and a system which the law and our society should respect as far as possible' [19]. On the other hand he acknowledged that the claim of the plaintiff as the surviving partner is one which is widely respected in European society.

His Honour held that while understanding and respecting the wishes of both parties the plaintiff's claim must prevail because under common law principles her claim appeared stronger (these were principles in relation to who would be able to apply to be the administrator of the estate) and because her views as a defacto spouse and mother of the deceased's children would generally prevail in European society [36]–[37]. In addition, the judge took note of the fact that the deceased had left his home and gone to live with the plaintiff and their children in Port Augusta.

***Jones v Dodd* [1999] SASC 125**

Court: Supreme Court of South Australia (Full Court)

Date: 1 April 1999

Judges: Perry, Millhouse and Nyland JJ

Facts: This case involved a dispute between the former de facto wife of the deceased and the deceased's father about the place of burial of the deceased. The deceased's former de facto wished to have the deceased buried in Port Augusta where she resided and where the deceased had also resided for some time prior to his death. The deceased's father wished to have his son's body repatriated to his traditional homelands for burial with other members of his family. The deceased's father relied on Aboriginal customary law in support of his claimed right to burial of the deceased. At first instance the court held that the father had the right to dispose of the deceased's body and to determine the place of burial. The deceased's former de facto appealed that decision.

Decision: The judgment was delivered by Perry J with whom Millhouse and Nyland JJ agreed. The ex defacto had argued, amongst other things, that the deceased was not a traditional Aboriginal man and had been brought up in the ways of the white man and showed no interest in the traditional values of his people. In relation to this the court stated:

The fact that the deceased was thought by some not to be a traditional Aboriginal and that he attended Christian religious services does not, in the circumstances, operate to negate any connection with Aboriginal law and custom [25].

In this case there was no executor and no estate. Where a person dies with no estate and there is no likelihood of any application for a grant of administration in intestacy ever being made then to base the claim on who would be entitled to make such a claim for administration is unreal. The proper approach should be to look at all the practical circumstances and to have regard to 'the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question' [51].

The court agreed with the original decision that the father of the deceased should have the right to bury his son according to his views.

***Dow v Hoskins* [2003] VSC 206**

Court: Supreme Court of Victoria (Practice Court)

Date: 10 June 2003

Judge: Cummins J

Facts: The plaintiff was the defacto wife of the deceased and they had two children together. The defendants were the siblings of the deceased. The plaintiff wished for the deceased's body to be buried next to the grave of his mother which was in a location where she and her children would be able to tend to and visit the grave.

The defendants claimed that the deceased should be buried with his father. The court accepted the evidence from the defendants in relation to the cultural significance of the resting place of the son with the father.

Decision: It was held that the prima facie test in these sort of cases is to consider who would be the person likely to be appointed administrator of the estate of the deceased if such an application were to be made [42]–[47]. However, that is not the end of the matter and cultural and other factors must still be considered. In this case it was decided that priority should be given to the plaintiff because she is the mother of the two children of the deceased.

In his reasons for judgement Cummins J also referred to some articles which suggested that statutory regimes throughout Australia for intestacy are 'all based on a non-Aboriginal view of family and kinship' [45].

Part III: Family law and placement of children

Cases involving the placement of children have expressed different views regarding the importance of the child's connections with their Aboriginal culture. The earlier cases stressed that there was no preference towards Aboriginal culture as distinct to a non-Aboriginal culture; however, the cases have gradually recognised the importance of a child maintaining a connection with his or her Aboriginal culture and traditions. Most cases have at least recognised the importance of maintaining a connection with culture but not necessarily to the extent of granting custody to the Aboriginal person.¹⁴²

In *McMillen v Director of Child Welfare*¹⁴³ the court granted custody to the child's Aboriginal mother rather than to an American couple who were planning to adopt the child and take him to America. The decision was based on the concern that the child would undergo an identity crisis and would suffer from not being able to have contact with Aboriginal people and his family. The fact that he would be accepted into the mother's community and eventually become an initiated man was considered a positive factor in the mother's favour.

A number of cases have acknowledged the problems suffered by Aboriginal children when they are brought up in a non-Aboriginal environment and have stressed that, if possible, it is preferable that an Aboriginal child be placed with another Aboriginal person. This is because when the child encounters racism and discrimination he or she will be better equipped to deal with it if they are part of an Aboriginal community.¹⁴⁴

While some cases have held that there is no bias in favour of granting custody to the Aboriginal parent or relative¹⁴⁵ and others have held that evidence in relation to the effect upon an Aboriginal child of living in a non-Aboriginal environment is inadmissible,¹⁴⁶ the more recent authorities are against those views. In the case *In the Marriage of McL and McL*¹⁴⁷ the court considered the physical appearance of the children (they appeared more Aboriginal than non-Aboriginal) as well as the fact that they had already been accepted into their mother's community as relevant considerations. It was held that life with their mother would better equip them to deal with any cultural issues than life with their father especially as their father referred to them as 'brown'.¹⁴⁸

In the case *In the Marriage of B and R*¹⁴⁹ the court accepted evidence about the difficulties of Aboriginal children raised in a non-Aboriginal environment. The court went even further and held that the cultural considerations for Aboriginal children are different to those for other cultural and ethnic groups in our society. It is necessary to take into account those experiences which are uniquely Aboriginal in order to administer equal justice to Aboriginal people.

Since 1995, s 68F(2)(f) of the *Family Law Act 1975* (Cth) has required the court to take into account the background of a child, including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders, when determining the best interests of the child. This section appears to reflect the considerations discussed in *In the Marriage of B and R* (above). The Commonwealth provision is reproduced in s 166 of the *Family Court Act 1997* (WA).

In the *Marriage of: In Re CP*¹⁵⁰ refers to s 68F(2)(f) and discusses it in the context of a dispute between two Aboriginal people who were separately applying for custody of their child. The court held that it was necessary to take into account the specific cultural identity of the child rather than simply comparing two Aboriginal environments. Therefore this case recognised the important concept that not all Aboriginal cultures are the same.

It is also noted that in 2003 the 'Aboriginal and Torres Strait Islander children – placement for adoption principle' was inserted into Schedule 2A of the *Adoption Act 1994* (WA). It states:

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

142. *Torrens v Fleming* (1980) FLC 90-840.

143. [1976] NTJ 1001.

144. See *R v R* (1985) FLC 91-615; *In the Marriage of McL and McL* (1989) 15 Fam LR 7; and *In the Marriage of B and R* (1995) 19 Fam LR 594.

145. See for instance *In the Marriage of Goudge* (1984) 54 ALR 514.

146. See for instance *C v T* (1985) 10 Fam LR 458.

147. (1989) 15 Fam LR 7

148. *Ibid* 23.

149. (1995) 19 Fam LR 594.

150. *In the Matter of: In Re CP* (Unreported, Family Court of Australia (Darwin), Nos NA 25 & 26/1996, Nicholson CJ, Ellis and Moore JJ, 11 March 1997).

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

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

The legislation also acknowledges that adoption is not part of Aboriginal or Torres Strait Islander culture and therefore the adoption of an Aboriginal or Torres Strait Islander child should only occur where there is no appropriate alternative.¹⁵¹

Case digest – Family law and placement of children

In the Marriage of Sanders (1976) 1 Fam LR 11433

Court: Family Court of Australia (at Brisbane)

Date: 2 August 1976

Judges: Evatt CJ, Demack and Watson JJ

Facts: The appellant was an Aboriginal woman from the Mudbudda tribe and the mother of a young baby. The father of the child was of Caucasian descent. A judge granted custody of the child to the father on the basis that it was in the best interests of the child. He considered a number of factors, in particular the physical and health conditions of the two alternative environments in which it was proposed that the child would live. The mother appealed the decision.

Decision: Evatt CJ and Watson J held that the custody of the child should have been granted to the mother primarily because the trial judge failed to give adequate weight to the benefits of the child's emotional development from being with its mother full time, especially in the early years. The judge gave too much weight to environmental and health issues.

In relation to the issue of Aboriginal culture they stated that:

The case before us and before his Honour is a difficult one, raising as it does issues of cross-cultural values. It would be wrong to fall into the trap of concluding that white Australian suburban values are to be preferred as it would idealise the life of the tribal aboriginal and imagine that it had survived the corrosive influences of white settlement' (p 11441).

McMillen v Director of Child Welfare (1976) NTJ 1001

Court: Supreme Court of Northern Territory

Date: 26 November 1976

Judge: Forster J

Facts: This matter was a contested custody application between the natural Aboriginal mother and an American couple who had acted as the child's foster parents when the Department of Child Welfare had taken the child away from its mother. The couple wished to adopt the child and return to the USA. Although they respected the child's culture and wished to make him aware and proud of his Aboriginal background they accepted that they would not be able to provide contact between the child and his Aboriginal connections.

The Department had taken the child away on the basis of neglect but there was evidence that the mother had been denied natural justice when the Children's Court had made the order that he be placed in the care of the Department.

Although there was some evidence of neglect by the mother, her circumstances had now changed and these concerns were no longer relevant.

Decision: Forster J held that he was satisfied on the evidence that if the child was taken to the USA he would undergo an identity crisis when he realised that he was different in appearance to the people around him (p 1005). Further, the couple would not be able to satisfy a desire by the child at some point to make contact with Aboriginal people in general and with his own relatives.

The judge also noted that he was satisfied that if the mother had custody of the child he would be accepted as Aboriginal by the community where she lived and would become a fully initiated man.

He ordered that the child be returned to the care and control of his mother.

^{151.} *Adoption Act 1994* (WA) s 3.

***Torrens v Fleming & Anor* (1980) FLC 90-840**

Court: Supreme Court of New South Wales (Equity Division)

Date: 19 June 1980

Judge: Kearney J

Facts: This case dealt with an application for custody of a 10 year old Aboriginal girl. The plaintiff was the natural mother of the child and was Aboriginal. The first defendant had custody of the child almost since birth as a foster mother. The second defendant was the first defendant's husband but they had separated.

The plaintiff had given her child up at a time when she was unable to care for the child but she had maintained contact with her throughout her life. The child expressed a strong preference to remain with the first defendant.

The mother relied upon her claim as the natural mother and, in addition to this, she submitted that her claim was stronger because both she and her daughter were Aboriginal and the child should have an opportunity to enjoy her culture. Evidence was given that it was desirable for Aboriginal children to be able to establish their identity with their own Aboriginal natural family rather than be left in a state of uncertainty when brought up by non-Aboriginal parents.

Decision: As a result of the deep bond between the child and the first defendant and the stable home environment, the first defendant was granted custody. However, in doing so the judge acknowledged that the parties were on fairly amicable terms and he ordered that the mother be granted reasonable access.

***R and R* (1985) FLC 91-615**

Court: Family Court of Australia (at Adelaide)

Date: 14 October 1982

Judges: Asche SJ, Dovey and Gun JJ

Facts: An Aboriginal mother made an application for the custody of her four year old daughter. The child had been living with her father (who was of European extraction) since the parties had divorced pursuant to an order of the court.

The mother proposed to return with her daughter to the Numbulwar community in the Northern Territory if she was granted custody. There was no suggestion that both parents did not love their daughter or were not equipped to look after her properly. The main issue was the relevance of the child's Aboriginal culture.

There was evidence that the father and his new partner had little interest in Aboriginal culture and believed that the child could learn what she needed to know at school. The trial judge commented that this attitude failed to recognise that the Numbulwar community had its own discrete culture. There was also evidence from the program director of an Aboriginal Child Placement Agency that the incidence of discrimination against a child of mixed racial parentage would be less in the Aboriginal community than in white society. He also gave evidence that in his position he had never seen a case where a mixed race child who remained with their European parent had been able to successfully integrate with that society.

Recognising all the consequences, including the above considerations and removing her from a stable environment the trial judge decided to grant custody to the mother. He did so mainly on the basis that she was going to take her daughter to her community. The father appealed against the order.

Decision: Asche SJ (with whom Dovey and Gun JJ agreed) held that the trial judge's decision was correct. The factors which the judge took into account, including the evidence of the expert that living in a tribal situation better equips a child of mixed race to cope with visits to non-tribal societies than the reverse, were important considerations.

***F v Langshaw & Ors* (1983) 8 Fam LR 833**

Court: Supreme Court of New South Wales

Date: 25 February 1983

Judge: Waddell J

Facts: A 17 year old non-Aboriginal girl gave her consent to the adoption of her baby to a non-Aboriginal couple. The father of the child, who was Aboriginal, applied for custody of the child. Initially the father had not shown any interest in the child. The mother agreed to give her child up largely because of her parents' racist attitudes towards black people. The father was encouraged to apply for custody by his own parents who would be heavily involved in the child's upbringing if he was to be granted custody.

It was submitted on behalf of the proposed adoptive parents that if the child was placed with the father he would be brought up in a town where there was considerable racial tension and where the natural mother would remain. He may

eventually learn that his mother and her parents were antagonistic towards Aboriginal people. The adoptive parents would be residing in an area where there was no obvious racial tension. It was submitted on behalf of the father that the child should be regarded as Aboriginal and his adoption by a white couple would not be successful because later on in life he would have an identity crisis.

Evidence was presented by two people who had been involved in working with Aboriginal children in need of care and assistance. The effect of their evidence was that an Aboriginal child should be placed with an Aboriginal family, preferably his own, or with another family in his community. In this context, Aboriginal means a person having some Aboriginal blood and who regards himself as an Aboriginal and is accepted as such by other Aboriginal people.

Decision: Waddell J held that although the child may experience difficulties as a result of being Aboriginal in the town where his father resides, if such difficulties arose with the adoptive parents they would not be able to support him and sustain his self esteem to the same degree as his natural father and grandparents (p 841). He decided that if the child was placed with his father he would be at least equally likely not to be hurt by racial discrimination then if he were adopted.

His Honour also held that the child could not strictly be regarded as Aboriginal because he had only 25 per cent Aboriginal inheritance and he was not yet part of any Aboriginal community. Custody was granted to the father but primarily because he was the biological parent and not to any material extent because he was Aboriginal.¹⁵²

***In the Marriage of Goudge* (1984) 54 ALR 514**

Court: Family Court of Australia (at Adelaide)

Date: 14 February 1984

Judges: Evatt CJ, Ross-Jones and Strauss JJ

Facts: A father of European background made an application for custody of his three children. The mother of the children was Aboriginal. She sought to maintain her children's contact with their Aboriginal culture while the father and his new partner had a negative view about it.

The trial judge who had granted custody to the father did not mention the Aboriginality of the children in his reasons. The mother appealed on the basis that the judge failed to give adequate weight to the Aboriginal identity and culture of the children.

Decision: Ross-Jones and Strauss JJ (Evatt CJ dissenting) held that the trial judge's failure to refer to the Aboriginality of the children in his reasons did not mean that he had not taken that matter into account. Questions of lifestyle and cultural identity are relevant factors which need to be taken into account. There is no presumption that all other things being equal or fairly equal then the parent with some Aboriginal origin should be the preferred custodian (p 536). Each case must be decided on its own facts but in any event the relevant considerations in this case were not balanced evenly between the two parents.

***C v T* (1985) 10 Fam LR 458**

Court: Supreme Court of New South Wales

Date: 19 September 1985

Judge: McLelland J

Facts: The plaintiff had cared for a young girl since she was about six weeks old. The plaintiff was an acquaintance of the parents of the child who were unable to look after her. The defendant was the natural Aboriginal mother of the child. Both parties sought custody of the child.

The defendant had been unable to look after her child because of drug addiction and the resulting life of crime and prostitution. Prior to expressing an interest in looking after her daughter she had given up her life of drugs and crime, formed a stable relationship and given birth to another child.

The plaintiff was non-Aboriginal. She had cared for the child during the child's withdrawal from the drugs taken by the mother during pregnancy. Together with her parents' support she had provided a loving and stable environment for the defendant's child.

Counsel for the defendant sought to call evidence from a senior lecturer in law about his views, and the views of the Aboriginal community, regarding the effects on Aboriginal children of being placed with non-Aboriginal families.

Decision: The above evidence was ruled inadmissible because it was not a sufficiently organised branch of specialised knowledge to satisfy the test for expert opinion evidence.

^{152.} The decision of Waddell J was upheld on appeal: see *Rushby & Anor v Roberts & Anor* (1983) 1 NSWLR 350.

The judge granted custody to the defendant at a future date provided her circumstances had not changed and an independent psychological report was of the view that it would not be contrary to the child's welfare. The defendant would be allowed increasing access to her child in the meantime. The judge's reason for this decision was based on the importance of being brought up by one or both natural parents. The judge did not refer to the child's Aboriginality as a deciding factor.

In the Marriage of MCL and MCL: Minister for Health and Community Services Intervening
(1989) 15 Fam LR 7

Court: Family Court of Australia (at Darwin)

Date: 2 November 1989

Judge: Rourke J

Facts: This case involved a contested application for custody between the full blood Aboriginal mother of two boys aged five and nine and their Caucasian father. There were a number of important issues including alleged sexual abuse by the father and the differences in the physical living conditions between the two proposed homes. In addition, the relevance of the children's Aboriginal culture was an important factor in the case.

The mother lived in the Laynhapuy Homelands in East Arnhem Land and it was proposed that the children would attend the 'two ways' education system at the school. This education system promoted the development of traditional Aboriginal culture while at the same time providing for a more formal education with scope for the more gifted children to pursue a Western education. The mother's Caucasian defacto husband was involved in Aboriginal education and was also welcomed into her community.

The father objected to the wife's proposal because the boys would regard themselves as tribal Aborigines and this would not equip them to cope with white society. The father encouraged the boys to regard themselves as 'brown' and belonging to two cultural traditions.

Extensive evidence was heard by the court from a relative of the mother about the traditional cultures, extended family networks and education system which existed in the mother's community.

Decision: The judge stated that: 'The cultural dilemma facing Aboriginal people in modern Australian society is a matter which this court can and does take judicial notice' (p 17).

The judge noted that the boys were of mixed blood but they appeared to be more Aboriginal than Caucasian. They had already been involved in traditional Aboriginal life and were accepted within the Aboriginal community as Aboriginal. For these reasons the judge held that life with their mother would provide them with more stability and normality, in particular, because they will be regarded as Aboriginal rather than as 'brown' (p 23).

The judge further commented that the fact that a community is isolated from the general community is not of itself a reason to refuse to place children within that community. The mother was granted custody and the father denied access.

In the Marriage of B and R (1995) 19 Fam LR 594

Court: Family Court of Australia (at Melbourne)

Date: 27 September 1995

Judges: Fogarty, Kay and O'Ryan JJ

Facts: The Aboriginal mother of a young child applied for custody. The child had been in the custody of the father since the mother had been undergoing treatment in an alcohol and drug rehabilitation unit.

At the trial, counsel for the child attempted to tender an affidavit from an officer of the Victorian Aboriginal Child Care Agency which outlined the emotional and social trauma experienced by Aboriginal children who are raised in a non-Aboriginal environment. The trial judge refused to admit the affidavit and held that the factors relevant to the child's Aboriginality were no different to those of any other culture or ethnic background.

The father was granted custody; the mother appealed.

Decision: In its reasons for decision the court referred to the right for a child to know his or her cultural heritage and held that:

While we strongly agree with the importance to be attached to these rights, it appears to us that to regard the relevance of Aboriginality as confined only to its connection with such general rights is to adopt too narrow a view of the significance of the child's Aboriginality as advanced in this case. The evidence which was sought to be adduced in this case focused on the effects on Aboriginal children of being raised in a white environment, in which the lack of reinforcement of their identity contributed to

severe confusions of that identity and profound experiences of alienation. Though obviously connected to Aboriginal culture and heritage, it appears to us that the point which this evidence seeks to make is either separate and distinct from the more general cultural issue, or at least a much deeper illustration of it (p 601).

The court noted that the 'history of Aboriginal Australians is a unique one, as is their current position in Australian life' (p 602). The court listed a number of factors which emerged from writings and which are relevant to the experiences of Aboriginal people:

1. Racism is still a marked aspect of Australian society;
2. The removal of an Aboriginal child from his or her environment to a white environment is likely to have a devastating effect upon the child;
3. Generally an Aboriginal child is better able to cope with that discrimination from within the Aboriginal community because usually that community actively reinforces identity, self esteem and appropriate responses;
4. Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances which deny or belittle their Aboriginality (p 605).

In response to the trial judge's claim that admission of the evidence would constitute discriminatory or preferential treatment, the court held that equal justice is not always achieved by identical treatment (pp 621–23). The court stated that:

By failing to recognise these uniquely Aboriginal experiences, its effect is to administer something less than equal justice to Aboriginal people (p 623).

The court held that the reasoning in *C v T*¹⁵³ was no longer the appropriate law and was contrary to most other cases. A re-trial was ordered.

***In the Matter of: In Re CP* [1997] Unreported, No NA 25 & 26 / 1996**

Court: Family Court of Australia (at Darwin)

Date: 11 March 1997

Judges: Nicholson CJ, Ellis and Moore JJ

Facts: This case involved a custody dispute between the natural mother and her family and another woman who had cared for the child for a number of years. The natural mother was a Tiwi woman as was the child's father. The woman who had raised the boy was born on Thursday Island and she regarded herself as Aboriginal.

The trial judge granted custody to the child's carer (the respondent). Issues of culture were considered by the trial judge as well as other relevant factors. The applicants appealed primarily on the basis that the trial judge failed to understand the differences between Tiwi culture and the culture of other Aboriginal groups.

Decision: The court referred to the requirement in s 68F(2)(f) of the *Family Law Act 1975* (Cth) for the court to take into account the child's background including 'any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders'.

The court held that the judge, in reaching his decision, had balanced one Aboriginal environment against another and therefore paid insufficient regard to the child's own distinctive cultural heritage as a Tiwi child. What the judge was required to do was to balance an Aboriginal environment on the one hand and a specific Aboriginal Tiwi environment on the other. The matter was remitted back for re-hearing.

Part IV: Aboriginality and sentencing

Introduction

Although this Part covers a number of areas outside the topic of Aboriginal customary law, it assists in understanding how the courts have dealt with Aboriginal offenders and the types of matters associated with their Aboriginality which have been taken into account. The common law principles which have developed in this area are directly related to the principles which explain how the courts in criminal matters have dealt with the issue of Aboriginal customary law. It is not a comprehensive review of all such cases but rather a selection covering the more important principles. The case digest following this Part presents the cases in chronological order to better show the development of the common law in this area.

^{153.} (1985) 10 Fam LR 458. See summary of this case above pp 59–60.

Summary

Relevance of Aboriginality to sentencing – general principles

Sentencing principles apply equally to all people regardless of their membership of a particular ethnic or other group.¹⁵⁴ Therefore, the fact that an offender is Aboriginal does not, in itself, provide any mitigation in sentence. If an Aboriginal person was sentenced differently solely because of their Aboriginality this would be contrary to the *Racial Discrimination Act 1975* (Cth).¹⁵⁵ However, the courts have held that factors which exist only by reason of an offender's membership of an ethnic or other group may be taken into account in sentencing.¹⁵⁶ Thus, a factor which exists only because an offender is Aboriginal may, if relevant, be taken into account in sentencing.

In considering the issue whether there are any such relevant factors it is important to remember that Aboriginal people are not homogenous and the individual characteristics of an offender must always be considered.¹⁵⁷ Further, the view has been expressed that it is important to approach the issue without any hint of racism or paternalism¹⁵⁸ and to focus on the person's place within the whole community including any cultural factors but without an undue concentration on the Aboriginality of the offender.¹⁵⁹

It has been recognised that the disproportionate rate of imprisonment of Aboriginal people and the problems associated with their treatment within the criminal justice system are factors which should be recognised by sentencing courts.¹⁶⁰ Whether these factors provide any mitigation will depend upon the particular circumstances. In *R v Scobie*¹⁶¹ the court took into account the repeated and longstanding failure of the authorities to follow the recommendations of the Royal Commission into Aboriginal Deaths in Custody with respect to the offender in that case.

In *R v Fernando*¹⁶² the court highlighted that the Aboriginality of an offender may not necessarily mitigate punishment but may assist in explaining the offence and the circumstances of the offender. Therefore, there is no principle that if a particular offender exhibits one of these characteristics they will automatically receive a lesser sentence. It will depend upon the particular circumstances of the offence and the offender.

The following sets out a number of factors which from have been taken into account in mitigation by sentencing courts.

Factors associated with Aboriginality which may be taken into account in mitigation

1. Socio-economic factors and disadvantage, in particular those associated with tribal or remote locations

Generally, courts have recognised that many Aboriginal people have suffered in terms of their socio-economic conditions. The problems which have been identified include the consequences of colonisation, harsh treatment, dispossession, separation of children from their families,¹⁶³ health problems,¹⁶⁴ poor self image, absence of education and work opportunity, and alcohol¹⁶⁵ and substance abuse.¹⁶⁶ A number of these factors are discussed separately below.

The level of punishment for an Aboriginal person who has been brought up in a remote community and who has, as a result, suffered disadvantage may well be lower than that which would be imposed upon another Aboriginal person or non-Aboriginal person who has had a comfortable urban upbringing.¹⁶⁷ It is important to remember that these cases are comparing a socially and economically disadvantaged life with a relatively stable and average existence. Taking into account the above general principles it is necessary that every case is considered individually because one case may involve a traditional Aboriginal person who has led an advantaged life and another may deal with an urban Aboriginal who has suffered significant disadvantage. In recognition of this, it has been commented recently that 'considerations arising from an offender's Aboriginality may exist whether the Aboriginal person is living in an urban or a rural situation'.¹⁶⁸

154. *Neal v The Queen* (1982) 42 ALR 609.

155. *Rogers v Murray* (1989) 44 A Crim R 301.

156. See *Neal v The Queen* (1982) 42 ALR 609; *R v Fernando* (1992) 76 A Crim R 58.

157. *R v Woodley, Boonga and Charles* (1994) 76 A Crim R 302; *Russell v The Queen* (1995) 84 A Crim R 386.

158. *R v Fernando* (1992) 76 A Crim R 58.

159. *R v Churchill* (Unreported, Supreme Court of Western Australia, No 160/1998, Owen J, 6 October 1998).

160. *Russell v The Queen* (1995) 84 A Crim R 386; *R v Scobie* [2003] SASC 85.

161. [2003] SASC 85.

162. *R v Fernando* (1992) 76 A Crim R 58.

163. *R v Fuller-Cust* [2002] VSCA 168, [91].

164. *R v Daniel* [1998] 1 Qld R 499.

165. *R v Fernando* (1992) 76 A Crim R 58.

166. *R v Carberry* [2000] ACTSC 60; *R v Scobie* [2003] SASC 85.

167. See *Leech v Peters* (1988) 40 A Crim R 350; *Houghagen v Charra* (1989) 50 SASR 419.

168. *R v Fuller-Cust* [2002] VSCA 168, [91].

2. Socio-economic factors associated with an urban environment

The courts have taken into account factors which exist only by reason of an offender's Aboriginality where that offender comes from an urban environment. In *Harradine v The Queen*¹⁶⁹ the court took into account the adjustment problems that the defendant had encountered when he left an Aboriginal mission at the age of 16 years and went to live in the city. This factor was still considered mitigatory even though the defendant had been residing in the city for five years at the time the offences took place.

In *R v E (A Child)*¹⁷⁰ the Supreme Court of Western Australia considered the potential mitigatory value attaching to an Aboriginal juvenile who came from a dysfunctional and disadvantaged background and who had an extremely negative and distrustful view of the police as a consequence of the poor relations between police and the Aboriginal community in Perth. The offender had been convicted of six offences of attempted murder of police officers. The court held that the offences were of such a serious nature that those personal factors could not provide any mitigation. The court did not, however, rule out the possibility that those personal circumstances associated with the Aboriginality of an offender in an urban environment could not, in the appropriate case, provide mitigation.

3. Alcohol and substance abuse

As a general rule, voluntary intoxication is not considered to be an excuse for offending behaviour. However, it has been held that where alcohol abuse reflects the socio-economic circumstances and the environment in which the offender has grown up it should be taken into account as a mitigating factor.¹⁷¹ This principle has been extended to take into account substance abuse, such as petrol sniffing¹⁷² and heroin abuse.¹⁷³

It has been held that in order for this principle to apply it requires more than the fact that the offender is Aboriginal and that the offender was drinking alcohol prior to the commission of the offence.¹⁷⁴ It has also been held that the subjective features of the case must always be considered in this regard as not all Aboriginal people have problems with alcohol abuse and to suggest otherwise would be offensive.¹⁷⁵

4. Racism

Racist behaviour towards an offender has been taken into account as a mitigatory factor when that behaviour provoked the offending. In *Pearce v The Queen*¹⁷⁶ the court viewed the racist conduct against the background of the particular difficulties which Aboriginal people faced in the area where the offender lived and treated it as an extenuating circumstance.

5. Separation or removal from family

In *R v Churchill*¹⁷⁷ the effects on the defendant consequent upon being forcibly removed from her Aboriginal family was specifically taken into account as mitigation. In *R v Fuller-Cust*¹⁷⁸ Eames J (with whom O'Bryan AJA agreed) considered that the defendant's removal from his Aboriginal mother, subsequent unsuccessful attempts to regain contact with her and the anxiety he experienced from not being able to embrace his Aboriginality were all relevant factors to be considered in sentencing the defendant. The two judges did, however, disagree on the weight to be given to those factors in that particular case.

6. Hearing loss

In *Russell v The Queen*¹⁷⁹ Kirby ACJ referred to research which indicated that there was a high proportion of hearing loss within the Aboriginal community and that where such hearing loss existed it may increase the likelihood of contact with the justice system and would also make an offender's time in custody more difficult.

169. (1991) 61 A Crim R 201.

170. (1993) 66 A Crim R 14.

171. *Juli v The Queen* (1990) 50 A Crim R 31; *R v Fernando* (1992) 76 A Crim R 58; *Gray v Madaffari* [2002] WASCA 13.

172. *R v Scobie* [2003] SASC 85.

173. *R v Carberry* [2000] ACTSC 60.

174. *R v Carr* [1999] NSWCCA 200.

175. *R v Tjami* [2000] SASC 311.

176. (1983) 9 A Crim R 146.

177. *R v Churchill* (Unreported, Supreme Court of Western Australia, No 160/1998, Owen J, 6 October 1998).

178. *R v Fuller-Cust* [2002] VSCA 168, [91].

179. (1995) 84 A Crim R 386, 393.

7. Hardship of imprisonment

In *R v Fernando*¹⁸⁰ it was recognised that for an Aboriginal person who has had little experience with European ways a term of imprisonment may be particularly harsh. In *R v Tjami*¹⁸¹ the court took into account the difficulty that the offender would have in prison as he had spent his entire life living on Aboriginal lands. Similarly, in *The Police v Abdulla*¹⁸² it was stated that the fact that imprisonment is a concept foreign to Aboriginal customary law should be taken into account in sentencing.

The courts will usually take into account the fact that a term of imprisonment for an Aboriginal person who comes from a remote area will be more onerous because of the loss of connection with land, culture and family. In some situations, especially in the case of juveniles, the prisoners will serve their sentence hundreds of kilometres away from their family.

8. Customary law and cultural issues

The courts have taken into account customary law issues and in particular traditional punishment as a mitigatory factor. The courts have done this on the basis of the principle in *Neal v The Queen*¹⁸³ that if a factor exists only by reason of the offender's membership of a particular group then it can be taken into account in the sentencing process. This principle has allowed the courts to maintain that although they do not condone traditional punishment its existence is acknowledged.

Aboriginal family violence

This is one area of sentencing where the courts have consistently stressed the seriousness of the offending and the consequential diminishing mitigatory impact of factors associated with an offender's Aboriginality.

In 1985 the Court of Criminal Appeal in Queensland acknowledged that crimes of violence by Aboriginal people within their own communities have often been dealt with more leniently than similar crimes by non-Aboriginal people.¹⁸⁴ However, the court stressed that this leniency must not be taken to the stage where the plight of the victims are ignored.¹⁸⁵ Similar comments have been made in relation to the need to deter such violence and protect the victims, but at the same time the disadvantaged socio-economic circumstances and widespread alcohol abuse faced by many Aboriginal people is acknowledged.¹⁸⁶

The courts have however, become gradually stronger in their comments in relation to violence by, in particular, Aboriginal men against Aboriginal women and children. In the Western Australian case *R v Woodley, Boonga and Charles*,¹⁸⁷ the Court of Criminal Appeal stressed the need to protect Aboriginal women from violence by their men and the consequential need to treat the perpetrators of this violence in the same way as any other member of the community. In *R v Daniel*¹⁸⁸ it was held that it was not appropriate to treat Aboriginal people who commit violent offences on their communities more leniently than the offence and the circumstances warrant.

In *Amagula v White*¹⁸⁹ the Northern Territory Supreme Court recognised the importance of eliminating the belief that it was acceptable in Aboriginal communities for Aboriginal men to assault their wives. Similarly, in *R v Wurramara*¹⁹⁰ the Northern Territory Court of Criminal Appeal referred to the need to treat Aboriginal perpetrators of violence against women and children in the same way as for any other member of the community.

Special Aboriginal courts

Despite the courts taking into account in mitigation a number of factors associated with an offender's Aboriginality and the general recognition of the devastating effect upon Aboriginal people as a result of colonisation and dispossession, there still exists a disproportionate rate of imprisonment of Aboriginal people across Australia.

One measure developed to address this issue is the use of specialised Aboriginal courts such as the Nunga Court in South Australia and the Murri Court in Queensland. These courts make use of Aboriginal elders who advise and assist magistrates in relation to cultural issues and appropriate sentencing options.

180. *R v Fernando* (1992) 76 A Crim R 58.

181. *R v Tjami* [2000] SASC 311.

182. [1999] SASC 239.

183. (1982) 42 ALR 609.

184. *R v Friday* (1985) 14 A Crim R 471.

185. *Ibid* 473.

186. See *Yougie v The Queen* (1987) 33 A Crim R 310; *R v Fernando* (1992) 76 A Crim R 58.

187. (1994) 76 A Crim R 302.

188. [1998] 1 Qld R 499.

189. *Amagula v White* (Unreported, Supreme Court of the Northern Territory, No JA92/1997, Kearney J, 7 January 1998).

190. [1999] NTSCCA 45.

The operation of these courts is usually on an informal basis and therefore, as was held in *R v Carter*,¹⁹¹ they are subject to the same rules and sentencing principles that apply to other courts.

Case digest – Aboriginality and sentencing

***Neal v The Queen* (1982) 42 ALR 609**

Court: High Court of Australia

Date: 25 September 1982

Judges: Gibbs CJ, Murphy, Wilson and Brennan JJ

Facts: The facts are not relevant to this discussion.

Decision: In his dissenting judgment in this case, Brennan J commented that:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group (p 626).

Brennan J's comments have been applied in numerous cases dealing with Aboriginal defendants.

***Pearce v The Queen* (1983) 9 A Crim R 146**

Court: Supreme Court of Victoria (Court of Criminal Appeal)

Date: 15 May 1983

Judges: Young CJ, Kaye and Brooking JJ

Facts: The applicant was sentenced to a total of 2½ years for a charge of unlawful assembly and a charge of unlawful wounding. The incident occurred when the applicant and his friends were at a party and were suddenly and in an offensive manner told to leave by a guest. The reason was that they were Aboriginal.

There was evidence before the court as to the very considerable difficulties faced by Aboriginal people living in that district.

Decision: Brooking J (with whom Young CJ and Kaye J agreed) held that although there was no provocation in the strict legal sense the behaviour was a significant extenuating circumstance, especially, when viewed against the background of the disadvantages faced by Aboriginal people in the district.

***R v Friday* (1985) 14 A Crim R 471**

Court: Supreme Court of Queensland (Court of Criminal Appeal)

Date: 11 October 1984

Judges: Campbell CJ, Connolly and Williams JJ

Facts: The respondent was a 27 year old Aboriginal female who was convicted of the manslaughter of her brother. The incident occurred after both had been drinking and a fight developed.

She was sentenced to two years' imprisonment with an order that she be released after having served six months. The Crown appealed against the leniency of the sentence.

Decision: All three judges agreed that the sentence was manifestly inadequate bearing in mind the range of sentences usually imposed for offences of this nature committed by Aboriginal people.

Campbell CJ stated that:

Crimes of violence by Aborigines, when they occur on Aboriginal reserves and after the consumption of alcohol, have been dealt with by the courts in this State more leniently or sympathetically than has been the case with offences of a similar nature committed by Europeans and people of non-Aboriginal extraction (p 472).

Connolly J stated that:

[C]ompassion for offenders of Aboriginal and Torres Strait Island descent must not be taken to the stage at which the court appears to be overlooking the plight of victims who are of Aboriginal and Torres Strait Island descent' (p 473).

¹⁹¹. [2002] SASC 48.

***Yougie v The Queen* (1987) 33 A Crim R 301**

Court: Supreme Court of Queensland (Court of Criminal Appeal)

Date: 9 September 1987

Judges: Matthews, Thomas and Derrington JJ

Facts: The applicant was a young Aboriginal female who was convicted of grievous bodily harm. The complainant was her boyfriend and she had thrown a glass bottle at him during a drunken argument. She had meant to hit him with the bottle but not to cut him. The applicant was a first offender and she had lived on an Aboriginal reserve for her whole life.

The sentencing judge made reference to the level of violence in society and stated that he did not care by whom, to whom or where it was perpetrated. He imposed a sentence of two years' imprisonment. The applicant appealed against the severity of the sentence.

Decision: Thomas J (with whom Matthews J agreed) stated that:

The problem of violence in Aboriginal communities is a very real one, and its cure will require more subtle remedies than the criminal law can administer. But that is no reason to deprive these communities of the benefits of law and order. The courts must continue to do what they can to deter this violence, especially when the strong prey upon the weak (p 303).

Derrington J stated that:

At the same time it would be wrong to fail to acknowledge the social difficulties faced by Aboriginals in this context where poor self image and other demoralising factors have placed heavy stresses on them leading to alcohol abuse and consequential violence. Its endemic presence in these communities, despite heavy prison sentences, is proof of the serious problem and, to some extent, the limited nature of deterrence in this social context. These various factors must all be given due weight (p 304).

All three judges agreed that in this case the circumstances were at the lower end of the scale for offences of this nature and imposed a sentence of two months' imprisonment and probation for 18 months.

***Leech v Peters* (1988) 40 A Crim R 350**

Court: Supreme Court of South Australia

Date: 15 December 1988

Judge: Perry J

Facts: The respondent was a 19 year old full blood Aboriginal man. He was sentenced in relation to one offence of break and enter and one offence of illegal use of a motor vehicle. He received a fine for the break and enter offence and a suspended sentence of imprisonment for the other charge. The Crown appealed against the leniency of the sentence.

Decision: It was held that the sentence for the break and enter offence should have been a suspended sentence of imprisonment. In the course of his decision the judge referred to a decision of White J in *Roberts v Young*¹⁹² and stated that:

[H]is Honour clearly recognised that very special considerations must apply to full-blooded Aborigines living in remote areas in a situation such as that which applies in the Yalata Community and he indicated that very much lower penalties might well be justified in cases involving such persons in comparison with breaking offences committed in the metropolitan area by white men or urban Aborigines' (p 353).

***Houghagen v Charra* (1989) 50 SASR 419**

Court: Supreme Court of South Australia

Date: 11 January 1989

Judge: Bollen J

Facts: This appeal concerned the adequacy of a sentence of imprisonment imposed upon a tribal Aboriginal man who resided at a remote community.

Decision: In the course of his reasons the judge stated that:

In one sense, penalties should be imposed on people for what they have done, and for what is relevant to their personal circumstances, irrespective of race, colour or creed. But that would not be practical nor just. One cannot, in my opinion, as a general rule, impose the same penalties, at least for some offences, on tribal Aborigines living at Yalata with no advantages in their life or background as one would impose on a person living a comfortable life in the suburbs' (p 422).

192. *Roberts v Young* (Unreported, Supreme Court of South Australia, Lib No 9408, White J, 30 September 1986).

***Rogers and Murray* (1989) 44 A Crim R 301**

Court: Supreme Court of Western Australia (Court of Criminal Appeal)

Date: 14 September 1989

Judges: Malcolm CJ, Wallace and Brinsden JJ

Facts: This case involved appeals by two men who had been sentenced in relation to sexual offences. Rogers was an 18 year old full blooded tribal Aborigine. He pleaded guilty to aggravated sexual assault against his seven year old niece. Prior to committing the offence he had consumed a significant amount of alcohol. As a result of the offence he had been shunned by members of his family. He was a first offender, pleaded guilty and readily admitted the offence to the police. Rogers was sentenced to six years' imprisonment.

Decision: Malcolm CJ and Brinsden J both held that the sentence imposed on Rogers was manifestly excessive. They imposed a sentence of three years.

Malcolm CJ held that it may be inferred from the fact that he was a full blood Aborigine and rarely went to town that he was relatively inexperienced with alcohol (p 305). Brinsden J agreed with this conclusion. Malcolm CJ also stated that the sentence should be reduced because he would be serving his sentence away from his ordinary environment.

Malcolm CJ made lengthy comments about the relevance of Aboriginality as a mitigating factor. In particular he said that:

Race itself is not a permissible ground of discrimination in the sentencing process. If there were a different approach to the sentencing of Aborigines based only upon their Aboriginal background this would be contrary to s 9 of the *Racial Discrimination Act 1975* (Cth)...It follows from this that the same sentencing principles to be applied in relation to a sexual offence committed by an Aboriginal must be the same as those in any other case. It is apparent, however that there may well be particular matters which the court must take into account, in applying those principles, which are mitigatory factors applicable to the particular offender. These include social, economic and other disadvantages which may be associated with or related to a particular offender's membership of the Aboriginal race' (p 307).

***Juli v The Queen* (1990) 50 A Crim R 31**

Court: Supreme Court of Western Australia

Date: 28 September 1990

Judges: Malcolm CJ, Wallace and Pidgeon JJ

Facts: The applicant had pleaded guilty to two offences of sexual penetration without consent. The two offences occurred on different occasions but against the same complainant. He was sentenced to a total of 10 years' imprisonment with eligibility for parole. In the course of his sentencing remarks the judge stated that although he accepted that the applicant was affected by alcohol and that it may provide an explanation for the offence it was not an excuse.

Decision: Malcolm CJ held that the sentencing judge failed to take into account three important mitigatory factors, namely:

1. The history of the applicant's alcohol abuse and the fact that he had been drinking at the time of these offences;
2. The likely impact of imprisonment upon an Aboriginal from the Kimberley; and
3. The applicant's mental illness which was made worse by alcohol.

Malcolm CJ stated that:

Drunkenness is not normally an excuse or a mitigating factor. In particular circumstances, however, it may be relevant as a mitigatory factor. In the particular circumstances of this case the applicant's abuse of alcohol reflects the socio-economic circumstances and the environment in which he has grown up and should be taken into account as a mitigatory factor in the way which I suggested in *Rogers v Murray*¹⁹³ (p 36).

All three judges agreed that the sentence was manifestly excessive. They set the sentence aside and imposed instead a sentence of six years' imprisonment.

***Harradine v The Queen* (1991) 61 A Crim R 201**

Court: Supreme Court of South Australia (Court of Criminal Appeal)

Date: 5 May 1992

Judges: White, Prior and Mullighan JJ

Facts: The appellant was convicted of two counts of rape and one count of assault occasioning bodily harm. He was sentenced to 10 years' imprisonment. The victim of these offences was the appellant's ex defacto. The appellant was

¹⁹³. (1989) 44 A Crim R 301, 305–08.

an Aboriginal male aged 23 years who had first come to live in the city when he was 16 years. He had spent his childhood at an Aboriginal mission and experienced a number of problems as a result of the transition to city life.

Decision: White J stated that the impact of city life upon the appellant was sufficient to result in some sympathetic treatment (p 205).

Mullighan J held that the offences 'were committed against the background of problems encountered by him in adjusting to city life as an Aboriginal boy from the relative security of Aboriginal community life' (p 210). These problems were still considered to be relevant in mitigation even though the appellant had been living in the city for five years. Just as it is permissible to take into account special problems experienced by tribal Aboriginal people it is also permissible to take into account considerations due to an offender being an Aboriginal living in an urban environment.

***R v Fernando* (1992) 76 A Crim R 58**

Court: Supreme Court of New South Wales

Date: 13 March 1992

Judge: Wood J

Facts: The defendant pleaded guilty to one count of malicious wounding. The complainant was a good friend and sometimes the defacto partner of the defendant. The defendant stabbed her with a knife to her neck and leg. He was under the influence of alcohol at the time and claimed not to remember the incident. The appellant was described as a semi-educated Aborigine from a large family with a deprived background. There was a medical report which suggested that he had a degree of brain damage caused by excessive alcohol abuse over a number of years.

Decision: After hearing extensive submissions and considering the authorities concerning Aboriginality and sentencing, Wood J set out eight propositions:

1. The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offender's membership of such a group;
2. The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender;
3. It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment;
4. Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aborigines of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment;
5. While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves a realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self image, absence of education and work opportunity and other demoralising factors have placed heavy stress on them, reinforcing their resort to alcohol and compounding its worst effects;
6. That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender;
7. That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality;
8. That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part (pp 62–63).

In this case, in terms of the above, the judge took into account the deprived background of the offender, his involuntary removal at an early age to an isolated mission and his early introduction to alcohol and abuse of alcohol within a community where such behaviour was encouraged. Taking into account all other relevant matters the judge held that the objective seriousness of the offence demanded imprisonment as did the need to show the Aboriginal community 'in the interests of

their protection that violent and drunken assaults are regarded very seriously by the law' (p 64). The defendant was sentenced to four years' imprisonment with a minimum term of nine months.

***R v E (A Child)* (1993) 66 A Crim R 14**

Court: Supreme Court of Western Australia (Court of Criminal Appeal)

Date: 30 April 1993

Judges: Malcolm CJ, Franklyn and Ipp JJ

Facts: The juvenile respondent was involved in three separate incidents where he and others intentionally instigated high speed car chases with the police with the purpose of killing police officers. He was sentenced in relation to six charges of attempted murder to an effective sentence of 23 months' imprisonment.

Before the sentencing judge and during the appeal the respondent's counsel argued that the fact that the respondent was Aboriginal, the relationship between the Aboriginal community and the police and the deprived and oppressive socio-economic conditions under which the respondent had grown up were all mitigatory factors.

Decision: In his reasons for judgement Ipp J referred to defence counsel's submission that the relationship between the police and Aboriginal youth had deteriorated 'to the point where there is almost open warfare' and that the respondent 'harboured feelings of disillusionment, anger and a sense of injustice towards the police' (p 30).

Malcolm CJ held that these factors assist in some way in explaining the conduct of the respondent and the degree of mitigation attributable to such factors depends upon the circumstances of the case (p 17). In this case there was no justification for the random selection of police officers as targets.

Franklyn J held that while factors of Aboriginality, oppression, socio-economic deprivation and similar matters may provide mitigation in an appropriate case none of them are automatically so (p 19). In this case he held that the factors had little relevance.

Ipp J accepted that the respondent was part of a group of Aboriginal youths who were in frequent contact with the police and who harboured feelings of resentment and antagonism towards them. He also accepted that the respondent had grown up in extraordinarily difficult circumstances. He held that it is not the case that personal circumstances of this type are inevitably mitigatory (p 31). In this case those factors merely helped to explain what would appear to be otherwise psychopathic behaviour.

The sentence was increased to six years' imprisonment with parole and with a direction that the imprisonment be served in a detention centre.

***Clinch v The Queen* (1994) 72 A Crim R 301**

Court: Supreme Court of Western Australia (Court of Criminal Appeal)

Date: 27 April 1994

Judges: Malcolm CJ, Pidgeon and Seaman JJ

Facts: The appellant appealed against the severity of his sentence and an order that he was declared to be a habitual criminal. He was sentenced to a total of 26 years' imprisonment for numerous very serious offences including grievous bodily harm and aggravated sexual assaults.

Decision: Malcolm CJ referred to the trauma and tragedy of the applicant's life and the resulting alienation and resort to violence and alcohol (p 308–09). Such issues as his parents' criminal backgrounds, their early deaths, and the removal of his grandmother from her own parents were discussed. His Honour commented that:

Unfortunately, this tragic background is all too common among our Aboriginal people. While it explains some of the reasons why these terrible offences were committed and it provides some degree of mitigation for them, it does not excuse them (p 309).

***R v Woodley, Boogna & Charles* (1994) 76 A Crim R 302**

Court: Supreme Court of Western Australia (Court of Criminal Appeal)

Date: 16 December 1994

Judges: Kennedy, Rowland and Franklyn JJ

Facts: This appeal was instituted by the Crown in relation to numerous respondents. There were two main groups. A number of the respondents were sentenced in relation to burglary offences and the other group were dealt with for serious violent and sexual offences.

In relation to the first group the sentencing judge dealt with them together and treated their cases in the same way despite the fact that there were significant differences in their circumstances. In relation to the second group the judge imposed very lenient sentences.

Decision: In relation to the first group the appeal court held that the sentencing judge should have considered each respondent separately. Although each was an Aboriginal and each had a drinking problem their backgrounds were different. The court held that while many Aboriginal people require special consideration by the courts each needs to be dealt with individually.

In relation to the group of respondents who had committed violent and sexual offences the court held that the sentencing judge, in imposing lenient sentences, had failed to give sufficient weight to the need to protect Aboriginal women (who were mainly the victims). The offences were serious and the court distinguished them from offences of drunkenness and disorderly conduct which the courts have recognised need to be dealt with by non-custodial options.

It was made clear that the courts should deal with vicious, drunken and arrogant violence to Aboriginal women in the same way that it would for any other member of the community and the primary concern in cases of this nature should be the protection of the women in the community.

***Russell v The Queen* (1995) 84 A Crim R 386**

Court: Supreme Court of New South Wales (Court of Criminal Appeal)

Date: 15 December 1995

Judges: Kirby ACJ, Allen and Dowd JJ

Facts: The appellant was sentenced to a total of 11 years' imprisonment with a minimum term of seven years for two charges of aggravated sexual assault and other matters. In sentencing the appellant the judge mentioned his Aboriginality as one of the special circumstances of the case but did not elaborate further. One ground of the appeal was that the sentencing judge did not give adequate weight to the appellant's Aboriginality.

Decision: Allen and Dowd JJ dismissed the appeal.

Kirby ACJ held that the Aboriginality of the applicant had no direct mitigatory effect on the sentence (p 391). He noted that it was important to take into account that Aboriginal Australians, like any other group, are not homogenous (p 392).

He further considered the general issue of the high imprisonment rate of Aboriginal people and commented that:

[The] usefulness of long sentences for Aboriginal offenders must increasingly be called into question in light of the Royal Commission and the other reports, produced in recent years. Judges with the responsibility of sentencing must generally be familiar with these considerations (p 392).

His Honour also referred to some recent research into the high proportion of hearing loss within the Aboriginal community and stated that it is open to conclude that this disability and its associated problems could increase the likelihood of contact between an Aboriginal person and the justice system. It would also make the offender's time in custody more difficult and harsh (p 393). In light of the appellant's personal circumstances (including his hearing problems), Kirby ACJ held that the minimum term should be reduced.

***R v Daniel* [1998] 1 Qld R 499**

Court: Supreme Court of Queensland (Court of Criminal Appeal)

Date: 30 May 1997

Judges: Fitzgerald P, McPherson JA and Moynihan J

Facts: The applicant was sentenced to a total of eight years' imprisonment for three offences of rape. The complainant and the applicant were both from the same Aboriginal community. In sentencing the applicant the judge commented that the fact that sexual intercourse was culturally prohibited between the applicant and the victim was a factor which made the offences more serious.

The applicant submitted that he should receive a more lenient sentence because both he and the complainant were Aboriginal people from a deprived and dysfunctional community where alcohol abuse and violent crime was more prevalent and tolerated more than in the general community.

Decision: After reviewing numerous cases that deal with the issue of Aboriginality and sentencing Fitzgerald P stated that:

It is at least implicitly accepted in many of the passages quoted above that there are often two victims involved in offences committed by Aborigines, especially drunken Aborigines, one the victim of the offence and the other the offender, whose race has been tragically affected by the colonisation of this country, harsh treatment, dispossession, the separation of children from families, the introduction of European diseases, and the misuse of alcohol and, more recently drugs (p 530).

Nonetheless, in the context of the current criminal justice system, I cannot accept that, in principle, Aborigines who inflict violent crimes on their communities while intoxicated should be accorded special treatment by the imposition of lighter sentences than would otherwise be appropriate having regard to the circumstances of the offence and other relevant factors, including considerations personal to the offender (p 530–31).

The appeal was refused.

***Amagula v White* [1998] Unreported, No JA 92/1997**

Court: Supreme Court of the Northern Territory

Date: 7 January 1998

Judge: Kearney J

Facts: The appellant was sentenced to six months' imprisonment to be released after serving two months for an offence of aggravated unlawful assault. The victim of the offence was the appellant's wife; during an argument he punched her to the head, struck her with a tree branch and tried to cut her with a knife.

At the appeal the court heard that the victim and the appellant were reconciled and that she did not want him to go to prison as he would lose his job and there would be resulting hardship to her and the family.

Decision: In relation to the relevance of Aboriginality the judge stated that as an Aboriginal person the appellant attracted the principles set out by the court in *Fernando*.¹⁹⁴ However, in this case there was no suggestion of alcohol. He held that the courts must do what they can to reduce violence against women in Aboriginal communities and noted that the widespread belief that it is acceptable for men to bash their wives must be erased.

The appeal was dismissed.

***Ashwin v Morris* [1998] Unreported, Lib No 980307**

Court: Supreme Court of Western Australia

Date: 21 October 1998

Judge: Miller J

Facts: The appellant was sentenced to five months' imprisonment suspended for six months for an offence of assault. The victim of the offence was his defacto and he pushed her to the floor during an argument. As a result she hit her head on the ground.

In the course of his sentencing remarks the learned magistrate mentioned that the number of Aboriginal men who beat their wives is enormous and that he did not wish to see the defendant become one of them.

The appellant argued that the magistrate had made an error in suggesting that the appellant was one of those Aboriginal males who beat their wives.

Decision: Miller J held that the magistrate was entitled to refer to the problems of violence by Aboriginal men towards their women in the particular community in which the offence occurred. The magistrate's understanding of the local problems must be acknowledged. The judge held that the magistrate treated the appellant as a first offender and therefore had not treated him as someone who had previously beaten his wife.

However, the sentence was, in Miller J's view, manifestly excessive. The judge quashed the original sentence and imposed a community based order for six months with 40 hours' community work in its place.

***R v Churchill* [1998] Unreported, No 160/1998**

Court: Supreme Court of Western Australia

Date: 6 October 1998

Judge: Owen J

Facts: The defendant pleaded guilty to manslaughter. The deceased was the defendant's defacto and the incident occurred after an argument and after the deceased had first assaulted the defendant with a stick. The defendant stabbed him with

194. *R v Fernando* (1992) 76 A Crim R 58.

a knife and as soon as she realised what she had done she turned the knife on herself. The defendant was significantly affected by alcohol at the time.

The defendant had spent the early part of her life living a semi-traditional lifestyle but was, as a young child, removed from her parents and placed on a mission. She frequently tried to run away and as a result she was often severely punished. Eventually the defendant was able to return to her family but by that stage they had been turned off the stations and had become fringe dwellers near Halls Creek. Her parents had at this time begun to abuse alcohol. The defendant had abused alcohol from the age of 12 years and this had continued into her adult life and was behind all of her offending behaviour.

Decision: In relation to counsel's submissions about the relevance of Aboriginality to sentencing the judge commented:

I am uneasy about the concentration on the 'Aboriginality' of an offender. To my mind it may unwittingly lead to attitudes that are paternalistic or patronising. There is a danger of falling into platitudes. I would prefer to see the focus of attention being on the whole person and where that person stands in the community in its broadest sense. This does not exclude, indeed it encourages, considerations of ethnicity and cultural background. It embraces the past, the present and the future in a more complete way (p 23).

The judge specifically took into account the fact that the defendant had suffered as a result of being taken from her parents and that she was a victim of her socio-economic situation in which alcohol and related violence were part of everyday life. He also took into account the fact that she had and would serve her time in custody far from her country and visits from her family would be impossible.

The judge imposed a sentence of 3½ years imprisonment backdated to 12 January 1998. The defendant was made eligible for parole.

***R v Wurrumara* (1999) 105 A Crim R 512**

Court: Supreme Court of the Northern Territory

Date: 28 April 1999

Judges: Mildren, Thomas and Riley JJ

Facts: The respondent was sentenced in relation to two offences of unlawfully doing grievous bodily harm. One of the victims was his defacto wife. Both offences occurred at an Aboriginal community in the Northern Territory. He was originally sentenced to a total of 3½ years' imprisonment suspended for a period of two years after serving 15 months. The Crown appealed against the leniency of the sentence.

Decision: The court referred to the issue of violence in Aboriginal communities in some detail.

The courts have been concerned to send what had been described as 'the correct message' to all concerned, that is that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so [26].

The court reiterated the view that this type of offending must be dealt with in a manner which reflects the seriousness of the offending. The court held that this does not mean that Aboriginal offenders are to be dealt with differently than other offenders but that normal sentencing principles must apply. This includes the objective seriousness of the offence.

***The Police v Abdulla* [1999] SASC 239**

Court: Supreme Court of South Australia

Date: 17 June 1999

Judge: Perry J

Facts: The Crown appealed against the sentence imposed upon the respondent who was a 21 year old Aboriginal girl. There is nothing particularly relevant about the facts of the case.

Decision: In the course of his reasons the judge made some comments generally about the sentencing of Aboriginal offenders:

That incarceration is a form of punishment which is foreign to Aboriginal customary law does not mean that imprisonment should be dismissed as an option for Aboriginal offenders. But a recognition of the debilitating effect on Aborigines of this form of punishment must be given sensitive recognition, even although it must be weighed against the need to provide protection for the community and the necessity for specific and general deterrence [36].

***R v Carr* [1999] NSWCCA 200**

Court: Supreme Court of New South Wales (Court of Criminal Appeal)

Date: 23 July 1999

Judges: Studdert and Simpson JJ

Facts: This was an appeal against sentence. One ground of appeal was that the sentencing judge had failed to give adequate weight to the appellant's Aboriginality and alcohol abuse as required by the principles in *Fernando*.¹⁹⁵

Decision: Studdert J (with whom Simpson J) agreed held that in order to fall within the principles as set out in *Fernando* with respect to the mitigatory effect of alcohol abuse and Aboriginality, it is necessary to point to more than the fact that the defendant was Aboriginal and that he had been drinking prior to the commission of the offence [31].

***R v Tjami* [2000] SASC 311**

Court: Supreme Court of South Australia (Court of Criminal Appeal)

Date: 13 September 2000

Judges: Prior, Duggan and Nyland JJ

Facts: The appellant had pleaded guilty to manslaughter and was sentenced to 12 years' imprisonment with a non-parole period of 10 years. The victim of the offence was the appellant's wife. The incident occurred when both the appellant and the deceased had been drinking and an argument commenced because the appellant was jealous. The appellant attacked her and the deceased's injuries were horrific.

It was submitted on behalf of the appellant that the sentencing judge had failed to give adequate weight to the appellant's personal circumstances including that he was a tribal Aborigine, that he had had an underprivileged upbringing, that abuse of alcohol was part of the lives of both the appellant and the deceased and that intoxication was a significant factor in the commission of this offence. It was also argued that the lower life expectancy of Aboriginal people was a matter which should be taken into account in sentencing an Aboriginal offender.

Decision: In respect of the lower life expectancy issue, Nyland J (with whom Prior and Duggan JJ agreed) stated that the court must 'be wary of reducing sentences based on broad generalisations alone' [19]. In this case one important matter that needed to be taken into account was the fact that the appellant would have a difficult time in prison as he had spent all his life on Aboriginal lands [24–25].

In terms of alcohol abuse Nyland J noted that 'not all Aboriginal persons or communities have problems with alcohol abuse, and it would be offensive to suggest otherwise. Hence it is important to emphasise the need to consider the subjective circumstances of the offender in question' [22].

The court held that, overall, the sentencing judge had failed to give sufficient weight to the personal circumstances of the offender. At the same time it is important to reflect in the sentence that violent crimes in Aboriginal communities are not considered as incidents of little moment and that members of those communities are entitled to protection [25–27]. The court imposed a sentence of 10 years' imprisonment with a non-parole period of six years.

***R v Carberry* [2000] ACTSC 60**

Court: Supreme Court of the Australian Capital Territory

Date: 7 July 2000

Judge: Miles CJ

Facts: The defendant pleaded guilty to armed robbery. The defendant was a 20 year old heroin addict. This was his first offence as an adult.

Decision: The judge referred to the Aboriginal background of the offender and endorsed the principles in *Fernando*.¹⁹⁶ The judge also highlighted that those principles should not be applied automatically.

The judge referred to one matter which was not mentioned in *Fernando*. It related to the fact that the offender was a heroin addict. It was stated that:

Neither he nor the Aboriginal community or any part of it is responsible for the scourge of heroin that so disrupts the life of this city and is so apparent in a high proportion of serious offences that come before this Court. Responsibility in that regard lies fairly and squarely on entrepreneurs whose origins are elsewhere' [16].

A suspended sentence was imposed.

^{195.} *R v Fernando* (1992) 76 A Crim R 58.

^{196.} *R v Fernando* (1992) 76 A Crim R 58.

Gray v Madaffari [2002] WASCA 13

Court: Supreme Court of Western Australia

Date: 10 December 2001

Judge: Miller J

Facts: The appellant pleaded guilty to one count of disorderly conduct and one count of breaching bail. The magistrate sentenced the appellant to six months' imprisonment for the disorderly conduct and a fine for the breach of bail.

The disorderly conduct took place outside a hotel at Fitzroy Crossing. The defendant had been drinking alcohol and he became abusive to the staff and other patrons.

The appellant appealed on the basis that the sentence was manifestly excessive. One of the particulars was that the magistrate had failed to take into account the fact that the applicant is Aboriginal and his underlying problem with alcohol reflected the socio-economic circumstances and environment in which many Aboriginal people live.

The defendant's counsel had put before the magistrate that the whole underlying problem was alcohol and the fact that the defendant was Aboriginal was clearly known to the magistrate. It was not specifically submitted that the defendant's alcohol problem reflected his socio-economic circumstances.

Decision: The judge held that although the magistrate did not make any specific reference to the problems associated within the Aboriginal community at Fitzroy Crossing it could be assumed that he was well aware of them. However, because he imposed the maximum penalty for the offence it appears that he did not take the problems into account.

The judge imposed a sentence of four months' imprisonment suspended for six months. One of the reasons for suspending the sentence was the problems of alcohol abuse and the socio-economic circumstances and environment in which the appellant was placed.

R v Carter [2002] SASC 48

Court: Supreme Court of South Australia

Date: 20 February 2002

Judge: Nyland J

Facts: The Crown appealed against the leniency of a sentence imposed by a magistrate in the Nunga court. The respondent was an Aboriginal woman who had pleaded guilty to a charge of assaulting a police officer. She had bitten him on the arm and the offence was more serious because she suffered from hepatitis.

The offence also breached an eight month suspended sentence. The respondent was already in custody for another violent but unrelated offence. The magistrate specifically referred to her tragic background as well as her desire to change since being imprisoned. He structured the sentence so she would not have to serve any further time in addition to her current sentence. For both the breach and the assault of the police officer he imposed three months' imprisonment each to be served concurrently with the other and with the existing sentence.

Decision: In relation to the operation of the Nunga Court the judge stated:

[T]he Nunga Court was established to allow for a more creative approach to be taken in sentencing with specific regard to Aboriginal defendants. I recognise that the court has been successful in providing a more sensitive environment for Aboriginal defendants within the criminal justice system. The approach clearly must be encouraged and supported. The Nunga Court does not, however, have a specific legislative framework. Essentially it is a Magistrate's Court operating in an informal way, depending largely upon the cooperation of the police and the defence to work effectively. Despite the court's unique procedures, it remains subject to the usual sentencing principles. In this case, once the magistrate reached the conclusion that it was necessary to impose a period of imprisonment upon the respondent, he was obliged to operate within the permissible limits of sentencing discretion [16].

In this case the decision to make the sentences concurrent with each other and with the existing sentence resulted in a sentence which was overall manifestly inadequate. The judge acknowledged that there should be a merciful approach to sentencing the respondent but there was no basis for imposing concurrent sentences when the matters were unconnected.

***R v Fuller-Cust* [2002] VSCA 168**

Court: Supreme Court of Victoria (Court of Criminal Appeal)

Date: 24 October 2002

Judges: Batt and Eames JJA, and O'Bryan AJA

Facts: The applicant pleaded guilty to nine offences including five counts of rape. The charges involved two separate victims. He was sentenced to a total of 20 years' imprisonment with a non-parole period of 17 years.

The applicant had an Aboriginal mother and an Irish father. In 1964 the applicant was admitted to the care of the Social Welfare Department. There was some suggestion that he was sexually abused by a foster parent. In 1979 he tried to establish a relationship with his natural mother but that was unsuccessful.

There were numerous unrelated grounds of appeal and as the court held that the sentencing judge had made an error in relation to the question of concurrency the court was obliged to re-sentence.

Decision: Batt JA imposed a sentence of 17 years' and three months' imprisonment with a non-parole period of 14 years. O'Bryan AJA agreed stating that the issues to do with the Aboriginality of the applicant (as set out by Eames JA) were relevant; however, in this case they did not justify a lesser sentence than that imposed by Batt JA [154].

Eames JA held that he would have imposed a lesser sentence but as he was in the minority he did not specify the length. He did discuss a number of issues to do with the Aboriginality of the applicant. He observed that to fail to recognise the applicant's personal factors (which included his Aboriginality) 'would be to sentence him as someone other than himself' [79]. Further, he noted that the offences arose out of extreme stress, which according to the evidence of the psychologist, was in part caused by the applicant's 'fears of rejection which were in turn closely related to his understanding of his separation from his natural mother and the consequent impact of that experience on his life' [89].

Importantly, Eames JA stated that '[c]onsiderations arising from an offender's Aboriginality may exist whether the Aboriginal person is living in an urban or a rural situation' [91]. He referred to the Royal Commission into Aboriginal Deaths in Custody and stated that the applicant was in a similar position to a number of the cases in that report [92]. The factors which he considered relevant included the impact of being removed from his family, the unsuccessful attempts to regain contact with his mother and the resulting anxiety from not being able to embrace his Aboriginality.

***R v Scobie* [2003] SASC 85**

Court: Supreme Court of South Australia

Date: 24 March 2003

Judge: Gray J

Facts: The defendant was due to be sentenced for seven charges of breaching a paedophile restraining order, three charges of breaching bail conditions, one charge of exhibiting indecent material and one charge of stealing. He had a lengthy record for serious offending including sexual offences against children.

The defendant was a traditional Pitjantjatjara man aged between 35 and 55 years. He had a longstanding problem with abuse of petrol and alcohol, and medical evidence revealed that his intellectual capacity was severely impaired.

Decision: In the course of his decision the judge referred to a number of the recommendations of the Royal Commission into Aboriginal Deaths in Custody and highlighted that the failure to implement these recommendations had directly impacted upon the defendant to the extent that if they had been complied with the community may have been protected because his offending may have been curtailed.

The judge held that the defendant's petrol sniffing and alcoholism were a result of the socio-economic factors in which he lived and which placed him in a position of disadvantage [70]. This factor was treated as a mitigatory factor [107].

During the sentencing process the court attended the Anangu Pitjantjatjara Lands and spoke with members of the community to 'gauge an understanding of their willingness to re-accept Mr Scobie and their general view as to sentence' [85]. The court took into account two statements from Aboriginal elders that they would look after the defendant and that he would abide by 'white fella law' and 'black fella's law'.

The defendant was sentenced to a community supervision order which required him to continue his medical treatment.

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background paper 2

Caught in the middle: Indigenous interpreters and customary law

Michael Cooke*

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Part I: Introduction

In addition to the mental gymnastics required to interpret between parties who share limited cultural, linguistic and conceptual common ground, Indigenous interpreters may face overwhelming tension between their professional role and the effects of their responsibilities and restrictions under customary law. There are also associated pressures from having their relatives as clients, together with false community perceptions about an interpreter's role. As a result, there are instances where interpreters cannot be found for particular cases or where competent and experienced interpreters refuse to work in legal contexts where these tensions emerge most severely.

With the recent increasing formalisation of interpreting services in Aboriginal languages in the Northern Territory and Western Australia, and with increasing opportunities for Indigenous interpreters to meet together for training and professional development, reports of these tensions have been emerging. These reports include examples of interpreters experiencing personal danger.

In July 2002, a group of Indigenous languages interpreters from across Australia discussed these issues at the conference of the Australian Linguistics Institute held at Macquarie University. The session began with a presentation from the Kimberley Interpreter Service (KIS) on how standards of professional conduct for interpreters can often be compromised for community-based Aboriginal language interpreters due to cultural and linguistic differences between European and Aboriginal societies.¹ The sharing of experiences by interpreters who were present indicated a possibly systemic problem requiring further investigation and the development of strategies not only to address occupational health and safety concerns but also to ensure the integrity of the Indigenous interpreter's formal role.

The purpose of this background paper is to expose and explore these issues relating to the impact of customary law upon the work and welfare of Indigenous interpreters operating in legal contexts, with the primary focus here being the criminal justice system. It documents a field-based investigation based on interviews and discussions with a range of people who have experience or knowledge of the challenges facing Indigenous interpreters operating in legal contexts, and who are generally well placed to consider what can be done. These people include:

- experienced Indigenous interpreters in Western Australia and the Northern Territory;
- non-Indigenous interpreters of Indigenous languages to compare and contrast experiences;
- trainers of Indigenous interpreters and providers of interpreting services; and
- lawyers, police and a magistrate who have extensive dealings with Aboriginal people of a non-English speaking background.

Priority is given to documenting stories and comments from interviewees in their own words through edited transcriptions presented below in Part III. The reason this material forms the bulk of this report is that, while interpreters have recently been raising these issues in a number of quarters, substantial information on the topic has not been documented. Furthermore, by giving voice to Indigenous interpreters themselves (as well as other Indigenous and non-Indigenous informants) the risk of misrepresenting their concerns, priorities and suggestions can be significantly averted.

At the same time, it is acknowledged that the modest scale of the project means that many other people with significant stories to share on the subject have not been heard. However, a high degree of commonality was nevertheless revealed in identifying the nature and extent of the problems, for instance that misunderstandings about a legal interpreter's role can lead to their being blamed for the outcome of criminal justice proceedings. Similarly, in respect of suggestions for improvement, there were repeated comments that community education is needed on the Indigenous side and that more substantial cultural awareness training is needed by those working with Indigenous people and interpreters. These common expressions from diverse sources suggest that the primary issues may have come to the fore. Furthermore, they accord with my own experiences as a practitioner, researcher and trainer in the field since 1989.²

The discussion section of the paper (Part IV) collates and considers many of the ideas that are documented in Part III under two main headings: 'Misunderstandings about the legal interpreter's role'; and 'Implications of customary law on the Code of Ethics for interpreters'.

1. The most widely used code of ethics in Australia was developed in the early 1990s by the Australian Institute of Interpreters and Translators (AUSIT) in conjunction with the National Accreditation Authority for Translators and Interpreters (NAATI). Olive Knight (KIS Interpreter) and Siobhan Casson (Kimberley Language & Resource Centre, Halls Creek), who gave this presentation as part of the Interpreting and Translating program (11 July), focussed on how the central ethical tenets of confidentiality and impartiality may be compromised by customary restrictions or obligations, while accuracy may be compromised where interpreters are constrained to literal translations (for example, in respect of a concept which has no equivalent in the other culture and which must therefore be explained).

2. The author's background includes experience as an interpreter and translator in Djambarrpungu (a Yolngu dialect of North East Arnhem Land), as a trainer of interpreters in Indigenous languages, and as a researcher in the field of Indigenous languages and the law.

Part II: Background to Indigenous languages interpreting in Australia

Recognising that some readers may have a limited background in interpreting and intercultural communication matters, this part of the paper is intended as an introduction to the Indigenous interpreting issues raised in this paper.³

The need for interpreters versus alternative strategies for overcoming language barriers

Given that contact between people from different language communities has occurred throughout history, the concept of an interpreter is old indeed. However, multilingual situations do not always necessarily require an interpreter.

The use of a lingua franca, such as French became in diplomatic circles in Europe, is one alternative. General multilingualism among a population is another. The emergence and use of pidgins⁴ as contact languages are also possible (as with Pidgin English in Australia).

In pre-European Australia multilingualism among Indigenous groups was prevalent, as it is in many Indigenous communities today. Indeed, many present-day Indigenous interpreters are fluent speakers of several distinct Indigenous languages and, in some cases, a variety of related dialects as well.

The spread of Europeans across the Australian continent in the 1800s and early 1900s saw the emergence and spread of varieties of Pidgin English as a contact language between (mainly) Anglo and Indigenous Australians. It appears that Aboriginal Pidgin English became prominent as a language of European/Aboriginal communication by the 1880s, and was even used in courts. The following example is from a 1913 Darwin murder trial⁵ where the judge is administering the oath to an Aboriginal witness, Ada:

Judge: Now, Ada, you savvy those blackfella there? (pointing to the defendants)
 Witness: Yaas, me savvy.
 Judge: You see those white gentlemen there? (pointing to the jury)
 Witness: Yaas, me see 'em.
 Judge: All right, Ada. Now, you tell those gentlemen all you savvy about those blackfella. And you talk straight fella.
 Witness: Yaas.
 Judge: And loud fella.
 Witness: Yaas.
 (Ada then proceeded to give her evidence.)

Aboriginal Pidgin English is spoken by few people today. Rather, pidgin dialects developed in two different directions. In a number of remote communities they came to displace traditional language as they expanded into creole languages⁶ to become the first language of community members. Kriol, which exists as several regional dialects, is spoken widely (but not universally) in northern parts of Australia including the Kimberley. In other places, particularly urban or rural areas, pidgin dialects strongly influenced the development of Aboriginal English as a dialect of English that retains many distinctive Aboriginal features.⁷

The significance of Aboriginal Pidgin English in the past, and Aboriginal English and Kriol today, is that they can be used in some contexts as lingua franca for those Aboriginal people who speak them. However, there also remain many traditional language speakers who are unable to communicate effectively using either Aboriginal English or Kriol.

Figures for Western Australia derived from the 1996 census reveal that 17 percent of its Indigenous people spoke an Indigenous language at home and that this figure rose to 51 percent in some rural areas. Of these, only three-quarters claimed to speak English well or very well.⁸

3. For a more detailed consideration see: Cooke M, *Indigenous Interpreting Issues for Courts*, (Melbourne: Australian Institute of Judicial Administration Inc, 2002).
4. A pidgin language can be defined as a limited contact language made up of words from various languages and with simplified grammar, and used in restricted contexts such as trade transactions between groups of people who do not share a common language.
5. Harris J, *Northern Territory Pidgins and the Origin of Kriol*, Pacific Linguistics, Series C – No. 89 (Canberra: Australian National University, 1986) 347.
6. A creole is a full language which develops from a pidgin when people start to use the pidgin as a general means of communication, and a first generation of children emerges who grammaticise and standardise the pidgin based on input from the languages they hear around them and thus become first language speakers of the new creole. The several Australian creoles combine characteristics of English, Indigenous languages and other languages.
7. For further information on Aboriginal English and its relevance to criminal justice proceedings see: Eades D, *Aboriginal English and the Law* (Brisbane: Queensland Law Society Inc, 1992).
8. Australian Bureau of Statistics, *Census of Population and Housing: Aboriginal and Torres Strait Islander People, Western Australia, 1996*, cat. no. 2034.5 (Canberra: ABS, 1998).

Thus, while most Indigenous people from remote regions do not speak English as their first language, they usually have enough to 'get by'. They may be able to answer simple questions about their background or family, ask for things at the shop, and hold short conversations about everyday topics like weather or sport. They may even be able to respond to quite complex propositions if expressed in a leading form, in which case the tendency of Aboriginal⁹ interviewees to answer *yes/no* questions in the affirmative may promote the illusion of effective English communication. (This form of suggestibility, now termed *gratuitous concurrence*, occurs as a sociolinguistic characteristic which has long been recognised as a feature of police and courtroom interviews involving Aboriginal people.)¹⁰

Further masking of English insufficiency during interviews occurs when the interviewer provides language assistance in the form of verbal *scaffolding*, such as by finishing an interviewee's hesitant or incomplete answers, or by prompting with suggested answers in the face of long silences.

These patterns and strategies have led many police and lawyers to believe that they can conduct their interviews without interpreters as long as they stick to 'simple' English. The problem, of course, is that the interviewee may have little understanding of what they have agreed with, and will not have had the opportunity to say what was on their mind.¹¹

It is still the case that the use of interpreters during the criminal justice process remains rare; even when the low level of English spoken by many Indigenous suspects, defendants and witnesses would appear to warrant interpreting assistance. The use of untested, ad hoc 'interpreters', such as relatives or a 'prisoner's friend' (as provided under the Anunga Guidelines), also remains as an unfortunate practice.¹²

What is an interpreter?

Many people use the term interpreter to include anyone who is bilingual. Unfortunately, this commonly results in deployment of inappropriate and incompetent 'interpreters' even in important matters such as police and courtroom interviews.

In addition to being able to communicate fluently in their second language (including being able to understand puns and idiomatic expressions), the interpreter requires sufficient cultural knowledge to be able to interact appropriately among native speakers of that language and to operate appropriately in respect of its social and political structures, organisations and institutions. More specifically, he or she requires knowledge of the processes and terminology particular to the semantic domain within which an interview is taking place.

These attributes are required simply in order for the interpreter to process an utterance in terms of what meaning the speaker is conveying and what their intended message is. Then the interpreter is challenged to work out how that meaning/message can be rendered appropriately (i.e. with equivalent nuance, force and effect) in terms of another language and culture. This can be daunting where the conceptual framework within which the original utterance is embedded may not exist or may be radically different. Often the interpreter must explain *about* what was said in cases where it is not possible to meaningfully say *what* was said. (Interpreting Aboriginal kinship terminology into English commonly requires this.)

Even where the meaning of an utterance can be interpreted easily in conceptual terms, the interpreter requires the skill to constantly make choices to overcome linguistic impediments to accurate interpreting. For example, Aboriginal languages have a far greater inventory of personal pronouns than does English. Thus, the English word *we* will be represented by four alternatives (or maybe more, depending on the language) which serve to specify whether two people or more than two people are being referred to and, for each of these alternatives, whether the speaker is including or excluding the addressee. The interpreter needs to be able to infer the required information from the English speaker's utterance in order to choose the right alternative. If unable to do so, the interpreter must decide if the matter warrants interrupting the interview to request clarification from the English speaker. Alternatively, the interpreter might choose to deal with the English term's ambiguity by including the range of possible meanings in the Aboriginal language translation.

9. References to Indigenous people and issues are sometimes marked here by use of the term *Aboriginal*. This indicates that the statement may not (or may not be known to) apply to Torres Strait Islander situations.

10. See, for example, the comment by Kriewaldt J from *R v Aboriginal Dulcie Dumala* (1959) NT 274, quoted in McCorquodale D, 'Judicial racism in Australia? Aborigines in Civil and Criminal Cases' in Hazelhurst K (ed), *Ivory Scales: Black Australians and the Law* (Sydney: UNSW Press, 1987) 30–59, 33.

11. These matters are discussed in reference to a Western Australian police interview and trial in: Cooke M, 'A Different Story: Narrative Versus "Question and Answer" in Aboriginal Evidence', (1996) 3 *Forensic Linguistics* 273–88.

12. Although the Anunga Guidelines specifically provide that a prisoner's friend may be used as an interpreter there is a strong argument that this is inappropriate on several counts: trained and accredited interpreters are now available; the prisoner's friend cannot be assumed to be a competent interpreter; and there is an inherent conflict of interest between the partisan role of a prisoner's friend and the impartiality demanded of an interpreter. These issues are discussed in Mildren D, 'Redressing the Imbalance: Aboriginal People in the Criminal Justice System' (1999) 6 *Forensic Linguistics* 141–42.

In making these choices, the skilled interpreter must assess the interrupting effect of seeking constant clarifications against the potential miscommunication arising from ambiguous interpretations. Then the interpreter must decide how far to inform each party of their intervention in order to counter any impression that he or she is adding information or otherwise interpreting inaccurately. (If the interpreter is explicating the inherent ambiguity of an English word to the Indigenous party, or else explaining a word that has no direct equivalent, then the interpretation may be significantly longer than the original English and lead to suspicion about the interpreter's competence and/or intentions.)

On top of this, the competent interpreter requires a range of capacities and skills including a good concentration and short-term memory, confidence to speak up, a clear voice, and a solid grounding in the ethics of the interpreting profession.

The role of the modern interpreter

The difference between an interpreter and translator lies in the medium of communication: spoken versus written. An interpreter enables speakers of different languages to communicate orally while a translator works on rendering written texts from one language to another. (North Americans, however, often refer to interpreters as 'translators'.) As a profession, translation began in antiquity with translators (often church officials or scholars) working on religious and other significant texts.¹³ The formal role of the interpreter is far more recent.

International conference interpreting was the first distinct interpreting role to emerge, following World War One.¹⁴ Simultaneous interpreting (i.e. where the interpreter follows the speaker a clause or two behind) in multiple languages was enabled by development of technology providing interpreters with separate booths equipped with appropriately connected earphones and microphones.

Liaison interpreting (also known as community interpreting or dialogue interpreting) developed following World War Two in quite different circumstances. The high levels of post war refugees and immigrants in many countries, including Australia, led to interpreting as a generally ad hoc response to the needs of either minority language populations or mainstream institutions. While at first, bilingual family members, friends or acquaintances were used to help interpret messages, over time the role of professional interpreter emerged. In Australia, government departments and other mainstream agencies dealing with large numbers of migrants came to recognise the need to address issues of standards, training and levels of accreditation. There was also pressure from migrant groups themselves, concerned by the dangers and disadvantage arising from inevitable miscommunication which results from using bilingual non-professional interpreters.

The provision of interpreting services by some governments in the past several decades is also a reflection of increasing recognition of the crucial role of interpreters in permitting the smooth functioning of our social and economic systems. A noteworthy irony is that it has taken the influence of migrant issues to achieve these outcomes while the blight of endemic miscommunication between mainstream institutions and their non-English speaking Indigenous clients was tolerated for two centuries.¹⁵

The development of interpreter services and codes of conduct for modern interpreters in Australia has proceeded largely without input from Indigenous languages interpreters or particular consideration of their situation. This has led to some problematic outcomes regarding Indigenous languages interpreting. For example, in 1986 the Standing Committee of Attorneys-General set guidelines governing the use of interpreters in the Australian legal system. They required each jurisdiction to ensure, amongst other things, that interpreters 'be independent of litigants'.¹⁶ Yet this is, of course, generally an impossible stipulation for Indigenous interpreters who would personally know most, and be related to all, members of their speech community. Given the prominence of Indigenous litigants in many jurisdictions it is unsatisfactory that the situation of Indigenous interpreting was neither recognised nor addressed.

13. As an aside it is interesting to note that, even then, translators recognised the futility of trying to carry over, all at once and without distortion, a text's semantic content, register/style and structures. The Roman, Cicero, articulated the tension between translating words and translating meanings: 'If I render word for word, the result will sound uncouth, and if compelled by necessity I alter anything in the order or wording, I shall seem to have departed from the function of the translator' (quoted from Bassnett-McGuire S, *Translation Studies* (London: Routledge, revised ed., 1991) 43). Unfortunately, the notion that interpreters should be able to provide meaningful literal translations still has some currency in legal circles.

14. Two of the prominent leaders at the Versailles peace talks—the British Prime Minister and the US President—were unable to speak French. Military officers were therefore conscripted as interpreters: see Gentile A, Ozolins U & Vasilakos M, *Liaison Interpreting* (Melbourne: Melbourne University Press, 1996) 7.

15. The Commonwealth's Telephone Interpreter Service (TIS), used extensively in Western Australia (in the absence of a state interpreting service), has been operating for over 20 years and covers over 100 languages; however, it does not cover any Indigenous language. The only jurisdiction to set up an Indigenous languages interpreter service is the Northern Territory which established their Aboriginal Interpreter Service in 1999 after years of intense lobbying.

16. Commonwealth Attorney-General's Department, *Access to Interpreters in the Australian Legal System*, Report (Canberra: AGPS, 1991) section 2.1.2.

The Code of Ethics for Interpreters and Translators, developed by the National Accreditation Authority for Translators and Interpreters (NAATI) and the Australian Institute of Interpreters and Translators (AUSIT), incorporates eight principles:¹⁷

1. **Professional conduct:** Interpreters and translators shall at all times act in accordance with the standards of conduct and decorum appropriate to the aims of AUSIT, the national professional association of interpreters and translators.
2. **Confidentiality:** Interpreters and translators shall not disclose information acquired during the course of their assignments.
3. **Competence:** Interpreters and translators shall undertake only work which they are competent to perform in the language areas for which they are 'accredited' or 'recognised' by NAATI.
4. **Impartiality:** Interpreters and translators shall observe impartiality in all professional contracts.
5. **Accuracy:** Interpreters and translators shall take all reasonable care to be accurate.
6. **Employment:** Interpreters and translators shall be responsible for the quality of their work, whether employed as freelance practitioners or by interpreting and translation agencies or other employers.
7. **Professional development:** Interpreters and translators shall continue to develop their professional knowledge and skills.
8. **Professional solidarity:** Interpreters and translators shall respect and support their fellow professionals.

Of these, the principles of impartiality, confidentiality and accuracy frequently raise difficulties for Indigenous interpreters. Impartiality is problematic when the interpreter is related to the client. Confidentiality is an issue where an interpreter is pressed by elders for information. Accuracy is challenged where customary law demands the use of a particular speaking style by an interpreter to a client that may not reflect how the non-Indigenous interviewer is addressing that client.

Nevertheless, a uniform standard for defining the role of interpreters is welcome for providing a basis for the development of strategies to protect and support Indigenous interpreters operating in legal contexts. For example, appropriate community education programs could help counter misconceptions of an interpreter as advocate, legal adviser or mediator, while fostering understanding of their role as a skilled and impartial communication facilitator.

The interviews documented in the next part will illustrate some of the cultural, family and community pressures which challenge the capacity of Indigenous interpreters to follow their profession's code of ethics. They also raise some interesting possibilities for resolving them.

Part III: In their own words

The airing of experiences, opinions and advice of Indigenous languages interpreters in respect of the particular challenges they face is the focus of Part III, which also includes contributions from others who work closely with Indigenous interpreters – including police, lawyers, a judicial officer, trainers and interpreter service administrators.

Methodology

In researching this paper I recorded some 20 interviews/discussions between September and November 2003. The interviews were held in Alice Springs and Darwin where I was conducting interpreter training during September and November, and in Broome during the 2003 international conference of the Foundation for Endangered Languages (22–24 September). Western Australian delegates included Indigenous interpreters and language workers from the Kimberley, Pilbara and other regions, as well as delegates representing relevant Indigenous organisations such as KIS, the Kimberley Language & Resource Centre (KLRC) and the Mirima Dawang Woorlab-gerring Language and Culture Centre.

Interviews took the form of open-ended, informal discussions with individuals, pairs or small groups, where people were invited to share their experiences, insights and suggestions about challenges facing Indigenous interpreters.

Most of the interviewees are Indigenous interpreters (or former interpreters) representing language groups from across the Northern Territory and Western Australia. Some of these people hold other positions including leadership positions in communities or Indigenous organisations (e.g. ATSIC, language centres).

17. Taken from the 'summary version' of the AUSIT Code of Ethics. See: <<http://www.ausit.org/ethics.php>>.

Other interviewees included non-Indigenous interpreters of Aboriginal languages, interpreter trainers, administrators and managers of three interpreter services (KIS, the Aboriginal Interpreter Service, and the Northern Territory Interpreter and Translation Service¹⁸), two police sergeants (one each from WA and the NT), two Legal Aid lawyers (one each from WA and the NT) and a magistrate (WA).

In order to facilitate open communication, I explained to prospective interviewees that I had no need to name them within this report. Thus, only basic categorical information is given in respect of the identity of those whose comments are recorded below. However, there are three exceptions: interviews with the chairpersons of the Kimberley Languages Resources Centre (KLRC) and the Mirima Dawang Woorlab-gerring Language and Culture Centre (KIS is a joint initiative of these two organisations), and with the Coordinator of KIS.

The interviews have been edited in respect of length with the symbol (...) indicating where text has been excised. They have not been edited in respect to style in recognition of the fact that Indigenous interviewees commonly moved between Standard Australian English (SAE) and Aboriginal English (AE). However, notes are sometimes given to assist those not familiar with AE dialects. Details about specific communities, languages and people are usually masked or omitted. Interviews are presented broadly in chronological order. The three interviewees who are named had the opportunity to review their contributions and some clarifications and other minor alterations resulted.

The choice of prospective interviewees was governed by who was available or present at the respective locations at the time, and by advice from those with whom I had contact. As a result of this somewhat opportunistic approach, the viewpoints of some valuable potential informants may not be represented. On the other hand, the openness and forthcoming responses from all interviewees yielded rich data with a number of consistently voiced concerns and some innovative strategies to address them.

Interview in Alice Springs at the home of a former interpreter

Int1 is a multilingual central-Australian woman whose work includes explaining legal issues to families in communities. *Int2* is an older multilingual woman from central Australia who used to work as an interpreter. She is a community leader holding a senior position in a national Indigenous body. *MC* (the present author) is the interviewer.

The recording began with *Int1* recounting the difficulty of providing cultural information to outsiders without specific authority. Subsequent discussion covered the following issues:

- Indigenous interpreters are required to observe customary law governing the form and style of language to be used with Indigenous clients as well as restrictions upon verbal communication in particular circumstances. Relevant considerations include ceremonial status, kinship position, age, gender and the topic of conversation.
- Interpreters may be blamed for the outcomes of court proceedings in which they work and as a consequence many are afraid to undertake legal interpreting.
- Community education about the role of an interpreter is urgently needed to correct misunderstandings and lawyers require training in cross-cultural awareness and communication.
- Interpreters must sometimes *explain* terms and concepts, and not just translate, if understanding is to occur.
- It's hard for young people to be interpreters because they don't yet have the required community standing and respect.

Int1: We went down to do family report. ... the court counsellor ... couldn't understand why young man have two wives. So I had to tell him it's either through men's ceremony or just through love, you know, they can have two wives.

And then I sort of thought, you know, have I got the right to say that, because [tribe X] people might get offended if I talk as a woman.

...

MC: Like you're speaking out of place because that's not your tribe?

Int1: No, [that] mob not my tribe ... they're different tribe ... but I'm just talking from my experience as an Aboriginal person ...

18. The Northern Territory Interpreter and Translator Service was established in 1986–87 to provide interpreting assistance in non-Indigenous languages.

Int2: And there's certain ways, as you get experience ... going through ceremonies, through law, the language changes about how you address certain people. And you have to then use that language whether you're interpreting inside a hospital or inside a court.

...

[T]he language is the most important thing and you learn that as you go through different ceremonies at different stages in your life. When you go through Aboriginal ceremonies [there are] certain ways that you talk to elders, certain ways that you talk to other people that are related to you through ceremonies.

...

Once you go through different stages of ceremonies, of law, there's different ways of addressing certain people inside your tribe.

...

(MC raised a separate matter of how language forms change when Aboriginal people address particular relatives, using the example of Yolngu languages where a man will use the more formal plural pronoun when addressing his sister.)¹⁹

Int2: Same in our language. When you talk to your elder brother you gotta speak differently, like you're addressing that one person. When you talk to your elder sister it's like you're talking to more than one person.

...

MC: But that's different from what you just said before about going through ... ceremony ...

Int2: That's different. That classifies how much power you have within the community like, I'll use this example: ... [My aunty's] daughter took my nephew in law (i.e. in marriage) so ... even though she's my first cousin, I can't talk to her as a cousin any more. So I have to talk to her in an avoidance way. I can still talk to her, but in a different language.

...

(Int1 and Int2 have a brief discussion in language together with other older women who are sitting close by about a recent instance of inappropriate communication between relatives in an avoidance relationship.)

MC: And when people drink, they forget it don't they?

Int2: There was an incident [where] we just went through law and within a couple of days, the person who wasn't supposed to speak to me come and just mentioned my name and [said] 'Give me money and give me cigarettes!' They just forget it.

Int1: That's what I always tell my kids, 'See those old men walking around here? These people law people, but you know what? They're losing it because alcohol is number one now.'

...

Avoidance relationship, you know, that's our law and they know that but through alcohol they forget it. So sometimes we've gotta remind them and shame them and tell them.

...

Int2: See, my daughter works at the hospital [and] I teach her all the things ... She might ring me up or she'll come home and say, 'So-and-so's in hospital'. I say, 'Well that person relates to us in this way and there's certain ways that you as a young person, a young Aboriginal person, you use a different language to that person because if you use the common language it's offensive to that person because, you know, that person's an elder.'

MC: So if you're interpreting in court you have to follow those same rules too, don't you?

Int2: Yes, Yes.

MC: So that also brings up the problem of ... working as an interpreter for someone you call brother; it mightn't be your full brother but someone you call brother. If it's about break-and-enter or something easy, and you are a woman, maybe you can do it—

Int2: —You can do it, but not rape and things like that. No way! Nothing! Rape and things like that should be left to men ...

I used to do a lot of interpreting in my early stages, you know, because I got NAATI certificate ... and I used to do a lot of interpreting out at [community X] and in courts here when I first started. And I used to completely refuse to do any rape cases with men. I used to say, 'No, I'd prefer it if you go and get a man interpreter for that man.' Because it's just not culturally appropriate for a woman to be interpreting in that situation.

...

MC: When an interpreter is blamed for taking sides, how does that come about?

19. It is important to bear in mind that for Aboriginal people, the term *brother* or *sister* refers not only to biological siblings but to certain cousins and certain other blood relatives, and others in classificatory brother/sister relationships (e.g. through the subsection or 'skin' system).

Int2: ... I'll use an example that happened many, many years ago ... a whitefella was the interpreter ... but right up till this day, because the bloke is still alive – I mean he's come out of jail after he got convicted – he still blames [the interpreter] for putting him in jail, and he was a white man.

And I refused to do that case because the family is still blaming people for putting you in and ... if the court finds no evidence and dismisses that case and that person goes free, you're still blamed for allowing that person to go free.

MC: So if you're not blamed by one side—

Int2: —That's right, you're blamed by the other.

MC: So what's the solution to that? How can we get around it?

Int2: I think ... the important thing is to educate people that interpreters are there just to make the thing easier for the victim or for [people who are] going through court ... I think that the hardest part is that people just don't understand what the interpreter's real role is.

MC: Would it help if the judge or magistrate, when an interpreter is being used ... introduced the interpreter to everybody there so that everybody can hear, and explain what the role of the interpreter is, that they're there just in the middle and they're not on this side or not on that side?

Int2: That's right. They're not on neither side; they're not sticking up for people. They are there just to explain to the judge what the person is saying and to that person what the judge is saying.

MC: So that might help if the judge or magistrate did that every time?

Int2: Oh, absolutely. Because definitely the role of the interpreter is just not understood widely by Aboriginal people. You know. They think they're there ... (*Int2* briefly discusses the blaming issue in language with other women present) ... and then they have a fight, see?

That's why you get a lot of people, community people, too scared to do that kind of stuff, and especially court. You know, if you approach them they'll say 'No way! I don't want to be blamed for something.'

I know I gave up interpreting because of all that stuff.

...

MC: What about interpreting in the police station, is that the same problem?

Int2: No! Police station [is all] right, you know, when they taking kids in, they just go and pick up family and stuff to help them. That's all right but, you know, court ... important things like murder or rape or something: too big!

...

MC: When did you make the decision to stop?

Int2: Oh, I stopped doing court interpreting years ago.

MC: Had you had one experience that made you stop or was it just time after time.

Int2: Oh just time after time you know ... like going back and people saying, 'What happened?' They just didn't really understand what the interpreter's role was, and I just got sick of sort of being blamed, you know, for allowing people to go free or putting people in.

MC: Do you find that people refuse to—

Int2: —I'm telling you! People are absolutely scared in communities. If they go up and they get asked to go and interpret in court – Wiya, wiya! They'll say 'No, no, no!' They'll blame (i.e. nominate) someone else.

MC: ... If everybody refuses, then what do they do? Do they get someone else ... somebody from out of town?

Int2: Yeah.

...

Int1: Some people will tell you, you know, they prefer someone outside.

Int2: That's right.

...

MC: You've talked about education, the importance of education, so people understand the role of an interpreter; do you also mean community education about that?

Int2: Yeah ... educating the community to understand the role of the interpreter.

MC: How could that be done?

Int2: ... Most communities nowadays have [community broadcasting] systems where they've got one hour live broadcast ... You could get someone to talk about those issues.

...

MC: When you realise that most Aboriginal interpreters know personally, and are family to, the people they are interpreting for, it puts them in a really hard position, because that witness will talk to them like family.

Int2: Yes.

MC: They won't talk to them like an interpreter?

Int2: No.

...

Int1: So sometimes I think people gotta be cautious of who they use as interpreters too.

Int2: That's right.

Int1: Not just get someone because they understand the language and [are] good at English and able to do the job. You have to have—

Int2: —Trust in that person too.

Int1: Yeah. Yeah.

...

Int2: ... We had an incident where ... the police were using ... a police aide to interpret ... and he wasn't even doing a good job ... because he was just telling the judge and the police what he thought, his personal opinion ... because he worked for the police.

MC: Well he's got a conflict of interest: he can't be impartial if he's a police aide.

Int1: So they are the sort of things our people gotta be educated in, you know? ... They're the community education things that have got to come out.

...

Int2: But the police are really cunning, I'm telling you! They ask the same question five different ways, and they don't get five different straight answers, because, you know, you just don't use that kind of language (i.e. discourse) in our language.

Int1: That's the hardest part – trying to find a language word that will fit an English word, so sometimes we've got to tell it like a story so people understand it.

MC: You can't just interpret word for word?

Int1: Yeah. That's the most important thing.

Int2: That's not interpreting because in our language you have to go around to get to it.

Int1: You have to sit down and try and tell the story, you know? Get all of the missing things out of it, out of that story, to get the whole picture.

Int2: And to get to that one word you might have to use a whole paragraph to get the meaning of that word.

MC: Yeah, well that introduces another problem because then sometimes the lawyer will say, 'Hey, what's going on here?—

Int2: —You're going too far.'

MC: Yeah – 'You're doing too much because I just asked you a simple question'—

Int2: —That's right, 'that needed a yes-or-no answer'. But there's no yes-or-no answer in our language.

Int1: We gotta explain it a different way to them.

Int2: You going to get that person in big trouble if they say yes or no, either way, because the question is, um, what they call it?

MC: Ambiguous?

Int2: That's right, yeah.

Int1: And the other thing too, because English is a third or fourth language for our people and they don't understand it and we have to tell it to them like a story ... to explain what this white person wants, you know, what answer they want.

So ... when you're talking about education, it's not just about educating Indigenous people; educating the white people too, how they set their questions.

...

MC: To be an interpreter do you think it's harder to be man or woman or harder to be young?

Int2: I reckon woman and being young—

MC: —Is hardest?

Int2: Yeah.

...

Int1: Our men can sometimes turn on us too.

Int2: That's right because ... you don't know whether that person has just come out of bush camp (i.e. ceremony) or things like that and you can't talk to them.

...

Int1: We might not know too much about that person, you know? Even though we're neutral people and can speak the language ... we gotta get a bit of background too about people.

MC: Why is that, why do you need the background about them?

Int2: Especially, you know like if they've just come out of ceremony and stuff: you know, they shouldn't even be near women ...

MC: And why do you think it's harder for young people: because they don't have the respect?

Int2: Well they don't have the standing in the community.

Int1: You gotta have that respect from people in the community, you know, have some sort of authority to be able to speak. Like we say ... young people, they can gain that by learning, you know, discipline, respecting ... It's like going to school: you learning as you go along. And you're gaining that respect from people in the community.

...

MC: What sort of education do you think the legal people need?

...

Int1: They need cross-culture. That's number one. If they are dealing with Indigenous people, black Australians, then they need cross-cultural awareness, number one. And not just to go and do training for five minutes [but] to understand and acknowledge and respect our ways.

...

And just because we're all Aboriginal people doesn't mean we all speak the same language. We've got different practices; all that too, [and] variations in culture.

...

(The discussion then turned to looking at contrasting completely different funeral ceremonial practices in the Central Australian communities compared with Arnhem Land.)

Int1: It's taboo to see a dead person in our way ... see they do dances and that up that way, you know, the widow dance and all that, aye? – which is different to our way.

Int2: See, they can't even have a look at the coffin – the widow's gotta be covered up even at the church. And in [tribe X] and [tribe Y] way the widow and her relatives are not even allowed to go to the church ... Early in the morning before that body gets flown in they have to go out bush and stay out bush until after the burial.

...

Int2: In [tribe Z] culture, it's different again: after we come out of the church the coffin is there. We've gotta go and place our hand on the coffin.

Police officer discussing interpreter intimidation and interviewing procedures

This story of intimidation of a female interpreter by a male suspect is reported by an Alice Springs police sergeant (*P1*) during discussion with a middle-aged multilingual female interpreter (*Int3*) from the Tennant Creek region, and *MC*. *Int3* also raises the value of the presence of a prisoner's friend as witness to the interpreter's impartiality.

P1: We arrested a person at [community X] for grievous harm. We transported the person to Alice Springs because the offence of grievous harm carries in excess of seven years imprisonment so we needed videotaping facilities and audio-taping. The only place they're available is in Alice Springs – so we transported the prisoner to Alice Springs ...

We then had the conversation with the person ... It became apparent to us that they needed an interpreter. We obtained the interpreter through the Aboriginal Interpreter Service and she came into the police station. Half way through ... the interview we were conducting in relation to the grievous harm matter, there was a short exchange between the suspect and the interpreter and the interpreter asked to leave the room.

We suspended the interview; we took the interpreter out. She told us that he had threatened her and told her that if she assisted the police any further that there would be repercussions to her family and she felt as though she couldn't go on. We had to suspend the interview at that point and allow her to leave.

We then had to make arrangements to get another interpreter to come in, which took some considerable time ... That interpreter came in and was a male interpreter ... We recommenced the interview with the new interpreter and we found from that point on that—how could you say it?—the tone of the interview was totally different.

It was quite obvious to us that the suspect had been intimidating the interpreter from the very beginning. She, I understand, later resigned as an interpreter. She wouldn't continue any further. The experience really shook her up.

...

What we now do, now as a matter of protocol, when we book the interpreter through the AIS we tell them who the suspect person is so that when the administrative part of the interpreter service goes to get the interpreter, they can say who this person is and the interpreter can refuse on the basis that they are a close relative or someone who they can't culturally be involved with, or a person they feel uncomfortable being involved with.

(This excerpt follows directly on. In the context of a Police Record of Interview (ROI), *Int3* suggests that a prisoner's friend may give protection to the interpreter against subsequent accusations of bias. *MC* then followed this up by asking *P1* whether the interpreter's role is specifically explained during ROIs.)

Int3: With the prisoner's friend as well, because if that person [is] in with the interpreter – at least that prisoner's friend know what we saying. Because when we go back home and that prisoner *don't have to say* (i.e. *mustn't/can't say*)²⁰ ... 'She or he put me in there because she was on the police side' ... because that prisoner's friend either can be family or they can go back and tell them ... I wasn't taking sides. I was just there to let them know what you (*Int1* is addressing *P1*) were saying and let you know what they were saying so you two can understand each other.

...

If you get the prisoner's friend who speaks the same language they'll understand where you coming from.

...

MC: Is it the case that in the record of interview ... the interpreter is asked to explain her role to the prisoner so that the prisoner understands what the interpreter's role is?

P1: Yeah, we will say to the interpreter: 'Can you please tell the suspect that you are an interpreter and your only role is to tell the police what it is he or she is saying' ... We usually say something like: 'You're not there to give advice. You're simply there to translate his words from whatever language it is into English language and English language into his language.'

Avoiding blame: get someone from another community

This discussion took place during a training session for legal interpreters that I was conducting in Alice Springs. *Int1*, a guest speaker, explains the need to sometimes use an interpreter who is distant from the community where Indigenous parties to legal proceedings come from. Also, as in the discussion with *Int1* above, *Int1* emphasises that interpreting may involve the need to explain and not just translate. *T1* is a non-Indigenous interpreter trainer from Alice Springs.

Int1's professional role includes providing advice to Indigenous families involved in family law issues. This work may take her to communities whose language she does not speak and so she herself must sometimes engage an interpreter.

Int1: When they're interpreting it would be expected that he favours this family here because he knows this family ... And then the other family feels like, you know, they're being left out and there's um – what do you call it?

MC: Conflict of interest?

Int1: Yeah, conflict of interest then—that's the white man's term—because he comes from the community.

...

20. In some AE varieties and in Aboriginal Learner's English, *don't have to* means *must not*.

It's not so bad taking an interpreter from here (i.e. Alice Springs) down there because that interpreter don't live there and we have to explain the role of the interpreter – like, you know: 'This person is a neutral person, even though this person might have family ties in these communities or with some of the people. But it's important for you mob to understand – this interpreter is coming from Alice Springs so [there's no need to] use someone from your community who knows all about that business.'

It's best to get somebody to come from outside; to come in and just interpret and be neutral on both sides.

T1: So in that situation there would be yourself and the interpreter, and then the family, and you'd be explaining all that to the interpreter ... and the interpreter says exactly what you say to the family?

Int1: Well that's another tricky thing about interpreting. When we do interpreting there's sometimes words, these legal words, that may mean nothing to us in our language. So we've got to tell it like a story, so that people understand or get the gist of ... what this business is all about. So sometimes it's really hard to use legal words too when we're interpreting; so we've got to tell it like a story, to get the story right and to do it right.

Discussion held with interpreters at Alice Springs Magistrates' Court

This interview was recorded inside the courthouse at Alice Springs in a room that is set aside as a 'home room' for use by Indigenous interpreters between their interpreting assignments. The three interpreters (*Int3*, *Int4* and *Int5*) are all experienced legal interpreters. I began the interview by asking about significant challenges for Indigenous interpreters. Discussion tracked through the following matters:

- the challenge of remaining detached and objective when interpreting for relatives;
- going through ceremony to gain endorsement and protection as *an interpreter*;
- community disharmony increased where customary law is prevented from operating because of the precedence of the criminal justice process;
- misunderstanding the role of an interpreter as a mediator;
- the effect of an interpreter's gender and age and kinship position relative to a client;
- interpreting in sexual matters; and
- the utility of non-Indigenous interpreters.

Int4: The hardest thing for me ... has been to stay objective and detached where, say, you came from a clan of a thousand people or eight hundred people. Everyone of those are involved with your day-to-day life ... because you are a cog in that wheel, the whole of that wheel that's the community.

The hardest thing has been to stay, as I said, detached and be objective in interpreting. The pains are great, the emotional stress is great and one of the things that we [need] ... is a place where we can debrief ... and it really is difficult because emotionally, you are involved.

The other thing that is peculiar to our traditional customary practice is that older people are to be utilised rather than the younger people ... as interpreters ... [*Int5*], from her community, has the trust, the blessing and the authority, and that goes for me as well.

Lately, because I have taken on interpreting for the Northeast and especially [Community X], [Community Y], [Community Z] and further ... the old people felt I had to be put through a ceremony to receive my shield, my coolamon, with my story and the poison story as well: the story that gives me real authority to be able to speak. [At Community X], my uncles put me through ceremony. I have to go back into ceremonies this summer, hopefully after Christmas.

...

And that was quite a big step in your personal life but it also puts the onus and responsibility on you and it's incredible how laden you feel. You feel as though the whole world is on your shoulders.

MC: What kind of experience makes you feel like that?

Int4: I think experiences where there has been homicide. Homicide usually—well according to customary law—that person was brought into the middle there if it happened, and that person did not flee, he didn't run away after committing that.

Usually people who accidentally kill other people, with alcohol or whatever, they'll say, 'I have done the wrong thing ... I'm guilty!' And they present themselves at the community level; they sit down. And the procedures of sorry business or payback starts then.

Payback to me is a horrible word. It's not payback, it's atonement for your action. Like you go to confessional in the Catholic Church and you say, 'Forgive me, Father, for I have sinned'. It is exactly the same thing only it involves the whole of the clan or group. It might even involve another clan group.

But with us the frustration is—like with the Aboriginal community—is police come and remove that person. And he's put in custody to await trial.

So usually the old people come in and say, 'We've got to have that person' because he has brought disharmony to maybe a thousand people, maybe two thousand people. [They say:] 'Can you please, tell judge or whoever, that we've got to have that person back to cleanse that; then they can have him.'

MC: So are they asking you because you're an interpreter and they know that you go to the courts a lot? So that they think that your role is—

Int4: —Mediator.

...

MC: So what do you do when they think you are a mediator [while] you know that really you are there just to do the communication between those two sides?

Int4: Well, usually, the accused will ask—from my area and from my experience—he will ask, through the interpreter, the lawyer, if he can be released on bail to face his obligations under customary law. Then they can do whatever they want with his body.

The first thing an Aboriginal person from my community will ask is to face [the community] and to clean up and then come back into jail.

...

Everyday things, you also find you've got to correct people. They'll say, 'You'll fix this for me'. And we've got to make that clear line that, 'No, no, no – I'm the voice of you when you talk to me in your language and then when that whitefella talk, that white person talk, then I put his word into our language. And I'm just the invisible one'—that's the ideal—I'm not your lawyer!

Int5: I've often said that too ... Sometimes they come and shake my hand, and they offer us money. [We say:] 'We can't have money.'

...

Sometimes when we go down there, they can't understand, especially the old people, you know ... I've had a couple from west there and I've sat them down, you know, talking over and over to them so they can really understand what I'm about, you know. And what the lawyer is about.

MC: Both of you, do you think that being older helps you as interpreters? Do you think that if you were young, say in your twenties, that you would be having a hard time?

Int4: I definitely would be – I say that without any hesitation because I wouldn't have the authority from the people that I'm interpreting for. If I am younger, I would not be able to do some of the rape cases. If I was younger, I would not be able to do the murder cases, the homicides. I would have to keep it [to] just petty things: drink driving and things like that.

...

[Even] if I was a brilliant interpreter, I would not have respect from those back there [in my community] if I was doing that kind of thing. Unlike, I guess, the dominant culture which is the European culture here. With age [for us] comes respect and protection as well.

...

MC: What I was interested in was in the cases like domestic violence or rape or something where ... they have to start talking about the real detail, how do you go then if you're interpreting?

Int4: I do very well because, at my age, I am considered by my traditional group to be almost genderless. I am no longer a young woman. I have had men who have committed rape. I have had men who have violated their own daughter who was under-aged. And I've talked to them. And I've talked to them in such a way that they did not feel uncomfortable.

I have had a nephew who was charged with rape and when it got down to the real nitty-gritty, I, because I am an older person, have said: 'Now Nephew, he's gonna ask you about how you did it to that girl. Now if you want me to sit here and help you, I will. But if you want to tell him—because you got enough English there—you can, and then you can call me back. You do it with your lawyer. You can talk to him.'

So it's up to the interpreter also to use discretion and also for the interpreter to be aware of protocols within his or her traditional social behaviour.

- MC: What about if that man is like a relation that's normally an avoidance relationship—say he's a man you might call *brother*—what do you do then?
- Int4: I have talked with brothers because I am usually the older sister. I am able to do it, to interpret for him. But also, knowing my language, [it] doesn't have the sordidness that English has got ... You put it another way.
- ...
- MC: (addressing Int3) You wouldn't interpret for a brother under any circumstances, is that what you just said?
- Int3: If it's a rape ... a female interpreter can't interpret for male.
- I mean you can go if ... you've got a female that has been raped ... yes, fine. But in that skin system also you gotta be careful who you're talking about.
- ...
- (At this point, MC raises the issue of a special male/female kinship category which may be designated a 'teasing relationship' where sexually explicit banter is a feature (while actual sexual contact may not be) and asks Int3 if she could interpret for a man in that kinship relationship with her.)
- Int3: In brother-in-laws you can tease and that.
- MC: For someone in that relationship, could you interpret for them, if they were in trouble for rape?
- Int3: All depends if that male asks for you. It all depends. Sometimes it is very, very hard ... in our culture, even if it's a grandson.
- Int4: But I can't relate being a 30 or 40 year old – I can't put myself in a picture where I could have interpreted for men here ... I couldn't interpret for men in that situation if I was a younger person.
- The ones who teach you how to flirt, how to talk dirty, and all that, are to us ... we call that one our *aperwl* – that's your husband line ... If I were to talk dirty to him, whether he is a 16 or 17 year old ... I can. I can say, 'I'm going to run away with you! I want young husband now!' ... That's that one now.
- Int3: Yeah we all do that.
- Int4: ... My paternal grandmother's brother line. 'Though I used to think they were filthy old men when I was sixteen, but they taught you how to protect yourself, how to ... talk back and how to be cheeky ... That's part of our training.
- ...
- To be a good interpreter also, you have got to be so steeped in your own law, in your blackness, before you can make sense in that court. Because people will say a different philosophy; it's so different. People will say things that a white person wanted to hear, and it's not necessarily what he really means.

Legal Aid lawyer reports community objections to use of interpreters

This is an excerpt from a discussion involving a Legal Aid lawyer (L1), Int3 and MC where L1 reports an occasion where a community objected to the use of interpreters in a criminal case; and where Int3 stated the need, on occasion, to use non-Indigenous interpreters.

- L1: There can be a funny perception within the communities for interpreters. We recently had an unlawful death in Alice Springs: someone was murdered – or killed. There was a number of people arrested; about four people were arrested. There was a big meeting out at [Community X] and then someone rang up our senior lawyer at [Legal Aid] and he said, representing [Community X], he said, 'Look, we had a big meeting out here in relation to those people that have been charged and the outcome of the meeting is we don't want any interpreters involved.' And we don't know why.
- Int3: That's the reason why.
- MC: What's the reason why?
- Int3: ... They're probably thinking that interpreters might put words into those people's mouth ... They might think you're adding on something to help with that person to get out.
- L1: That seems to be a common perception, which is unfortunate.
- ...
- (Int3 initiated a discussion about using non-Indigenous interpreters.)
- Int3: But on the other hand, you know, like for, because of conflict of interest and all that. You know like, which is good to have people like *Kwementyay* now (referring to MC) – he talk in Top End language and for [person X] that talks Warlumpungu, and for her other half ... he speak Warlumpunpa, which is good and I think he also speak Warlpiri. You know if you can't get anyone in, maybe if that person don't understand, maybe you can

get a European person to talk because them mob can't say nothing. Because they know he's a whitefella; he won't take sides. He'll be in the middle ... You know what I mean?

MC: Yes sometimes I've been in the situation where I've been asked to be the interpreter, not because I've got better language skills but because I'm a white person and from outside the community.

Int3: Mm. That's what I'm saying.

Perspectives from Arnhem Land

This is a discussion recorded with a group of five Yolngu (*Int6*, *Int8*, *Int9*, *Int10* and *Int11*) from NE Arnhem Land communities who were preparing to sit for their NAATI interpreter accreditation examination (three are already experienced interpreters). Also present were: *IS1*, an officer of the Northern Territory Interpreter and Translation Service, and *Int7*, a bilingual non-Indigenous doctor who was also seeking interpreter accreditation.

This was a wide-ranging discussion which explored the following issues in some depth:

- attributes required for community acceptance and recognition of Indigenous interpreters;
- dangers and pressures facing Indigenous interpreters; and
- strategies for protecting Indigenous interpreters, including educating communities about the interpreter's role.

First to be addressed was the matter of who is a desirable interpreter. *Int6* comes from the position that everyone is related, 'like a map', so an interpreter is needed who is respected by both sides in a dispute to prevent exacerbation of discord. Her example was the case of a restraining order, which tends to raise conflict between families of the parties involved:

Int6: Because in the community everyone is in the ... kinship system. Everyone is related. It's like a map ... Everyone is related through that system. So if something like that happens (i.e. a restraining order application), it's like ... cutting a line of division of both families ... It's very hard because the other family doesn't relate to the other one properly.

MC: Does that involve an interpreter sometimes?

Int6: It does, sometimes, yeah.

MC: How does it involve an interpreter?

Int6: Have to get someone who's respected in the community – ... where the person is coming from (i.e. understands) the background [of] what their family issues are. And often they have misunderstandings about why that person is representing the person but, that's how they think.

MC: So you are saying that they misunderstand the role of the interpreter.

Int6: Yes.

MC: Are you also saying it's better to have an older person as an interpreter in that situation?

Int6: Yes, I think so.

MC: And is it better to have somebody who is connected to the families or someone who is separate from the families?

Int6: Well I can't say (i.e. answer) that because everyone's related.

MC: Yes, but you know how you can be closely related or—

Int6: —Someone who is a good model in the community, who is someone we can look up to, an elder, someone to trust.

MC: Even as an interpreter between the ... whitefella and the Aboriginal person?

Int6: Mm.

MC: Well that's interesting because that shows that you don't see the interpreter in the same way as ... Europeans see the interpreter, because the Europeans see the interpreter as completely separate – just like a machine ... but you see the interpreter as ... having some larger role—

Int6: —Someone who is more, um, looking at both sides really, balancing the both, both cultures.

...

Int7: So, if you're going to court ... then the interpreter who goes to court has to be a special person?

- Int6:** Not more (inaudible) special but someone who understands both systems, you know? ... Even when they have arguments afterwards, they would say, 'No, *this* is how that law goes in the western side and *this* is our law'.
- MC:** I see, so you're talking now about cultural broker—
- Int8:** (*Int8 is a younger woman who speaks partly in her language, partly in English. Her contributions have been translated as required.*)
— If you got me as an interpreter [in my community] or somewhere else, they would regard me and say, 'Who is this? She not a recognised person.'
- Int6:** Because often there's people who goes as interpreter, but she's not respected in the community.
- Int8:** Also an interpreter is not respected. Here in Darwin you people recognise my role as an interpreter because I have a certificate. When I'm out there in my own community, and family, sometimes they reject me and leave me out.
- ... (*Discussion then turned to the question whether an interpreter is seen by Yolngu as a mediator. MC explained the technical differences between these roles and then asked whether the two roles should be distinguished in practice.*)
- MC:** ... Can you have the one person doing the two jobs [of mediator and interpreter] or do you want two people doing the jobs separately?
- Int8:** Probably the Yolngu see the two jobs together: mediator and interpreter. They seek someone who has strong language and someone who is recognised under our law. Someone who is recognised in the community.
- ...
- Int9:** In this case [of the] restraining order ... using a ... [sacred] proclamation, that would be good, if she is under restraining order, so the husband could not go near her – under the Yolngu system. So one who has the knowledge of Yolngu *rom* (law) and one who understands *balanda* (European) *rom* together—
- Int8:** —So they can use the two laws together in that area.
- ...
- MC:** ... Are there any other situations where the interpreter is in a hard place?
- ...
- Int8:** In the situation of avoidance relationships—
- Int6:** —And dialects.
- MC:** So when people speak different dialects there can be some confusion.
- Int8:** Sometimes the dialects are pushing against each other – when people are speaking in different dialects.
- Int10:** And also our accents.
- ...
- MC:** What about the age of the interpreter and the gender ... and whether the interpreter is Aboriginal or non-Aboriginal? ... In the community, when people are looking at interpreters what do they have in their mind?
- Int9:** They (the Aboriginal client) should ring up and inquire ... they should tell the interpreters—the main office— 'I want an Aboriginal woman about the age of – ' because they might think she's got more knowledge of both sides, or they might want someone younger.
- ...
- Int6:** Someone middle aged ... and someone who has got that understanding and cultural background.
- ...
- Int10:** How do we achieve recognition in our community if we are interpreters? That's my question ... Because there's a lot of interpreters out there, through to Bible translators—they're all interpreters—as well as us here ... How will the picture be carried onto communities throughout central and east Arnhem Land?
- MC:** That's a very good question. So what ideas do you have?
- Int9:** Let the person go through the thing and let them be the judge.
- MC:** Let the interpreter be tested ... and let the community be the judge?
- Int9:** Mm.

Int11: Yes.

Int10: Because we're looking at murder, child abuse, sexual assault, lots of things.

Int6: And everything is connected through the kinship system – and if you are not recognised, there's big trouble.

Int10: It's up to us to explain ourselves to the community and tell them what the role is for us.

MC: And when do you do that talking and how do you do that talking? Do you get up on the community loudspeaker? Do you talk to the people in the court, or to the families?

Int6: To the families. Go and tell the family what our role is so they understand. But there's other things beyond that point. For example, with a big crime it's a really complex situation where something happens and everyone is affected.

...

And then, if the interpreter is interpreting that story from someone else the outside community will say, 'Okay, she knows the information now'. And they turn around and point (i.e. accuse) her or him who is doing the interpreting.

MC: And what do they say about that person?

Int6: Well, it's not saying, sometimes actions and sometimes something happens.

MC: For example?

Int6: Murders, killing, arguing. Attacking through sorcery. And that's a big thing, that people doesn't want to do it.

MC: ... Why would they blame her just because she's heard the information?

Int6: Because of other issues that's happened before.

MC: I see – they might think of family history?

Int6: Mm.

MC: And how the interpreter is related to those other people?

Int6: Mm.

MC: So are there times when ... people in the community prefer to see a non-Yolngu interpreter?

Int6: ... And that's when they make a decision, 'Okay, I'll move away and let someone step in who is not Yolngu, not of this community.'

...

(MC cited a court case in Alice Springs involving a serious crime where no local Aboriginal interpreter could do the job and so another Aboriginal interpreter, who spoke the language concerned as a second language, was brought down from Tennant Creek. MC asked the group if, in the case of serious crime, it would be okay to deploy a Yolngu interpreter from another community.)

MC: So sometimes, for example if there is big trouble at [Community X], it might be better for an interpreter to come from another community ... That's my question.

Int6: He could, only if it's someone fighting or something happened or accident but not big – not for murder.

...

Int8: There is fear around.

...

MC: ... Do you see that it's sometimes needed to have a [non-Aboriginal] interpreter?

Int10: That's good, we need non-Aboriginal interpreters for Yolngu—

Int9: —To protect us from what the families might think – in the wrong way

...

(For a minute or so, there was animated discussion with several people talking at once in Yolngu languages about how Yolngu interpreters might be protected. MC recounted the story given by Int4 in Alice Springs about her going through a ceremony in her community that was like her shield of protection. The consensus in this group was that the community should give their approval for interpreters in recognition of their language skills and professionalism.)

MC: How do we get that agreement from the community, what steps do we take?

...

(Again, there was overlapping discussion, with a number of clear points coming through:

Int8: Approach the community council to organise a council meeting and then a community meeting to have the issue discussed;

- Int10:** All names of Yolngu accredited interpreters should be presented and accompanied with an explanation of the training they have been through;
- Int8:** Teach them so that in the future they won't look at us and ask, 'What are you doing and what is your work?' (*Int11:*) 'So they don't accuse us of telling stories when we are working.' (*Int8:*) 'The first thing on people's mind is that we are telling false stories'.)
- MC:** Okay that's one kind approach. What about another kind of approach like when court's on ... bush court. What should happen then, before the court case? ... How can we get people to recognise what your role is?
- Int9:** Victim's family or accused's family—
- Int6:** —Get the family together and go and get the interpreter and tell them she or he is here to help interpret and what is the role of the interpreter.
- MC:** ... [*Int6*]'s suggestion was go and see ... the families involved. Who is that someone?
- Int6:** A lawyer and with the person, the interpreter, go and see the family.
- ...
- IS1:** That sounds good [because] it's not just the interpreter saying, 'I am the interpreter', because sometimes that doesn't work; but everybody there meeting with the lawyer, with the family and interpreter there ...
- Int9:** That covers the immediate family or the extended [family] and later, when the court opens, probably give one or two minutes just to let everybody in the court know, what the role of the interpreter is, so they don't get misunderstanding.
- MC:** And who should give that information?
- Int9:** The lawyer, defence lawyer, prosecutor, magistrate.
- ... (This provoked overlapping discussion with the point being made that the defence lawyer and prosecutor are adversaries. All then agreed that the magistrate should give this information.)
- Int9:** What happens ... if anything happens to the interpreters, what happens then? Like if someone gets up from family and starts throwing stones or saying something bad. Where do we go? What do we do? Do we get any protection from the court?
- ...
- MC:** Yeah I see what you mean, and that has happened before ...
- ...
- Int6:** And once that happens, the conflict is in the family system, in the community, and then the new generation grow up and it carries on.
- ...
- MC:** Do you know anybody who doesn't like to or refuses to do legal work or police or court work because they are frightened?
- Int6:** A lot of people don't want to do legal work.
- Int10:** I would only do interpreting for shoplifting and minor offences.
- Int6:** There is a difficulty with time. In health work you have time to think about going from ... English into Yolngu. And they get frightened because on this side (i.e. legal work) ... we have to do it quickly.
- MC:** A lot of interpreters prefer to do hospital work or health work ... and I want to know what the problem is with court work. Is the problem—what you just said now—that it's actually harder – you need more skill, because there's more pressure and so on, or is the problem that people are frightened? ...
- Int9:** One is to the standard English ... academic or legal words; they are probably frightened to stop and say, 'What's the meaning of this word?'. The other one is family conflict.
- Int11:** (Translated from Yolngu language:) And even if the interpreter knows the academic words that will be used in the court, he/she could be there in court and the lawyer could say something for the interpreter to translate to the client and the interpreter might make a mistake and the people in the court will hear him/her and someone will say, 'What is he/she, stupid?'.
- MC:** So, fear of shame, of making a mistake in public—
- Int8:** —Or criticism ...
- Int6:** But even when that Yolngu interpreter has learnt a lot of skills, still that he or she is scared, inside. 'Cause he or she is thinking about the family, what's going to happen later.

MC: So do you know of anybody who's been a court interpreter or a police interpreter and who's then said no more ...

Int6: Yes, my brother did. He used to be an interpreter and he worked at Legal Aid here, and he just finished ... It's Yolngu politics.

MC: ... You know this confidentiality rule that you're not allowed to tell what happened? Is that also a problem that some Yolngu think that that interpreter is spreading stories around? ...

Int6: Mm, maybe. Some [information] can be pushed outside through the family way: Yolngu politics. Like we were saying the other day: policeman can't get information. I zip up my mouth, not say anything, and then the police will probably try another one ... and makes the person talk. Same on the Yolngu side.

MC: I see, you can force the story out—

Int6: —Force it out of my mouth!

Int8: And by making us hurt with accusations and challenging the interpreter to justify themselves by reporting what they said. And saying things like, 'Did your relative hurt that person?' ...

...

Int11: And even old stories will be forced out! Even if you stamp on the story with your foot it will still come out.

...

MC: And sorry, Sister, what was that?

Int9: [I would say]: 'I'm under oath and I won't tell anyone'—a [sacred] proclamation (i.e. in the Yolngu way)—through this path we can be assisted. Same like swearing on the Bible, that we won't tell. Like it's a [sacred/secret] story.

Perspectives of a non-Indigenous interpreter

Int12 grew up in a coastal Northern Territory Aboriginal community close to the Western Australian border and learned to speak one of the local languages. He later trained and worked as a lawyer but now, in his early thirties, works regularly as a legal interpreter.

The transcript begins with a recount of an occasion where some teenage boys requested him as an interpreter ahead of Indigenous female interpreters who were already on standby. The discussion covered matters including:

- factors affecting clients' choice of interpreter;
- the difficulty in remaining objective and dispassionate;
- an interpreter's age and ceremonial status in determining community acceptance; and
- the advantages of being a non-Indigenous interpreter.

Int12: [I've had experience of] being required to interpret where an Indigenous interpreter didn't want to [in] the situation ... where young boys at [Community X] ... were confronted with female interpreters who had been working all day at the court. And when they were asked if they wanted them to be interpreting for them, they didn't reply at all—just didn't say a word—clearly indicating that they didn't want that female interpreter working on their behalf. And then, when they were asked if they would like me to do the job, then that was fine. They just nodded their head and walked away from the female interpreter and I was brought in and the job went ahead absolutely fine.

MC: ... Was the issue, as far as the boys were concerned, that they were going to be talking about sexual issues?

Int12: No, no. These weren't sexual issues. These were even simple break-and-enter, stealing matters and [they] still didn't want the older female interpreter interpreting on their behalf – which I hadn't struck on occasions previously.

MC: You said female, but how do you know it's not that ... those interpreters were too close to the bone in terms of family relationships? ...

Int12: I don't know that for sure. I don't think that the interpreter concerned was too close in that sense. I think in some ways that the reputation that I have, the boys may have actually wanted me because they'd seen me working in court before; they'd heard me having a good reputation working with a lot of the older guys and so, 'No, we don't want so-and-so ... we want [Int12] to be interpreting for us in court. Yeah. I think that has a lot to do with it sometimes – people often ask for me before they will ask for the others, even though the others are there far more often ...

MC: ... Have you come across any conversations with any [interpreters] where this has come up ... where interpreters find themselves in an interesting or difficult or challenging situation – apart from the linguistics?

...

Int12: It's probably more been on the positive front where they've been involved in, say a court matter, and they've had relatives who will especially ask for them to do that job because they know them; they trust them. To me that then throws up another issue of whether ethically they really should be doing that because they are too close.

Others are, when people are interpreting in ... hospital and they've found it extremely difficult dealing with a situation where a relative of the person that they are interpreting for is dying and so they're dealing with that in a hospital scenario – just the emotional aspect of that fact that somebody's dying in front of you. Very, very difficult! And trying to stay independent, trying to stay impartial ... inside, all the emotions are churning away – they know both people involved. They're trying to do the interpreting on behalf of the Aboriginal people there and the doctor. They're sad, they're angry and they (i.e. the interpreters) perhaps in some instances don't understand what's actually going on until the entire interpreting scenario has unfolded ... because the doctors haven't given a briefing prior to the case taking place.

...

MC: Do you get any sense that it's easier to be an interpreter if you are older rather than younger? Do you see youth as a disadvantage?

Int12: Yeah, that's a really interesting question. The instant thought that popped into my head then was yes, I think there is a greater advantage being older. It seems ... to me that many people look on the older interpreters with more faith, more trust; that they actually deserve to be in that position, whereas the younger ones are still going through that stage of growing up, in effect. And just because we, as non-Indigenous people, look at somebody who is 25, 28, 30 and look at them as being a mature adult, in an Indigenous context ... 30 is nothing in some ways.

They seem to reach adulthood earlier than what we do but adulthood doesn't mean maturity. Adulthood doesn't mean being entrusted with things that require great respect and so interpreting, and dealing with legal matters and dealing with difficult medical matters – it would not surprise me to have somebody do interpreting training when they're in their mid-twenties or early thirties ... and in ten years' time be a sensational interpreter ... totally trustworthy, respected by the community, and do a fantastic job. I think the maturity side of things or the trusting and respect actually comes later, even though their version of adulthood would come earlier from a ceremonial point of view than what it does for us as non-Indigenous people.

MC: ... so Aboriginal people perhaps would think that this is not just about language skills – so what's the other part?

Int12: The other part is age and respect from the community—actually having knowledge 'Aboriginal way'—not just being able to mix in a non-Indigenous sense. So yeah, it is that – it comes back to the bicultural aspect of yes, being acceptable from a non-Indigenous point where all we are really concerned about is—okay, we're talking in a medical sense—being able to speak your own language properly, being able to speak English well, having a knowledge of the medical system and we're happy! We're away! We want to engage that person as an interpreter because we can talk to them in English – they understand the system that we want them to work in. But then the other side of it is, from an Indigenous community factor, having that person actually fit in from their cultural point of view. Are they entitled at their age or level of ceremony, to be talking about those things to certain people? Maybe with children they're able to, maybe with people younger than them they're able to, but are they able to do it at any other level?

...

MC: Does this need to have older interpreters indicate a misunderstanding of the role of the interpreter or a different view on the value of the office?

Int12: I think the potential need to have an older interpreter probably requires a different view of what the office entails; an understanding of what the office is. I think at times I'm preferred because, while I'm accepted as one of the community—I'm a part of the community at [Community X]—at appropriate times of their choosing I can step outside of the community as well. So I'm very much seen as independent, and in fact as an outsider in a sense because of the colour of my skin. But then at the other times that can switch off straight away and I'm back inside again. So in that sense I'm seen as independent and seen as outside of whatever rules there are. Other people may still be seen as within that and perhaps – perhaps at any time too close until they are reaching that older level.

...

I know that in some communities in Arnhem Land, from speaking to interpreters at the court, they still have extreme difficulty in saying, 'No, no, no! I'm not working for you against the police; I'm not working for the

police against you.' Maybe because of some of the work that I've done out at [Community X] over time and because I've done a fair bit of work in here for the younger boys, that doesn't seem to have been an issue out at [Community X] so much. I've never had anybody come up to me and say, 'Oh you're working for the police, aren't you?'.

I have in the one committal hearing, interpreted on behalf of the witnesses and then, even though I felt extremely uncomfortable at the time, walked straight outside and then explained to the defendants what was going on. A group of very, very tough, strong looking young fellows and for the first time ever as an interpreter I thought 'Hello, what is going to happen here? How are they going to view me?'—because I've just been interpreting some pretty heavy stuff—and they were totally fine: up close with me, talking, asking questions. Not a problem at all! And to me they really did seem to appreciate, they really appreciated the fact that I was totally independent and that I was simply helping people understand and communicate in the courtroom context, whether it was witnesses on behalf of the police, or for them as the defendants. They didn't have a problem with it at all. So for me the age part hasn't been a barrier but the fact that I'm white, I think has been more a positive than a negative.

Bringing that back then to community interpreters, I know, speaking to one of the interpreters at Alice Springs, the fact that she is an older interpreter—she's a very experienced interpreter—she is accepted very much so within her community and elsewhere. And, in fact, I was with great interest listening to her tell a story of how she went through a particular ceremony to indicate that she was now no longer considered to be either female or male—obviously she's female—but she was considered to be totally neutral, she was gender neutral. So people from her community, no matter what gender they were, were permitted to utilise her and she was permitted to act as an interpreter on their behalf, which then shows the importance that they put on that role and obviously her age and position. I found that stunning! I'd never heard anything like that before. Never! Really interesting.

Group discussion involving interpreters, candidates and trainers

Present at this discussion at the premises of the AIS in Darwin were: *Int13*, an experienced female Arnhem Land interpreter (who is also a NAATI examiner); *Int14*, a male candidate for an upcoming NAATI accreditation test; *T2*, coordinator of interpreter training for the AIS (he is also a lawyer); and *MC*.

MC opened by asking *Int13* to speak of the challenges she faces as an interpreter. Subsequent discussion included the following issues:

- the need for non-Indigenous users of interpreters to adequately brief interpreters and to explain their jargon;
- community perceptions of a legal interpreter as some kind of police officer or lawyer;
- a process for resolving an accusation that an interpreter put an Indigenous client into jail;
- the need for interpreter service representatives to visit communities and explain the interpreter's role;
- growing interest in a few communities in interpreting work;
- community wishes for legal professionals to undertake community based cross-cultural training and to learn about customary law;
- poor utilisation of interpreters by lawyers in taking instructions and advising clients;
- dealing with requests to interpret for close family or a person in an avoidance relationship;
- gender and age of interpreter in respect of the Indigenous client; and
- introducing the interpreter during court proceedings.

Int13: Last time when I was interpreting at the hospital I found it very hard that some doctors or the other health workers weren't listening to the interpreters ... when they come to see the patient. And they knew that there were some interpreters there, then they had to ignore us. They were being rude and they actually didn't give us a chance by, you know, they didn't wait for the interpreters to explain properly to the patients. And we didn't know what to do because, on our first assignments, like the first ... jobs, we were a bit nervous and there was no-one there to, sort of, encourage us.

But then each day when I went back to hospital ... I started realising that there was something wrong and I thought I have to see the people who work at the hospital, like Aboriginal liaison officers, and explain to them that what we finding here is very hard and it's not making us happy. And I felt really bad, especially for the patients. And at first it was a bit embarrassing that we were being ... ignored and it was like, being rude. They were being rude [by] not actually sitting with us and explaining exactly what these big words are. It's like they

just sit with you probably five, ten minutes and then just get up and walk away like they in a hurry – in a hurry to do something important.

And that's where it actually upsetted most of us. Even the patients knew that they were being mistreated, and they did tell us, but then we didn't know where to turn and who to explain to.

But then, four weeks later, we've had some people like coordinators and other Aboriginal liaison workers who actually cared for us, both the patient and the interpreters. They come up and sat with us and started telling us and explaining that if you have difficulty or a problem, just come and see us and we'll probably go see these people and tell them.

And that's where I started being strong. I thought for one interpreter like myself, I thought maybe ... I'm wasting my time looking for people because it's a big hospital and when you are looking for one person like Coordinator or someone who is looking after you, if you don't catch them because they [are] elsewhere. So I thought it's time I have to be strong. I have to stand up and just tell them myself. So one day I did practice on that. One of the Indian doctors came and was interviewing this patient and then he talks fast and I looked up and I said, 'Excuse me. I'm an interpreter; she's a patient. What I actually need to let you know is if you're a doctor and if you really want to help this patient, I think you need to help both of us. It's time I need to tell you that you need to explain to me clearly and simply because I've just started and I need to learn. There has to be some good communication between you, me and the patient. So, because if you're rushing around, running around, I might be giving the patient a wrong stories.'

... (Int13 now turns to speak of experiences as a legal interpreter.)

First time when I was in—this is another part now in legal service—when I was doing interpreting, I found it a bit hard too, you know. I think I made couple of mistake. I was being asked, 'You have to sit and wait here if (i.e. in case) someone needs you'. So, that's 'cause I didn't know and nobody told me what was I really supposed to do. So what I did was I just go up, sit down, and just stare at people going up and down – and couldn't get no information. So I sit down, and that's why I was being ignored. Then people say she must be here for court, you know, and without knowing that I'm an interpreter. That's because I made a ... mistake for not introducing myself to them. So, anyway, a couple of days later I was being encouraged – again I went back and I said 'Hey, look, I'm an interpreter. If you need me I'm waiting. The language is [X] and I'm for East Arnhem. So I sat down and this one lawyer come up and he said, 'Would you like to help me? I need an interpreter.'

I said, 'I'll be happy.' But then when we went to see this person, and ... I started interpreting, and this lawyer was a new person who had come all the way from, probably Sydney or Adelaide. He could not give me a chance. He could talk fast and look at the paper, just like this, quickly! And he said, 'How are you and what else do you want?' And then he just ignores me like I'm just a – his secretary or something, you know just sitting around there listening to him. And he couldn't use me as an interpreter for two days.

But then later when we come out I met the same lawyer and I said, 'Excuse me, Sir, but could I have a word with you?' So he said, 'Okay.' I said, 'Listen, if you need me next time, I have to remind you next time if I go with you, try not to read too fast because you might be giving false stories to the judge'. You know, I had to remind him. And he said, 'So what do you want me to do?' [I said] 'Maybe next time if I go with you, just have a look at the paper and ask questions and, you know, find out the cultural background where this person is and I'll probably interpret for you properly. We have to remind each other how to help each other. That way we can help this person in prison and he could probably give Judge the right stories.' So anyway, there was a bit of encouragement and we talked and talked and he said, 'That's a good idea. Look, I'm sorry, I didn't mean to be so rude but ... I was just in a hurry to do other things'.

I also did at the [court]. You know, I was sitting here (pointing) and there's a defendant, there's the judge and there's a lawyer. He's using ... bigger words. And then I was already told, 'Look, if it's difficult just raise your hand'.

So I did, I raised my hand. I said, 'Could you please, Lawyer, explain that in a simple English so as I can understand and I'll give this person a right story; I *don't have to* (this means *must not*) give him some wrong stories'.

So when we come out and I said, 'Could I see you, Lawyer?'.

He turned round: 'Okay. Yes what can I do for you?'.

'Look, if I'm sitting there, you have to look at me because I am Aboriginal and try to use simple words.'

So, I was only trying my best to stand up, to be confident, not causing trouble, but to be honest and tell them straight, how I feel and so I said to him, 'Look, if I was an Italian or a Greek you could use that word, but just look at me because I'm Aboriginal and try to use a simple English. That way I can understand'.

And so [he said], 'I'm really sorry', you know. And then later he realised. Then he said, 'I'm really sorry about it.' So that's how I find it hard sometimes [and] sometimes easy. It will actually help the lawyers themselves or the field officers if I remind them and explain. You know there's a lot of times I meet with the defendants, even if I'm interviewing I have to also explain about my role.

So, did that make a bit of sense there?

MC: Yeah, what you've explained fully, and it's been very interesting, is the problems you've had on the *Balanda* [European] side. Now just turn over to the Yolngu side and think of when you've had trouble, argument, complaint, uncomfortableness, when you've been frightened, or unhappy – or when you've been very happy –whatever—with the Yolngu side.

Int13: Okay. In Yolngu side, as I went on interpreting, people started looking at me as if – the community started looking at me as if—without understanding—they thought I was some kind of a police woman or a lawyer. What they didn't know, that I was only an interpreter.

...

And there was a bit of problem while interpreting at the legal service. I've had trouble from the communities. There was a confliction between me and the community. So I thought [that] I couldn't call the police or make complaint to the police. I did tell the interpreter service, 'Look, hey look! I'm involved because of this'.

And one time I did ask the interpreter service employees, 'Can one of you or two of you come with me to community and we'll probably talk to the community'. But then, I understood that they were a bit scared there could be trouble; you know, they could get involved. But then I thought, 'Oh well it's better for me to go over to the community and face the community themselves'.

So I went there in person, alone. It was a bit risky and it's dangerous to face people angry and who can blame you for, you know, when you're interpreting what the police, the lawyer (says) and this person goes to jail and you can get blamed for it.

MC: What were they blaming you for?

Int13: Well they thought I put this person in jail. There was a missed understanding. What they didn't know, I was only interpreting. So I got the blame by the family. They said, 'Okay it was [Int13] because she was there and she might have put this man in jail'.

MC: Did they look at the family history and is there some problem before, old problem between your family and their family? Were they looking at it that way, or—

Int13: —They did. They did. They looked at an old five-years-back problem which my father and his young brother made a mistake—not mistake—there was still a missed understanding in the community because my father, he was actually an honest man, and he always tried his best to help the community understand because he worked for the Council. Now there was an old death because they fought—my father and his brothers before—so anyway I had to go to the community and face the problem.

MC: Did you face the family. Was it a community meeting or family meeting?

Int13: I had to bring the family and the whole community to witness. Then because I had two other tribal people which was my father's family, they had to witness it and because they knew that old death what my father did. They knew that it was been settled already through cultural law. So I've settled [a] few things. So I thought is the only way I can face them.

MC: To prevent that sort of problem in the future, what can we do? ... What can the Aboriginal Interpreter Service do? What can I do as a trainer, or what can [T2] do as a trainer?

Int13: Well, as a trainer, sometimes it would be a good decision that we could have people like [T2] or someone to fly *bala* (to) community, visit the community and sit with few other peoples like, people like chairperson or president. But they more helpful, or like clan leaders. Speak to them, explain to them what the interpreter's job is and what the roles are. Yow. (Yes.)

And they mostly – they really understand about people these days and they can actually accept people like [T2] or many other lawyers; like in Yolngu customary law, when they look at Balanda come in, and they say, 'Okay, stop. No trouble. We'll have to show this person a lot of respect'. Just bring the whole community, sit down and we'll listen to this person, what they are going to explain. Yow.

MC: And do you think that over time, more and more people within the community are coming to understand what an interpreter really is or do you think they still misunderstand what the interpreter is?

Int13: Well actually, I spent three months in community [recently] and what I seen are people are really understanding and communicating now, and lots of community people are interested in doing interpreter work. A lot of them.

But in outstations I have found interpreters are being treated like we're lawyers. They think we are lawyers now. But I visited three outstations and publicly spoke to them that I am not a lawyer, but an interpreter and I am nobody's, on no-one's side. I'm just a public servant²¹ and I actually help interpret just to get the message across. And there was a lot of understanding these days and I've seen lots of people are now interested in doing interpreting these days. Even the older, older men are asking to do that job with some legal service like Legal Aid lawyers. They also ask, 'Okay, interpreting is good but can you also have those people come visit our community and do the cross-cultural [training]'. That's what they're crying out now, crying out for, is they rather have some lawyers and judges and everyone from city – welcome them and teach them the customary law and do cross-cultural.

MC: Which places have you heard that feeling expressed, where people have said that they're interested in having the cross-cultural side growing? Which places?

Int13: I've heard it at ... (*Int13* names four major NT coastal communities).

...

T2: Yeah I agree with a lot of what [*Int13*] has said – it is a problem. The feedback that you get from the communities is that there's a lot of pressure put on interpreters to do – fulfil other roles, other than what they are really there for, to be an interpreter, including to give some legal advice, to become almost, ah, a bit of a health expert because they've been working up at the hospital doing interpreting and because you've been working up at the hospital you must be – you must have medical expertise. So then you give advice on health matters, you know.

And there's been talk, particularly when we visit the Centre (Central Australia), about people being blamed for, you know, maybe supporting the prosecution if somebody is in court. I personally haven't seen any of that happen here in the Top End especially, and I'm not aware of it, but then obviously I wouldn't be aware of it because I don't have that, you know, the ramifications of what the community think of me. I just see people working but I don't see what happens when they go back to the community. But it appears just from my observations that it is, that it seems to be more of a problem around the Centre. I'm not saying that it doesn't exist here, it does, but it seems to be more prevalent in the Centre.

In terms of – just going back to the Balanda side of things that [*Int13*] was talking about before, I think that there is—there has been—I've noticed a little bit of a shift, particularly in the hospital. I thought at first at the hospital they were very, a little bit arrogant towards the interpreters; there was, you know, comments made that, you know, how can they interpret if they don't know about medical procedures or terminology or whatever. You know: 'They're more dangerous than they would be of use because they could misinterpret.' And I know ... that that's sort of swung around a little bit, in part because like, you know ... (*T2* names a health interpreter trainer) is there; but other things as well have happened. There's been sessions have been conducted with the hospitals and also the realisation that yes, they aren't experts on medical terminology and procedures but in terms of what they were getting over to their patients. The message they were getting over compared to what they can now get over is, you know, a hundred percent.

On the legal side unfortunately it's been—it's probably been more difficult—even though that this whole interpreter service almost stemmed from the legal services and that's where the initial push was (was to get people adequately represented in the courts) there's a little bit of a reluctance still to use interpreters. I think when [*Int13*] mentioned before, one of it has got to do especially with the way the Darwin Magistrates' Court is set up. It's really badly designed for using interpreters in the sense that there's nowhere for the interpreters to go to be identified as interpreters. They basically just hang around in the public area and to be quite honest, you do look like another client waiting for Legal Aid to speak to you. You sit outside Legal Aid's office with all the other defendants or witnesses or whatever ... and no-one there, apart from a few of the lawyers, are even aware that interpreters are there.

It's not like, say like at Alice Springs, you go into the court and there's physically an office where the interpreters go. When you sit in that office—and I've sat in that office quite a few times with them ...—it's a constant flow of traffic between the interpreters, the lawyers. They know exactly where to look for them. They come down: 'Well, can you do this? This is the language. Can you come in, it's about such-and-such.' And they're off!

...

But also too the fact that I think, with the lawyers, from my observation is that they're too obsessed with the court and that's where the whole problem is. They think the interpreters should be used in the courts, whereas I sort of think that really, the court is, in a lot of the matters, particularly you know, Magistrates' Court matters, almost irrelevant [for interpreters]. They should be there doing instructions with them, finding out what happened before they go in. And they seem to think, 'Oh well, you know, you hang around here and when he goes into court I'll grab you'. And then you go into court: 'How do you plead?' 'Not guilty.' Bang, bang, bang!

21. Interpreters working for the Aboriginal Interpreter Service are, in fact, employed as casual public servants.

There's really nothing for you to do. You know, for all intents and purposes you can almost get by without having anyone there and then as the person comes out you tell them what happened.

So until they get this idea of trying to use them pre-appearance, I don't think it's ever going to work and, also too, they're still badly organised in the sense that we've had so many calls for interpreters for matters which they know would have been set down at least a month ahead. And the other day we had a call for a Warlpiri interpreter; they were in court already! [It had] been set down for nearly five weeks before. They rang up on the morning. It's a lack of recognition of their, anyone's, professionalism. It's like, 'Hey, get one in here quick!' Whereas, when you see from ethnic interpreters, when we were at Nhulunbuy one time there was Legal Aid working with the one Indonesian interpreter. They went and stayed there the night before. She was there, both of them were there. They spoke at length that night before – she was fully aware of exactly what was going on in the case. She was introduced to all the defendants. They sort of worked out exactly what was going to happen in the court.

And then ... the next day, when we went to court, you know, I saw one lawyer there click his fingers and call up this interpreter, this Aboriginal interpreter, saying, 'Quick! Get up here!', you know? But there's never any discussion beforehand with them. You know, I mean they're sort of like, there's a recognition that this lady was a really good interpreter—which she was, she was a brilliant interpreter—but then it was sort of almost like well if we need one this guy's here, but there's not that same recognition. I don't know what it is because I think often they just think it's not that crucial that you need an Aboriginal interpreter there when you plead not guilty anyway – why don't we just get through it?

...

To be quite honest, if people said, 'Is it changed? Could you sort of really observe the change?' I would say, 'No'. Over this year I've seen very little change from when I first started to now in terms of use, particularly in circuit courts. Like so often in circuit courts we go out there, interpreters are lined up, they'll sit there for three or four hours – no one even talks to them.

MC: What about you, [Int14], do you want to say anything about your experience as an interpreter about any challenges?

Int14: Yeah, the only challenge I find is trying to learn the jargon of the hospital or the courts. Yeah. Interpreters probably have to work on that, yeah.

MC: And another question, this is about males and females ... you know how the issues with brother and sister, the kinship issues, the avoidance relationships and that sort of thing. Then there's when you're talking with a woman interpreter, interpreting for a man's health problems, or a man interpreter interpreting for a woman's health problems; or interpreting in a court or police where there's some thing, some sexual assault has happened – all those sorts of things. How do you manage with those issues?

Int13: ... If I interpret for a male defendant, like if he's done something like rape matter or whatever ... a person if I don't know him, he could be a distant relative from other community like [X] or [Y], um, I'd ask him and ask the police if it's all right, whether he needs me to be their interpreter. And I have to make sure [and] ask him is it okay if I talk this and that when the police says (i.e. speaks).

MC: So in other words, you ask permission; you check up first.

Int13: I have to check first. So I think it's okay for a distant relative. You can interpret for a male but not the close relations like the avoidance, like [poison] cousin²² or a brother.

...

Some of them can be a, what you call ... conflict of interest.

...

I've actually done that with my very close cousin, very close family of mine. [He] was involved but then I had to let the police know, and I have to tell the interpreter service this is very close family of mine. But then they couldn't get another interpreter ... so they used me and I said ... 'I'll just interpret whatever questions you give and I'm not here to help her'. And I told my sister, 'I'm not here to help you. I'll just interpret *nhungu matha* (your speech), and for the police. And that's it.'

...

For example, if a clan leader with grey hair comes in for a court—maybe he's smuggled gunja, cannabis or something—and if he's caught by the police, it would be better not for the young lady interpreter to be there for him ... because all the cultural background that every young woman has to respect that elderly man and keep away.

22. Int13 is referring here to a man who is, or who is categorised as, a woman's paternal aunt's daughter's son. Such a man is eligible to be her son-in-law.

MC: So, in other words, you don't want to be there when it's trouble, but if he was giving a speech at a meeting, then what about having a young woman?

Int13: Well, if a speech is made, *balanya nhakun* (such as) conference meeting, then it's up to him really to choose whether he needs that young lady to interpret for him.

MC: It's not so much a problem there, you're saying it's more of a problem when he is in trouble—

Int13: —When he is in trouble.

MC: When he's embarrassed?

Int13: Yep, yeah.

T2: And this is what happened in Alice Springs the other week where quite an old man was on a charge and he went off and just abused the interpreter – it was basically, 'How dare you interpret for me!' And [he] sat down on the floor and wouldn't get up until she was out of the room. And it was like, you know, 'This is an insult that you come in' and – so that was it. She was off and there was no interpreter there – couldn't find anyone to do it, so that was it. But he was adamant that there was no way that she was going to interpret for him.

Int13: But these days, today what we find—I've experienced this—this year I've, every time I walk across and I see this one elderly man, he's an old fella, he looks at me and he walks straight towards me and I thought I was in trouble. So he comes up and he—I was just sitting there and I didn't want to see his face—he comes up and said, 'Hello', politely: 'Get up!'. And I had to get up. I thought I was in trouble but then he shook my hand: 'It's good to see you do public work'.

And that was really good, and then he tells me, 'You're most welcome to go to the outstation, get what you like – geese or clams, collect what you really like, cause I'm just happy to see you work.' Yow ...

T2: Can I just bring up one issue, sometimes with this question of blame—like in the court set up—you've got the prosecution and then you've got the defence – so that like defence is maybe NAALAS²³ or another legal aid organisation, and then you've got prosecution which is like the police. And then the interpreter is asked to work for either the defence or for prosecution – and then the problem is sometimes when they're working for prosecution, and that person then is found guilty and gets put into jail ... One of the things that has been raised to try and get over this idea of who you appear to be working for is that the interpreter simply works for the court and interprets for everybody; doesn't matter whether they're interpreting for the prosecution or for the defence, or even if the magistrate wants them to do some work, they interpret for the magistrate.

Int13: Yow.

T2: So that they're seen then just like people like the court orderly or somebody who belongs to that court and not someone who belongs to, like the police or anything like that.

Int14: Yes.

...

T2: What interpreters have said to us ... is that, when they're sitting in the court, they often have family come in and the family come in and see them sitting near the police or see them—if it's say a violent sexual assault crime—they see them sitting with the defence lawyer getting that person off at the expense of that woman's family.

MC: What about if the magistrate or judge, just before the interpreter is being used, introduced the interpreter to the court and said, 'This is [Int13]. She's an interpreter for this one. She's not connected with the police, she's not connected with the lawyer, she's just interpreting'. So if the judge said that everybody would understand.

T2: ... We've started to implement that in some circuit courts. Some magistrates obviously are more accommodating than others – people like for example [Magistrate X] will say 'We have an interpreter here from the Aboriginal Interpreter Service. They are assisting us to—', like that sort of thing. That is a help.

...

Like we've suggested a few things. Say like for example, before I start work you know if like I'm in court ... you've got to stand up and say 'I'm [T2] for the defendant, Your Worship'. But no one ever bothers finding out who the interpreter is. So what we are trying to say is, okay, even just in small things like that, 'And we have such and such as the court interpreter' so everybody knows and it's recognising them as another professional member of the court.

23. Northern Australian Aboriginal Legal Aid Service.

Interview with Chairperson of the Kimberley Language Resource Centre

The 2003 Broome conference of the Foundation for Endangered Languages was organised with the assistance of the KLRC which is chaired by June Oscar, a speaker of Bunuba. The conference was well represented by speakers of Western Australian Aboriginal languages including language workers and/or interpreters from the Kimberley, Pilbara and Western Desert regions. As such, the conference presented a good opportunity to interview a number of participants interested in the issues which are the subject of this paper.

Given that the Kimberley Interpreter Service is the only Aboriginal languages interpreter service in Western Australia, I took the opportunity to interview the heads of both of the Aboriginal organisations which set up KIS: the KRLC and the Mirima Dawang Woorlab-gerring Language and Culture Centre in Kununurra.

The main points covered in this interview with June Oscar (JO) were that:

- officers of agencies which use interpreter services require training in how to work with interpreters;
- interpreters require interpreter training in specialist areas such as health, law, education and welfare;
- an Indigenous person's identity and reputation within their community impacts on how they are perceived in their role as an interpreter; and
- with trained interpreters now available, they should be used more often by all agencies.

JO: The people from agencies who engage the interpreter to assist them – they ... need to know what the interpreter's role is ... and how to use them properly. So yeah ... that's a critical issue, and from advocating for languages and proper communication in terms of interpreting ... that, whilst we are putting a lot of effort into Aboriginal people to become skilled at facilitating that proper communication ... we need to be also looking at how we can get ... the agencies and their operators skilled as well – to use interpreters. So it's not just ... placing the responsibility on the interpreter to be the one that stands and ... delivers well on the day. It has to be on both sides; the side that we ... keep missing ... is in the education, awareness-raising and training of the professionals within these agencies, such as police, magistrates, lawyers and health professionals ... to really fully understand and know how to work with interpreters.

...

MC: In which part of Western Australia—which town or community—are interpreters used often?

JO: I can only speak as a Kimberley person living in the Kimberley that interpreters aren't being used in many of the areas. You hear of certain individuals in the Aboriginal communities being asked to come and provide interpreting support; ... people who could speak English and their own language are often asked to interpret on a very 'as needs' basis and very ad hoc and so no organisation ... And no training necessarily for any of those people ...

Then recently people were made aware of what was happening in the NT and what Batchelor [Institute] was offering...

Then with the work that Dagmar Dixon and Eirlys Richards and others had done through Karrayili Adult Education Centre, which was able to provide interpreter training here in the Kimberley, in the mid '90s I think, and so there were a few people who went along to that course to train as interpreters in Kriol and Walmajarri ... And then gradually different people became interested and wanted to provide that support as interpreters and so then people enrolled at Batchelor. The Karrayili training was once-off and the funding came through the Department of Justice in Western Australia.

...

So it wasn't until recently that more people went along to become trained and accredited to operate as interpreters with some level of skills and ... professional development. Proper communication is something that is crucial and is very needed in the Kimberley, not just in justice but in all the service areas.

...

MC: Do you know of any interpreters who've stopped interpreting on the law side because of problems—wherever they come from—that they can't overcome?

...

JO: No-one has raised it with me directly ... Untrained users of interpreters can also create problems within a situation which is problematic already and so they create more pressure for the interpreters ...

MC: And in general terms is KIS well understood or well received by the authorities ... in terms of the way they are towards you? ... Do you find them supportive with their words?

JO: Most of them are supportive. Most of the agencies we met with were agreeing with the need for interpreters ... The follow-up of making sure that they use interpreters, and how they use interpreters, is the difficult part.

...

We need more people helping us and advocating for the proper use of interpreters because of the fact that people speak languages other than English, and to look at ... changing, implementing and drafting policies within their own organisations; and then to work with people within their own organisations to create the learning and the changing of attitudes and the changing of approaches to really working with Aboriginal people in the programs and services that they provide and the programs they administer.

MC: And ... what are your priorities?

JO: In order of priority I think the skilling-up of the current interpreters so that we can create a pool of people with specialist skills to be able to provide interpreting support in health or in the legal justice system, in education and in the social or welfare area.

... (At this point the tape finished and this passed unnoticed. Upon changing tapes, MC recounted JO's answers to the question of who is best to work as interpreter in Indigenous contexts.)

MC: In [respect of] age and gender you said that it depends on the circumstances: that sometimes it's more appropriate to use a man; that sometimes it's more appropriate to use a woman – it depends on the sort of situation ... Then we spoke about whether non-Indigenous interpreters could or should be used and you said again, it depends on the situation, the circumstances, but that as a matter of normal priority the Indigenous interpreter should be used ahead of the non-Indigenous interpreter for reasons that it provides recognition and it's their own language; and it provides employment and a source of esteem and a source of acknowledgment in the community and giving that language some respect ...

Then what were we talking about, the qualities of an interpreter?

JO: ... people should also be mindful of the factors that might influence choice of interpreters, and the qualities of interpreters, how people interact with other persons within their community and with everyday interactions and life in the community ... because people don't just forget what you do and what role you have in their community just for the time that you might provide the interpreting job.

...

For Aboriginal people, it's difficult to operate in that other way where you forget that that person is this-that-and-the-other within their community; whether it is good or bad, people look at you and that's who they see. And so really in working and developing interpreters to be respected, that needs ... to be a consideration when people are putting their hand up to be interpreters.

...

MC: Are there enough people who are willing to put their hand up to be interpreters?

JO: ... We can find that out by promoting the role of interpreters ... how interpreters are an important part of people's lives when they're in situations and they need that support; how interpreters, through their role, can make a difference; and, that if people can see interpreters at work and really appreciate their roles and understand it, then that might help in promoting and creating the interest and the motivation for people to want to do interpreting. People have got to see—both Aboriginal people and the agencies ... —interpreters making a difference ... and they can only do that by being used.

Interview with David Newry, Chairperson of Mirima Dawang Woorlab-gerring Language and Culture Centre (Mirima Council Aboriginal Corporation)

Circumstances did not permit the audio-recording of this interview. The following summary was prepared from notes which were taken at the time.

Discussion with David Newry centred on challenges facing Indigenous interpreters and strategies to deal with them. Mr Newry, an interpreter himself (the 15th interpreter to be interviewed), made the following points:

- The fact that an Indigenous interpreter will be related to other speakers of the language means that a pool of interpreters is needed. This provides choice in matters where particular interpreters (such as relatives) may be inappropriate.
- The relatives of a client may raise objection to a particular interpreter being used and it may be necessary to gain family permission about the choice of interpreter in legal cases, even for minor crimes.

- People do not understand the interpreter's role. A common assumption is that interpreters are there to help the defendant get out of trouble.
- If the interpreter's role was clearly explained to families of witnesses/defendants then there would be much less concern about the identity of the interpreter: 'If someone running the show explained to people, it would be much easier, you know ... I get someone to explain my role each time I interpret for the Land Council.'
- In Land Council contexts, delegates (who are mainly elders) prefer local interpreters who they know will understand the context of the discussion. 'They choose me for Land Council because they know me; they respect me in a tribal way.'
- There may be difficulties using young people: 'If they just come out from high school, they're too green. [Instead], they pick someone who they know can translate the words, examples and ideas in a way that elders can understand better ... [it's] knowing how to put things in a cultural way.'

'Our pride falls on us': facing the need for interpreting assistance

Int16, an accredited interpreter, is now a language development officer and works occasionally as an interpreter. She was interviewed in the presence of the Coordinator of KIS, Lesley Baxter (*LB*). The interview began with the question of what challenges Indigenous interpreters face. The conversation centred upon views expressed by some elders in response to interpreting assistance.

Int16: Well the first thing ... we get stuff from ... old people because they've never been exposed to interpreters' roles ... They come from a background of coming out of their own traditional country and then coming into the Western world and then trying to communicate with *gardiya* (i.e. non-Indigenous people) ... [For] them to think that they can't fully understand what is happening – we got pride, aye? Like our pride falls on us.

They tell us ... 'I been working with *gardiya* all my life. I know what they are talking. There's really no need for you to come here!'—not saying it out—but the impression we get is, 'There's no need for you to do it. I been working with *gardiya* before you were born. I understand English.' You know, we come across that problem.

...

We're saying [that] ... us as young people really don't understand the English too, but we're out in the open with it ...

MC: Do you think it's important if you're an interpreter to be an older person or a younger person or a man or a woman?

Int16: Of course, we have to have man and woman. Have to have that.

MC: ... Do you know any young interpreters?

Int16: Our youngest would be [X].

LB: ... she would be about 43.

MC: That's interesting ... I know very few interpreters who are under thirty ... I think it's because ... they find it a bit hard to be young and an interpreter.

Int16: Exactly, because our culture says we always gotta listen to our elders and this is something like saying, 'Okay well we know more than what you do'.

MC: Putting yourself higher.

Int16: Yeah! Exactly. And we've always been in the role of growing up – always respect your elders and your elders' words ... And now, until such time as we educate all our people about ... the role of interpreters ... and you do get elders, like Mum, when I did that course with interpreting—lucky I been bring all the tapes back ... and videos we been do in Batchelor—and I said to Mum, 'This is what I been doing' ... and she sat and watched – 'Oh yeah', and she been getting the idea, 'I see now what you mob are doing' and that's good.

...

They look at it in another way with interpreters. If it's court work they'll say (translated from Kriol): 'Oh leave that family to speak for themselves because they've been to school ... to learn high English' ... but not thinking that for an interpreter it's more in-depth, you know?

Interpreters belonging to country

Int17 is a non-Indigenous language consultant who, as an Indigenous language speaker, is called upon to facilitate communication between traditional owners and a mining company in Land Council discussions. Her role is to both give assistance to the Indigenous interpreters and to alert participants to intercultural miscommunication.

Int17 highlights the issue that Kriol interpreters may not feel comfortable working outside the context of their own country (bearing in mind that Kriol is spoken widely across many communities and clan groups).

MC: You were talking about two people who had trouble being Kriol interpreters because they didn't feel they represented the—

Int17: —they said that they were from another country and they didn't belong to the country where the job ... was, so that they felt obliged to get up and apologise to the people and ask permission if they could work there, and because they didn't actually belong there. And I said to them, 'Look this whole meeting is full of whitefella experts from thousands of kilometres away and you're only from Halls Creek and Kununurra' ... But still, that's how people feel and it's how some people who belong to country feel.

...

People think of Kriol being the same throughout the Kimberley. The problem is that there are words which for—at those meetings I went to—there are people from both Kununurra and ... Turkey Creek end, and there are ... English words that are perfectly acceptable for the [tribe X] mob, which the [tribe Y] mob find unacceptable to be used ... Because I have [tribe X] people living in my house all the time, I hadn't even realised ... that you couldn't say the words *law* and *ceremony* in public from the [tribe Y] side, but the [tribe X] side don't care. You know, they say them all the time on the verandah ...

...

Because I understand [tribe Y language], [tribe X language] and Kriol—but I would not describe myself as a fluent speaker of any of those—but none of the people engaged to be interpreters are also fluent speakers – truly fluent speakers of English, and their understanding of really difficult complex terms in English (mining terms and land ownership terms) are just – it's very hard for them ... Basically my job is to listen for misunderstandings ... on all sides and jump up if there is such a [misunderstanding] and use whatever language. Sometimes I use [Y language] or [X language] to explain. You know, it depends on the context ... who I'm speaking to about what.

Helping out with language – not trouble

This excerpt is from a brief interview with an older male accredited interpreter (*Int18*) who recounts an experience of being misunderstood as an advocate rather than a communication facilitator:

MC: Do you find it easier because you are an older person? Do you think it would be hard for a young person to be an interpreter?

Int18: Young fella might be shamed ... I stand up one time when I had a problem where this wife and her son were in court; ... he was feeling ashamed with me – he didn't talk up ... I was the interpreter but he wouldn't talk. And all the family come visit in there (i.e. court) and the family said, 'Hey, you helping him out, now'.

[I said,] 'No, no, I'm not here to help ... If you've got anything problem – you can't understand ... talk to me and I can listen.'

Some defendants don't want interpreters

This interview with *Int19* (who is from the Fitzroy Crossing area) is also conducted with the assistance of Lesley Baxter (LB), Coordinator of KIS. *Int19* interprets mainly in hospital, community and land council contexts. This interview is remarkable in revealing that some Indigenous defendants see an interpreter as potentially causing adverse outcomes for them in terms of criminal justice proceedings. This problem is discussed in the context of the under-utilisation of interpreters and the need for community education about the interpreter's role.

MC: How were people seeing you as an interpreter?

Int19: People don't mind – we're from that land.

...

Sometimes at a big meeting I say, 'I can't interpret because I want to be part of this meeting too.'

...

MC: Do the police, when they go to your community (near Fitzroy Crossing) use interpreters at all?

Int19: No ...

LB: Do you reckon they should?

Int19: They should. They should at all times ... They should use interpreters. Then again, I find out like, you know, when we were training to be interpreters, when we come back from Batchelor, we used to do our training at the police station (in Fitzroy Crossing) too, you know, just go and sit down and listen. And there's that lawyer come up there, and we wanted ... to go and do some things there ... we wanted to go and sit down there and listen and we was there with the lawyer, ... and we find out from the people themselves – like they thought that we were somebody like a lawyer, you know ... They felt shame, frightened, you know. They didn't want us to be part of the thing.

...

We wanted to sit down there when this court was on, you know. People come in for court and that lawyer is there every time we come; lawyer come and sit with those people and they thought that we were doing the same thing as the lawyer, you know. And you know our people were always ... put down, you know, by *gardiya* from—before, long time ago—where they want to be. They don't want anyone to go and help them, you know, like interpreters ...

MC: So they don't trust you; is that what you are saying?

Int19: No. They do trust us in a way but they don't want us to – like they think it's just like fighting for them, for their rights, you know. And they don't want that to happen. That's the way I saw it.

LB: Who, the lawyers or countrymen?

Int19: The people, countrymen. They can work with the lawyer, you know. Because that lawyer try his best too, to help them. But they always want to go to court and plead guilty, you know. And that's why they been frightened – they thought that we might help them with any problems they had with that police. That's the way I read it ... That's the way I see those things.

MC: ... You know how an interpreter is supposed to be in the middle—

Int19: —Yeah, I know that—

MC: —Not on one side and not on the other side.

Int19: I know that.

MC: Well, those people, those countrymen that you're talking about now – do they see you or do they see the interpreter as someone who helps them, or someone who helps the police?

Int19: That's what they might [be] thinking, you know. I don't know but that's the way I read it, you know. They was really scared.

MC: So they thought you were working to put them in trouble – or take them out of trouble?

Int19: No, take them out of trouble. Which meant that they were scared that if we did take them out of trouble and the police will go after them again, you know ... there'll be more trouble on them. That's the way they want to be, how they being handled by the police. That's how I saw it, you know. I see those people there.

...

LB: So, [Int19], I don't know if I'm hearing you right, but are you saying that people are used to going to court and pleading guilty, and then if they have an interpreter there, that it's going to change all that and so that's why people are frightened?

Int19: That's what they're frightened of ... they used to the way they been going along you know, whether they didn't do anything or not.

...

LB: ... One lawyer one time said to me, just not long ago, 'Well, you know, interpreters will change everything. Sometimes I'm much better off that the judge doesn't understand what really happened because I can get people off easy. But if that judge understood the full story, those people would be in much worse trouble'.

...

MC: Does the lawyer usually tell them or advise them to plead guilty?

Int19: No, they ask them. But they know their rights already ... Yeah, but as for this thing, the Law Reform [Commission Project] ... I think, you know, that what they should do is ask the lawyer to go and see them there, tell the lawyer how many people they got for court – ask them if any of those people need interpreters. You know, they've got to start asking ... All they've got to do is ask.

...

LB: 'Cause we've got a lot of interpreters in Fitzroy. It's the biggest concentration of interpreters. Whenever I go to ALS²⁴ or Legal Aid or the police, and I've done it many times, and I talk about interpreters to them, ... they say, 'Yeah, yeah. We know people plead guilty when they haven't done anything. We know that'.

Int19: Even the hospital mob ... especially on specialists' day, like when the doctor comes for children's specialist or eye doctor or bone doctor, and they get a lot of people going there – and they don't even do their plan already and look around and ask for an interpreter for that day. They just, you know, work with them until suddenly they find themselves caught up and they go: 'Oh, can you come up here and interpret for this person?' You know, they need a plan before ... But they don't do that, this hospital mob.

...

MC: So your suggestion, the one you just gave me, the lawyer should go and see the families—not the families—the people in trouble and find out if they need an interpreter—

Int19: —If they need an interpreter. They can ask the people and then explain to the people too, what the interpreter can do for them, you know? Interpreters are there ... just to interpret what they say, you know ... explain the role of an interpreter to that person.

LB: We just applied for some money from the ... Public Purposes Trust to make two videos: one for legal professionals, for those who work in the courts, police, ... [and] the other one for community mob. And if we get that money we'll make those videos next year, and make a lot of them so that we can give them to households.

Int19: ... They don't watch video in prison, eh?

LB: No, but we'll give them to everybody in the community. We'll make a good video so that people will want to watch it, you know, with people acting from all over the Kimberley.

Int19: I think we should leave it in some sort of office—I don't know where—set up some sort of place where we can, maybe, those people who go to jail and we can maybe bring 'em out down there in their spare time; bring 'em into the office and they can watch that video. And put all these video in that area, they can come and watch it in.

...

One video should be made about the role of an interpreter and those prisoners can watch ... When they take them to the police station they will think about that: 'Well, I should get my interpreter' – they can say that.

Suggested two-stage interpreting process

LW is a language worker whose grandmother is an interpreter. In this brief excerpt, *LW* explains how the importance of briefing an interpreter and explaining the legal concepts to them; even possibly having an initial translation from English into Kriol and then into the relevant traditional language. *LW* begins by stating that few people from Halls Creek understand about interpreters.

LW: To be honest I don't think people now, well in Halls Creek, I don't think they know much about that they got interpreters, full stop.

...

My grandmother is an interpreter but I think if they are there I don't think they get used a lot.

...

I don't think hardly anybody knows what most of the government organisations ... are responsible for ... And there needs to be more cultural awareness, even though there is an interpreter ... because maybe sometimes the problem might be ... not so much that they can't understand, but the person is trying to explain things to that other person, you know. And so I'd see that the interpreter going to have a lot of problem too, you know.

I know most of the interpreters—my grandmother is an interpreter—so I could see how they ... going to miss out, and she probably needs someone to go from English to Kriol to her and she'd ...

And you know like sometimes ... and I've noticed this lately as a – you know when you are doing language (i.e. as a language worker) and trying to change something. A lot of English is used round-and-round-the-garden and they never get to the point of what they really want to say or find out, you know.

And sometimes interpreters—and especially because I know they use older people—they'll get confused with all that round—about language, you know, ... and really miss the point of what them mob really wanted them to say.

24. The Aboriginal Legal Service.

... How much time do they have with each, like client, that they interpreting for? How much time do they have to explain to the interpreter about what they need to translate? ... I think that's an important thing.

Western Australian Magistrate

This interview, with a Broome-based magistrate (M1) whose circuit covers Kimberley communities, highlights a number of issues that affect communication in interpreted witness testimony including:

- the self-consciousness of interpreters working in front of relatives;
- the potential for relatives to signal subtle pressure on interpreters as they work; and
- the value of using interpreters—even with present deficiencies—over not using them.

MC: The first thing I would like to ask you ... is whether you have ... made any observations of Indigenous interpreters and any difficulties or challenges or particular things that have surprised you, that might be very different to what you find with mainstream languages?

M1: Yes, I've had quite a few experiences with ... interpreters in this court in Halls Creek, Kununurra. I use them as much as I can. The first complaint that I would have—not complaint but observation—[is] that we don't have enough ... Secondly, I find quite often [that] ... interpreters are hesitant in really interpreting directly because of the family connections ... quite often they hesitate because 'my uncle' is sitting in the back of the court, 'my cousin' is there, 'my wife' – you can see that, yes, and I give them all my sympathy because of that.

MC: Do you see any evidence of sign language or of signalling.

M1: Yes, yes, the eyeballs ... not looking at each other, but sometimes the eyeballs go down ... not hands so much ... how you look, how you turn your head. Yes. And then the next answer that you should get, you can see it's very, very, difficulty given quite often. Also quite often, not [only] with the accused or the complainant, but even with the audience at the back. And you can't tell them, 'Don't look there!' And if the trial goes on for a half day or day, you know immediately which one that ... the interpreter is conscious about ... You can follow that ... How to prevent it, I don't know – clearing the court: maybe.

...

MC: In your circuit, which courts mainly use interpreters?

M1: Halls Creek, Kununurra, Balgo, Kalumburu sometime – and that's where you also see the most of what I just talked about—the sign language, the body language—because [they are] much smaller (i.e. than Broome) – and I walk out and step on an airplane and go.

...

MC: We've just spoken about what happens in court; you also, I imagine would see many records of interview in your work. Have you got any comments about what you see in records of interview?

M1: ... They are even more difficult, I think, as in court. At least in court you know you've got the protection from the magistrates there ... but in [police] interviews, you don't. I mean, you get two policemen there and I'm not trying to knock the police but their job is to get the best evidence they can get. I'm not saying that quite often it's unfair but very often you put a question to a witness [and the answer] can hang you ... Then, again, I guess, the interpreter can really answer in the interview what she wants to ... speaking a few different languages myself, it quite often depends how you 'sing the tune' (i.e. intone one's answer) ... it depends how I 'sing it' as to different meaning ... So it could also work against the policeman.

MC: My experience in the Northern Territory about the use of interpreters – you know the Anunga Rules ... are incorporated into [police] standing orders in the Northern Territory ... the practice prior to the interpreter service being set up, and the practice still, often, is that police will ... try and use the prisoner's friend as an interpreter only for the first part of the interview when they want to administer the caution. Or even when they've got a 'real' interpreter there, that's when they'll use them. Once they're satisfied that the administration of the caution will 'pass muster' in court, then they often go on to just ignore the interpreter and the prisoner's friend and just work on getting answers to their questions. Do you notice that [here]?

M1: Yes. Absolutely. Absolutely. And you see the prisoner's friend, or even the interpreters, quite often are not strong enough. You've got to be a very strong person.

...

MC: One suggestion that I've heard, getting back to that issue that ... the role of an interpreter is not understood in Aboriginal communities because there is no such thing as a pure interpreter ... in discussion with a number of interpreters in Alice Springs, Darwin and here in Broome, this idea has come up: that when interpreters are going to be used in a magistrate's court – at the beginning of the session, or at the beginning of the case,

the magistrate ... introduces the interpreter and says, ... 'This is the interpreter. The interpreter is here to help the court understand what that person is saying and to help that person understand what [others] are saying. The interpreter is not here to do anything else and is not involved with the case'. What do you think of that idea? Do you see any legal problem with it? And would you be prepared—if that was a strong suggestion coming from many people—to do that sort of thing?

M1: I would. I would. And I see no legal problem. No, no. And I would, yes, yes, definitely.

MC: How do you see the potential or actual conflict of interest or the difficult things that come up because of the fact that the interpreter will know the [Indigenous] people they're interpreting for – and not only know them but be family to them.

M1: My belief is that you will never get a perfect system. You will never get an interpreter like the United Nations [situation] ... we should strive to overcome that [difficulty] but I'm not overly worried that we only get 70 percent because [without interpreters] the court has nil ... And then it is on the court, I think, to look into it deeper.

But I think, even with the dilemmas we just talked about, the court now has a very good image available and therefore can give a much better judgement – more fair, than now [when] you speculate that the person understands.

...

MC: Do you have any ideas as to training that they are missing ... what I mean is deficiencies – can you be specific?

M1: My most common experiences are with [untrained interpreters]. I also have the other one (i.e. trained interpreters). I have basically no problem—like I say, what they disclose to me, even with all their dilemmas—the 60 to 70 percent that I didn't know, and then hopefully I'm intelligent enough to say, 'Oh, oh!' The alarm bells ring. I want to go further. Or I would say, 'No, it's quite clear to me now.' And I find with the interpreters, what all of them can use, or 98 percent, is that we build up more their confidence.

Discussion with a Western Australian Aboriginal Legal Aid lawyer

In this discussion, L2, a Legal Aid lawyer working in the Kimberley context, recounts a startling case of real physical threat to an Indigenous employee who had to be evacuated from their community after being called upon—in the normal course of their duty—to support the interests of a suspected killer during a police interview in the dual roles of prisoner's friend and interpreter. The threat of harm came from the family of the homicide victim who saw the employee as siding with the suspect and the suspect's family.

MC and L2 then discussed possible strategies to protect Indigenous interpreters from this kind of threat before moving on to discuss defence counsel's perspective on the utility of an interpreter in respect of Aboriginal witnesses.

MC: I'm looking specifically at ... Aboriginal interpreters and ... looking at how, in a way, they're caught between two systems ...

L2: There was a killing in [Community X]. And at [Community X] ... the Aboriginal Legal Service permanently station an Aboriginal Court ... Officer: a person who has got some training in basic [court duties]—how to get bail for people, how to remand matters—till it gets to a lawyer.

Now, as I say, this court officer was rung by ... the [Community X] police and asked if he would sit in on the interview. The function of that is: one, to interpret if necessary – very important especially in the explaining of the police caution, the right to silence issue, a crucial factor in all trials involving Aboriginal people. Secondly he's there just to give comfort or support, just by his presence, in that a person who has been arrested may be less fearful of what he thinks in his mind the police are about to do to him if he was there on his own. So, to interpret and to be just a presence; someone of his own kind. And thirdly, the reality if that person is there, then the police are less likely to do anything inappropriate. So you can see it's a very important role. And for many years I've just assumed it was a good idea and there wasn't a problem with it.

But as I say, last week, I discovered that I had to assist in extracting the court officer from the [X] community because he was seen by the family of the deceased as aligning himself with the family of the about-to-be-accused and it was a very serious situation – and I still have that person in my office here, hundreds and hundreds of kilometres away, waiting for the situation [to be resolved].

Now, I'm an experienced criminal lawyer with Aboriginal people and because I was just looking at the obvious advantages of interpreters ... I didn't see this problem and I can see I've been blind. It's amazing you can do these things for so long and you honestly – you could see something today that's so obvious. Why didn't I think of that problem! So now I'm looking at the interpreters, because I've got a murder trial coming up

different from this matter but – and I'd made arrangements to get an interpreter from within the community at [Community Y] ... Now, I was aware I couldn't get a mother-in-law and I couldn't get all sorts of family members, but I can see now that just getting anyone—anyone from the neutral corner—will still, would seem in some cultural way as choosing to align himself with the person accused.

Now, I said, 'And what about the lawyer?', and then I got the response: 'No, because they're white, they don't get accused so strongly.' In my experience you'd tend to get a little bit of antipathy towards you, and it depends on the result of the court case. While I have a low level of potential antipathy by aligning myself with accused people constantly – for an Aboriginal person, especially someone who is from a traditional background, I can see their lives could be at risk just by trying to fulfil their task of interpreting.

So, wow! Now that all us 'whities' have all of a sudden switched on a light, do we scrap interpreters? How do we deal with it? Or do we just leave it as it is and ... well, it sort of worked, and if we don't have it we're going to be worse off. Obviously we can't do away with them.

... This was a problem that became obvious quickly for police aides or ... APLOs (i.e. Aboriginal Police Liaison Officers) ... and we have had enormous trouble because here the communities are staffed by APLOs not full police ...

Well here we've found that to be a problem because in any action they do, they align themselves! ... Once you put your foot into it and you're Aboriginal: problems!

...

MC: One suggestion in terms of the magistrates' courts—bush courts—is that on each occasion when an interpreter is to be used in the court, that the magistrate gives an announcement to the court, to the audience, that this person is going to be an interpreter, that their role is simply to aid communication, they're not involved in the case on this side or on that side and ... their job is to be right in the middle.

GB: There's merit in that suggestion – the formal pronouncement approach. They like that ... especially in the higher courts where it's done with all pomp and ceremony and you do tend to get 'rellies' (i.e. relatives) in if it's a murder or something serious.

...

MC: If interpreters are used exclusively as interpreters—not prisoners' friends, not these other people—and they are trained people who have accreditation then maybe you can get the perception arising that this person has the specific and restricted job—

L2: —Wouldn't this be best approached through these things like the Kimberley Interpreter Service, that they provide specialist interpreters for the police, independent from the police, but something that people can latch [on to]: 'Oh we're these mob coming from that, come and do this talking – the interpreter service' ... [It's] just we use them so infrequently; I don't think anyone quite understands what they're doing there.

...

I think we need to make a structure that people can touch, smell, see, poke,... can see where it's coming from and explain, 'Yes, they're not telling anything to the white people that shouldn't be told'. You see, I think their big fear is that because they're language speakers they could, could tell white people stuff that shouldn't be told.

...

I never use an interpreter unless it's really serious and using an interpreter is to my advantage in getting an acquittal.

...

I use interpreters as support persons and I don't use them as pure interpreters because it's so boring for people who do understand English. It's just some concepts, you don't really need an interpreter – you need that nudger or that prompter in a Shakespearian play who, when an Aboriginal person doesn't get a concept—he can understand English but he doesn't cop the concept—'What this provocation?', and the bloke *explains* to him. He's not really interpreting—

MC: —You mean a cross-cultural broker?

L2: Yeah, they're the people we need because I've tried running trials with interpreters who interpret word-for-word ... The interpreter goes to sleep by the afternoon and it breaks down. In the end we're back to doing it all in English. But if he's there when needed, and there are some sessions we don't need him when it's pretty plain: me cross-examining police or something or other, he can go to the toilet, have a smoke or whatever, but he's on call and I can push him in when I need him ... I'd have problems with the prosecution and probably the judges with that because clearly I'm giving him a helper—

MC: —But, you see, an interpreter has to be both—

L2: —Yes, but they're not allowed to be, because they take the oath to just interpret exactly ...

- MC: ... Every significant vocabulary item in either language has a context in which it operates; for example, just the word *mother*. In white society we're pretty clear ... it's the person we [physically] came from. Whereas if a witness is asked, say, ... 'How are you related to the victim?'—and say the witness is a thirty-year-old man and the victim is a ten-year-old girl—and he says in language, 'She's my mother'. Now if you want a word-for-word translation back into English, 'She's my mother', you're going to have a meaningless statement. So it's valid to say that an interpreter has to give some explanation ...
- L2: Well those people would be very useful if we could create them ...
- MC: I'm just saying ... that's a valid interpreting role—
- L2: —Not in a court of law as the law stands.
- ...
- MC: If you are not permitted to go outside the literal kind of translation you won't get effective communication.
- L2: And that's why I think to this day [there is] limited use by experienced criminal lawyers of interpreters because they know there's not a lot of value in it. Sometimes getting the exact translation is more damaging to your case than sort of leaving the jury a bit perplexed – they don't know what's going on at all.
- MC: Yes, yes. I accept that there's a whole lot of tactical issues...

Interview with a senior sergeant of police

P2 is a senior police officer with almost thirty years of policing experience in Indigenous contexts in Western Australia. While he acknowledges that Aboriginal Police Liaison Officers may require support in cases where their family/community identity may present problems in respect of their dealings with community members, he states that in his experience interpreters are rarely used in policing, so the problem has not really arisen.

- MC: Have you got any anecdotes or ... experiences of this issue that Aboriginal interpreters are unable to do their job in the same way that interpreters of European languages might do, because of the fact that they know their clients and are probably related to them and often from the same community?
- P2: I have not yet had to call on an interpreter to do with an Aboriginal issue. Most times when we deal with individuals in our organisation, whether it be a crime issue, or a family issue, a social issue—it's quite numerous—I've never had reason to call for an interpreter. We've been able to manage to deliver information and seek information from just the normal process of talking to people and there's an understanding about how you go about retrieving information and delivering information. And an interpreter service, in my view, is a service that's only been available in a short time and there's no doubt if we came across hurdles in the future then we'll make use of ... those assistance to be offered.
- ...
- To be honest in all the years I've had in the bush and dealing with Aboriginals I've never had the opportunity to call for an interpreter service.
- ...
- MC: What about your Aboriginal Police Liaison Officers, 'cause they, I imagine, would occasionally be caught in a situation where they're not happy?
- P2: ... They have been handy when I've been retrieving and giving information in my past. That's where it's been available to me because they're the only service ... Having dealt with Aboriginals for not quite 30 years ... I think if you ... set up a trust basis with them, understanding is very simple. It's very basic, and it goes both ways so I haven't had that problem. But modern day policing, specifically when the respect that used to be given to police officers in the past is not there today, that's where it becomes a bit difficult. And seeing what goes on a day-to-day basis in my police station, some people don't need an interpreter service – they just don't want to talk to us, full stop.
- MC: Again, I'll just ask you about your liaison officers ... have they ever reported trouble to you that people are blaming them for being involved. Do people understand from the uniform that they've got a job to do?
- P2: ... The police aides are very, very aware of their role within the organisation—West Australian Police Service—and their impact on their own people and they are very careful, and most times they make it known to me as their OIC or whoever's their shift supervisor, what they think they should become involved with. Now that's the respect we pass down to them because of their family roles and their position within their family groups and, also, outside family groups. And yes, they do report to me if they have concerns for any issues. But we're very sensitive to Aboriginal content of family values and address those as they come across the board.

- MC: Do they ever—you know when you're running ... a record of interview and you are, for example, administering the caution—do the liaison officers ... ever help you with that in the language side?
- P2: No, not at this stage, not unless they're involved in the actual inquiry. I don't do the interviews anymore because of the position I hold within the organisation. But since I've been sitting here, I've had none of those issues come across my desk and, using the Anunga Rules which was first incorporated into the Territory some time ago, I'm well aware of what the requirements are. They're applied here in their entirety and we don't seem to have any difficulties, no.
- Most times, you know, a friend or a relative sits in with interviews and I don't think there has been any language barrier issues at all.
- ...
- MC: You've said you don't use interpreters, or you don't have call for interpreters – are the prisoners' friends ever used to do language translation in interviews?
- P2: There may be the odd word that possibly the person we interview doesn't understand or maybe the person's friend doesn't understand a word and maybe the person we are interviewing does. So it's a flow of information between the people in that room. That's my experience.
- ...
- MC: You would, I'm sure, sometimes have difficulty getting across the meaning of the caution. Just generally ... how do you get around that problem?
- P2: ... How you deliver that caution and how it's received is the crux. You don't have to use the exact words ... How you go about it is up to you and if you've done it properly the courts will accept that.
- MC: Are they often challenged on that basis ... [of not] understanding the caution.
- P2: Cautions are challenged and matters have been put aside because of those cautions but ... we learn from the experience and the Police Service aren't always right and we learn from our mistakes.
- ...
- MC: ... There's a possibility that the government will end up, somewhere along the track, looking at procedures and thinking if they could be made better – I'm thinking of interview procedures or courtroom procedures or anything. Have you got any procedures, improvements that you could see ...?
- P2: I've been a policeman for 29 years and every day something comes across the desk that I haven't seen before. The ability to be able to adapt will make you successful. I don't care what sort of procedures anybody writes up – it's like a business plan or it's like an emergency management plan, you cannot write anything up for each particular incident. It's skill to deal with any issue that comes across your desk ... to understand what the issues are, the legalities of what you are doing. And if you're doing your best nobody will criticise you. And most times if you do your best, you'll succeed. Can't say any more than that.

The KIS perspective

The Coordinator of the Kimberley Interpreting Service, Lesley Baxter, provided a great deal of useful information (and practical assistance) during the course of this research. The series of interviews with others revealed that Aboriginal languages interpreting services are not being sufficiently utilised in legal contexts and I was interested to follow-up this issue with Ms Baxter. She revealed that, 'in the last 12 months we've had one job from the police in the whole of the Kimberley'. By way of contrast, the Kimberley 'Land Council uses interpreters regularly for meetings to explain what's happening in land claims, for example'.

On the availability of interpreters and promotion of their use:

... there are interpreters in most regions, so potentially the police could use interpreters throughout the Kimberley ... I have visited every police station in the Kimberley and I've talked to the senior sergeant of every police station in the Kimberley.

... I also went to visit a senior police officer for the whole of the Kimberley and he told me that although he understood that most Aboriginal people don't speak English, that his boys know how to handle them and ... that within a year or so the new police pick up the lingo.

Even in courts, interpreters are 'rarely used' with only several bookings during 2003. Nevertheless, examples arose of interpreters experiencing difficulty or their roles being misunderstood:

- 'An old man who wanted to know why his grand-daughter was following the words of the *gardiya*, because he didn't understand what her role was in the court.'
- In 'another case ... [for] three young men, a male interpreter agreed to do the job. His wife wouldn't let him go'.
- 'Five young [teenagers] were in court for indecent assault and rape ... and it was very hard to get an interpreter ... who would do the job. It needed to be a male. We don't have a lot of male interpreters and it needed to be a person who is brave enough to do it because there were so many families involved in it ... We had a [language X] interpreter who was studying in Perth who did that job.'
- 'There was a murder case a couple of years ago and no one would do the job.'

The problem of interpreters' roles being misunderstood requires attention. A positive development is the increasing use of Aboriginal languages interpreters in a range of areas including community services, health and aged care. Of particular note is the effort being made by Argyle Mining Company in employing a team of interpreters to ensure the integrity of negotiations with traditional owners for a new agreement. These activities help raise the profile of interpreting among those who are involved and promote a better understanding of the function of an interpreter.

However, the utilisation of interpreters remains 'patchy'. While they continue to be used rarely in criminal justice proceedings it is difficult for community members to see how they fit in as a neutral but integral aspect of the criminal justice process. Under these circumstances, 'the bottom line is we need money to educate everybody involved in it'.

Another point raised with Ms Baxter concerned the role of an interpreter extending to *explaining* unfamiliar concepts uttered by one or other party in the course of an interpreted police interview or witness testimony:

MC: Do you see a role for a cultural broker for Aboriginal people in the criminal justice system?

LB: ... What I've seen is that interpreters provide that function because they are Aboriginal; they do act as cultural brokers all the time. And whether it's explicit or not, that is a part of what they are doing all the time and, with my committee, when we talk about interpreting, it's always an issue that comes up – every time we talk about it. And there's an assumption that that is a role that they absolutely need to perform.

Part IV: Discussion

The interviews documented above largely speak for themselves and much of the material is left to do so. However, it may be helpful in this final part of the paper to provide some distillation of the main points and consensus dealing with the central issue at hand: impacts of customary law upon the work and welfare of Indigenous interpreters operating in legal contexts, and how to appropriately respond.

This part is organised into two themes: the effects of misunderstandings about the role of the interpreter, particularly in the criminal justice domain; and, impacts of customary law on the integrity and practice of the interpreting Code of Ethics.

While deriving primarily from the stories and ideas documented in the previous part of this paper, discussion and analysis here will also draw from my own reflections as a student of intercultural communication and Indigenous languages interpreting in legal contexts.

Misunderstandings about the legal interpreter's role

In terms of occupational safety issues facing Indigenous interpreters, the main concern here is that the impartiality which is integral to the modern interpreter's role (i.e. as defined in the Australian context by AUSIT) is often not understood in Indigenous communities. Rather, partisanship may often be assumed according to the interpreter's identity, personal history, family history, and kinship and cultural affiliations/obligations – with these factors being considered in relation to the interpreter's Indigenous clients (and *their* families, histories, etc) and in light of what happens to them following an interpreted interview.

This common assumption of partisanship can be understood by considering that legal proceedings are analogous to traditional conflict resolution processes, particularly in cases of criminal justice proceedings involving victim and accused who are Indigenous people from the same community or 'country'. In traditional proceedings the victim and the offender may each be assisted by an appropriate person who can speak for them in promoting or protecting their respective

interests. Thus, in state proceedings (whether police or court) where the accused is accompanied by an Indigenous interpreter who 'speaks' for them in English, it is not surprising that the interpreter's role may be conflated with that of a partisan spokesperson, and that any outcome may be attributed (at least in part) to the participation of the interpreter in that role.

Blaming of interpreters for the outcome of proceedings figured as a serious concern among most interpreters and causes many to keep away from legal interpreting. It is important to note, however, that the seriousness of the crime is a crucial factor here. There is little concern interpreting in cases of petty crime, especially involving young people, compared with crimes of homicide and rape, for example.

The use of non-Indigenous interpreters in serious crimes is often seen as a way of avoiding placing the Indigenous interpreter in this invidious position. There is less likelihood that the non-Indigenous interpreter will be accused of working in with family or other customary alliances and obligations rather than doing the straight job of interpreting. Yet this is no final solution for the reasons that:

- the non-Indigenous interpreter may still be blamed for the outcome (*Int2* at pages 84–87, above);
- the non-Indigenous interpreter's understanding of customary law may often not be adequate (as was implied by *Int4* at pages 89–91, above): 'To be a good interpreter also, you have got to be so steeped in your own law, in your blackness, before you can make sense in that court.');
- non-Indigenous interpreters of Indigenous languages are very rare indeed, even in the more widely spoken languages.

Further evidence of distinctive Indigenous perspectives concerning the legal interpreter's role can be identified in comments by many interviewees about community acceptance of interpreters depending upon their personal attributes (maturity, gender, ceremonial status and standing within the community) in addition to the necessary language skills. This situation accords with the perception that an interpreter's role extends to mediation, where the interpreter promotes intercultural understanding as part of the conflict resolution process involving western and Indigenous parties in legal proceedings.

This was highlighted in the discussions featured at pages 91–96, above, with comments about the attributes of a good interpreter and their mediation role:

- ... someone who is a good model in the community, who is someone we can look up to, an elder, someone to trust (*Int6*);
- ... someone who understands both systems ... Even when they have arguments afterwards, they would say, 'No, this is how that law goes in the western side and this is our law' (*Int8*);
- Probably the Yolngu see the two jobs together: mediator and interpreter. They seek someone who has strong language and someone who is recognised under our law. Someone who is recognised in the community (*Int8*).

Int4 (at pages 89–91, above) also expressed that she was often seen as a mediator and sometimes asked by elders to petition authorities to temporarily release an offender so that the community disharmony brought about by the offence can be cleansed through customary law – and 'then they can have him'.

There were many other comments pointing to misunderstanding about an interpreter's role including confusing the interpreter as some kind of police officer or lawyer (*Int13*) or seeing the interpreter as someone who's job is to help get someone out of trouble (*Int15, Int18, Int19, L2*).

Apart from the stress placed on Indigenous interpreters working in the legal field, there are other serious consequences arising from this state of affairs. *Int19* related the example of defendants who did not want 'help' from interpreters because:

... they always want to go to court and plead guilty, you know. And that's why they been frightened – they thought that we might help them with any problems they had with that police. That's the way I read it ... That's the way I see those things.

... they were scared that if we did take them out of trouble and the police will go after them again, you know ... there'll be more trouble on them. That's the way they want to be, how they being handled by the police. That's how I saw it, you know.

The Legal Aid lawyer, *L1*, also cited the example of a community which made clear that interpreters were not wanted for a forthcoming murder trial involving a number of their members. *Int3* offered this explanation for the decision:

They're probably thinking that interpreters might put words into those people's mouth ... They might think you're adding on something to help with that person to get out.

In other words, community misunderstandings about the role of an interpreter not only affect Indigenous interpreters working in legal contexts but may also compromise the trial process itself when interpreters are refused by defendants or their counsel on grounds other than the level of the defendant's English skills.

The following suggestions were given for overcoming misunderstandings within Indigenous communities concerning the role of the interpreter and the consequent difficulties:

- providing information to communities through community education broadcasts and through the development of information videos to be distributed in communities and perhaps to be accessible at police stations, courts and prisons;
- having magistrates and judges formally introduce any interpreters by name during court proceedings—especially during bush court—and explain their role as impartial communication facilitators operating for the benefit of the court rather than for one party or another (this explanation could even be interpreted);
- visits to communities from interpreter services to meet with community representatives in the presence of interpreters from the community in order to properly and authoritatively explain their training, skills and role;
- lawyers and judicial officers visiting communities and 'outstations' for cross-cultural communication and cultural awareness training with community members and elders; and
- ensuring that interpreters are *actually used* in police stations, courts, prisons and by legal services so that people can become accustomed to their presence and their role as a normal part of the (criminal) justice process.

These suggestions are reinforced by the stories told by *Int13* at pages 98–103, above. *Int13* is a trained and experienced legal interpreter whose work is becoming acknowledged in the communities from which her clients are drawn. She told the story of how she faced a community meeting to explain her impartiality as an interpreter under circumstances where she was being blamed for the outcome of a case, and how she has conducted her own community education campaign in local 'outstations' (i.e. small communities on traditional homelands) to counter impressions that she was a lawyer. She also reported the comments of an elder who acknowledged her community service and of other older men who are now interested in working as legal interpreters and who, at the same time, strongly desire to conduct cultural awareness training for lawyers and magistrates/judges in their homelands. It is also noteworthy that *Int13* works in a region within Arnhem Land for which there is a significant pool of accredited interpreters and where interpreters are commonly utilised. These accounts point to community education and the utilisation of interpreters as key strategies in countering misunderstandings about their role.

By way of contrast, the situation in the Kimberley is evidently problematic since it appears that interpreters are very rarely used by police (*P2* at pages 113–14, above; *LB* at pages 114–15, above) or by Legal Aid lawyers (*L2* at pages 111–13, above). A similar situation exists in the courts (*LB* at pages 114–15, above) where those that do appear are (more often than not) untrained and unaccredited anyway (*M1* at pages 109–11, above).

Ensuring that Indigenous communities are educated about an interpreter's role in the contemporary western sense need not of course negate or deny the importance and prominence given to the office in some Indigenous communities. The consensus by those interviewed in this project about the issue of an interpreter's acceptance by their community is that mature individuals who are respected as individuals in their community are more readily accepted as interpreters than young people (and particularly young women). The respect given to law by Indigenous elders is thus reflected in the expectation that the legal interpreter will be educated not only in two languages but in two laws. In this sense the bar is perhaps set higher for legal interpreters by Indigenous communities than by the mainstream agencies who use them.

Of great interest in this context were the comments by *Int4* (at pages 89–91, above), a mature woman whose community elders decided should go through ceremony to gain the authority to interpret with protection under customary law. The result is that even as a female interpreter she is able to interpret in rape and homicide matters including for some men who, under normal circumstances, are in an avoidance relationship with her.

Implications of customary law on the Code of Ethics for interpreters

Three of the eight AUSIT ethical principles for the interpreting professions—impartiality, confidentiality and accuracy—are variously and sometimes inevitably compromised through the effects of customary law.

1. Impartiality

An Indigenous interpreter and their client commonly know and are related to each other, and carry rights and obligations to each other under customary law according to each one's kinship status relative to the other. Furthermore, serious offences may polarise communities, often along family or clan lines, and the interpreter may be caught up in this. As a result, Indigenous interpreters may experience a conflict of interest between their work and their kinship or other obligations towards the client, or may not be able to maintain objectivity and professional detachment in the face of community feeling, or indeed their own feelings, in relation to the situation at hand.

Many potential difficulties can be resolved by attending carefully to the choice of interpreter. Agencies who wish to book an interpreter need to provide the interpreter service with adequate information including the interviewee's name and language, their community and the nature and topic of the interview. This information allows the interpreter service to choose the appropriate interpreter for that person and that job. But it is also clear that the small size of many Indigenous language speech communities and the nature of Indigenous kinship systems mean that interpreter impartiality is frequently under challenge.

There are steps which can help avert or minimise potential conflicts of interest or challenges to objectivity:

- For each language, establishing a pool of male and female interpreters from different family groups and from different communities (i.e. in cases where a language is spoken in a number of communities) will increase the chance of finding an interpreter who is sufficiently distant from the client as a relative and sufficiently detached from the events under consideration so as to be able to function impartially and objectively. Again, the use of non-Indigenous interpreters (where available) may sometimes be necessary.
- Only trained interpreters should be used. Interpreter training covers professional ethics and provides strategies for recognising and dealing with factors that compromise these ethics (e.g. informing parties of their role and of any potential conflicts of interest or challenges to objectivity; knowing when to withdraw from an assignment; making clear to clients the distinction between speaking for them and interpreting what they say).
- Police, lawyers and members of the judiciary require sufficient cultural awareness training to anticipate, enquire about and deal with potential compromising factors facing an Indigenous interpreter in respect of their impending assignment. Those who use Indigenous interpreters require training in working with them. They should know to explain through the interpreter to the Indigenous party that the interpreter's role is limited to helping with language issues and that when they are 'at work' they must put family and community issues temporarily aside. This will help avert false expectations of the interpreter on the part of the Indigenous client and will reduce the likelihood that the interviewee will try to engage the interpreter in inappropriate conversation during the interview.
- Again, community education about the role of an interpreter and providing people with the opportunity to see interpreters at work will help Indigenous clients become familiar with the principle that interpreters must not attempt to influence the direction or outcome of an interview.
- Adequate briefing of the interpreter prior to an interview—informing them of the nature of the impending conversation and the topics to be covered—will alert the interpreter to potential cultural sensitivities.
- Interpreters may require debriefing or access to counselling following upsetting or traumatic assignments (e.g. interviews concerning extreme violence to relatives or about recently deceased relatives). They need strategies for minimising or otherwise dealing with the emotional impact of traumatic and upsetting interviews and to learn to recognise when they are losing objectivity during an assignment (and therefore to withdraw).

2. Confidentiality

Interpreters gain access to highly sensitive and confidential information about family and community members in the course of their work. While trained interpreters are clear that they must not share information learnt during an assignment (with defined exceptions), they may sometimes be heavily pressured by elders or other family members for information (see the discussion at pages 91–96, above).

Again, community education is critical so that people come to understand that the interpreter is not allowed to share information. The exclusive use of trained interpreters also assists by ensuring that this principle is observed to be consistently applied (untrained, ad hoc interpreters are under no such constraint).

Int9 suggested a strategy (at pages 91–96, above) for asserting her restriction from sharing information by proclaiming the information to be secret/sacred under customary law and thus unutterable. Notwithstanding this appealingly appropriate suggestion, one can imagine circumstances in which elders may require information urgently where, for example, their clan or community is in turmoil after being grossly offended on behalf of a victim who is their member, and where the interpreter is the only person whom they can access who knows the details of the offence through having interpreted for the suspect at the police station. The interpreter may experience a serious ethical dilemma in the situation where sharing the information might assist elders in diffusing a tense, and perhaps violent, community situation.

This scenario highlights the importance of cultural awareness training and cultural sensitivity on the part of police and lawyers. Under ideal circumstances police and lawyers would anticipate, or at least appreciate when appraised, the operation of Indigenous cultural and community dynamics that may urgently require information to be released. In this scenario, police could enable the interpreter to report on what transpired at interview by seeking the consent of the suspect (through the defence lawyer if need be) as disclosure of information may only be made with client agreement.

The point to be made here is that ethical issues and dilemmas facing interpreters arising from the operation of customary law may often be discussed and resolved when the quality of intercultural communication is high, channels of communication are open and cultural awareness is well developed.

3. Accuracy

The AUSIT Code of Ethics provides annotations to its eight general principles.²⁵ Annotations concerning accuracy include:

- Interpreters shall convey the whole message, including derogatory or vulgar remarks, as well as non-verbal cues.
- Interpreters and translators shall not alter, make additions to, or omit anything from their assigned work.

At pages 83–87, above, the influence of customary law on language use was discussed in some detail with *Int2* giving examples of how Aboriginal people are constrained according to factors including age differences; how speakers are related; ceremonial considerations; and, that constraints are carried over into the courtroom context.

While customary law in respect of language use may vary from tribe to tribe, there are some common examples that may affect Indigenous interpreters in their work:

- Respectful language is used when interpreting for an elder.
- Some relatives must be addressed in the plural form (just as respect is signified in French by addressing people using *vous* instead of *tu* for you).
- Vulgar speech must not be used in many circumstances (as *Int4* said at pages 91, above, 'you put it another way').
- During periods of ceremony people may be further constrained in who they talk to and how they talk.

An interpreter must not only tailor their speaking style according to whom they are addressing, but also according to whom they are referring. Thus, a man cannot be asked personal questions about a female categorised as his sister without causing great offence (and therefore introducing a significant dynamic into the interview). Another common constraint is to avoid talking about recently deceased people, to avoid using their name (and even any words sounding like their name) and to refer to them indirectly or obliquely or use the plural pronoun *they* instead of *he* or *she*.

The consequence of these factors is that the course of police and courtroom interviews may be affected in ways that are not recognised or appreciated by the interviewer. On the other hand, if an Indigenous interpreter insisted on putting their customary law aside and always interpreted questions in the form and manner in which they were asked, then the course of the interview would still be impacted by dynamics of embarrassment, hostility or even a reluctance to proceed on the part of the interviewee. (Such unintended communicative effects also compromise accuracy.)

25. AUSIT Code of Ethics for Interpreters and Translators, see: <<http://www.ausit.org>>.

So what are the possible responses to this? First, it is important to recognise that these are legitimate constraints which need to be understood and accommodated. It is imperative, for example, for cross-examining counsel to realise that, in circumstances where respectful language is required of interpreter to witness, attempting to unsettle the witness through aggressive questioning uttered in challenging tones might necessarily fall flat.

Again, education and training are indicated. Police, lawyers, magistrates and judges who deal with Indigenous people need training in intercultural communication and cross-cultural awareness so that they can: anticipate the impact of their style of speaking; adjust their style according to the circumstances; and seek and be receptive to advice from the interpreter about the cultural dynamics which may be affecting communication during an interview. This training should not be seen as an added burden but as an extra tool. For example, the advocate who wishes to 'vigorously' cross-examine an elder would then know to begin by locating a mature interpreter.

Both counsel and witness would also be assisted by the witness being advised beforehand—through the interpreter—of the process they are about to undergo and to be alerted to its key characteristics (bear in mind that English speaking Australians absorb this information through the mass media). Community education about these matters, including the role of a witness, would also promote greater acceptance of courtroom questioning as an essential component of justice rather than being feared as a terrifying ordeal of white-man's law.

It should be pointed out that among AUSIT's annotations to the general principles of the Code of Ethics is the provision that 'Interpreters and translators shall explain their role to those unaccustomed to working with them'. This provision can only be met for courtroom witnesses if the interpreter *knows* their role—which cannot be assumed for untrained ad hoc 'interpreters'—and if time is set aside by the court, or by counsel who called the witness, for the interpreter to fully explain their role to the witness before evidence is taken.

For the Indigenous witness who knows the interpreter as a relative and as an individual there is an additional, perplexing, aspect of the interpreter's role that many might not appreciate. This is the provision that the interpreter should not interpret counsel's utterances in the manner of *reporting* to the witness what counsel has said, but must adopt the persona of counsel and, in effect, play the role of counsel by speaking their words (in the other language) and even adopting their tone. Confusion arises when counsel says something like: 'That's not true, is it?' because when the witness hears the interpreter uttering this in their own language the witness may assume that the interpreter is speaking person-to-person rather than as an actor. This reinforces the critical importance of providing the interpreter with adequate opportunity to fully explain this aspect of their role. (The alternative is for the interpreter to preface all questions addressed by advocates with: 'That lawyer is speaking to you like this: ... (*the interpreter then speaks as the lawyer*)'.)

Finally, there is another challenge to accuracy that was discussed in several places within Part III, above: the need for an interpreter to sometimes explain what cannot be simply translated. *Int1* put the issue in these terms:

- That's the hardest part – trying to find a language word that will fit an English word, so sometimes we've got to tell it like a story so people understand it. (at pages 83–87, above)
- Well that's another tricky thing about interpreting. When we do interpreting there's sometimes words, these legal words, that may mean nothing to us in our language. So we've got to tell it like a story, so that people understand or get the gist of ... what this business is all about. So sometimes it's really hard to use legal words too when we're interpreting; so we've got to tell it like a story, to get the story right and to do it right. (at pages 88–89, above)

Whether or not interpreters are permitted to explain what cannot be simply translated is, according to the lawyer interviewed in Part III, questionable. While this is not so much an issue of customary law, it is nevertheless important that courts more readily acknowledge and accommodate the reality that direct translation is not always effective (let alone *literal* translation, which is rarely even possible); and that explication, or even explanation, of some terms and concepts may be required if a witness is to understand the lawyer's intended meaning or, indeed, if the lawyer is to understand the witness's intended meaning.²⁶

26. This position is set out by the author in Cooke M, 'Understood by All Concerned? Anglo/Aboriginal Legal Translation' in Morris M (ed), *Translation and the Law* (Amsterdam: John Benjamins Publishing Company, 1995) 37–66.

background paper 3

The value of a benchmarking framework to the reduction of Indigenous disadvantage in the law and justice area

Greg Marks*

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1. Introduction: the human rights context

The Australian legal and political system increasingly operates in an international context. In a globalised and inter-related world it is not possible to ignore international standards and opinion. International scrutiny is a fact of life.

Consequently, policy development and program implementation at the national level must take account of international standards and practices. This is especially the case in the area of human rights, and for settler societies such as Australia the human rights of Indigenous people are a particular focus. Attempts to avoid international scrutiny, and to claim that Indigenous issues are essentially a domestic concern, are no longer credible. As Paul Keal has pointed out in the context of discussing Indigenous rights:

Increasingly, the moral standing or legitimacy of particular states is bound up with the extent to which other members of international society perceive them to be protecting the rights of their citizens.¹

International human rights law and practice provide considerable guidance as to required standards. United Nations (UN) declarations and treaties set out the applicable principles and norms, and the jurisprudence of UN treaty monitoring bodies provides development, clarification and guidance in respect of these standards. International concern to protect and promote the rights of Indigenous peoples has been a feature of the human rights regime developed since World War II. This concern has been driven in part by the recognition that Indigenous peoples have collective rights arising from their prior occupation of the nations within which they now live.

However, the recognition that Indigenous peoples often suffer significant disadvantage, poverty and distress has also been significant in focussing attention on the human rights situation of such peoples. The socio-economic circumstances of Indigenous people is often marginal and their disadvantage severe. To a considerable extent they do not reach the living standards common in wider society.

This situation is characteristically evident in the area of law and justice. However, international human rights standards provide guidance—both directly and indirectly—in respect of the rights of Indigenous peoples with reference to law and justice matters. This guidance addresses the disadvantage experienced in the interaction of Indigenous peoples with the law and justice systems of nation states, including the obstacles they face in maintaining and applying their own laws and customs, at least in relation to their own internal affairs.

International law prohibits discrimination on the grounds of race. The principle of non-discrimination, contained in a number of widely ratified international instruments, is generally considered to be a peremptory norm of international law from which no derogation is permitted.² Non-discrimination is a bedrock rule of the international order.³

International law provides guidance on the timing and manner of implementing standards. In respect of certain rights, particularly civil liberties and rights of democratic participation, the expectation is that they will apply in full and without delay. In other areas, including economic, social and cultural rights, a progressive approach to implementation is possible, in cognisance of the fact that resource and institutional constraints may not allow for full and immediate realisation. Nonetheless, demonstrated good faith in moving towards full realisation is required of governments.

Law and justice rights have both elements: there are rights, particularly in respect of the treatment of the person, where immediate application is mandated; and there are other aspects, for example developing appropriate judicial processes, where it is accepted that time may be required in order to devote sufficient resources to achieve full realisation. In addressing Indigenous disadvantage in respect of law and justice in Australia, the seriousness of the disadvantage is well known. High arrest and incarceration rates, repeat offending, domestic violence, and alcohol and drug abuse are all too common. The community consultation phase of the Law Reform Commission of Western Australia's Aboriginal customary law project has shown that a very high degree of concern is felt by members of Aboriginal communities about their disadvantage in respect of law and justice matters.⁴

1. Keal P, *European Conquest and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2003) 1.

2. See Article 53 of the *Vienna Convention on the Law of Treaties* 1969 which describes a peremptory norm, or *jus cogens*, as a norm from which no derogation is allowed.

3. See Blay S, Piotrowicz R & Tsamenyi BM (eds), *Public International Law – An Australian Perspective* (Melbourne: Oxford University Press, 1999) 69.

4. See, for example, Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Geraldton, 26–27 May 2003* and *Thematic Summaries of Consultations – Wiluna and Meekatharra, 27–28 August 2003*.

Relevant international instruments

The two chief human rights instruments are the International Covenant on Civil and Political Rights (ICCPR)⁵ and the International Covenant on Economic Social and Cultural Rights (ICESCR).⁶ Australia has ratified both Covenants, and in addition has allowed individual complaints to be taken by Australian citizens to the committee of experts that monitors compliance with the ICCPR – the Human Rights Committee. The ICCPR has considerable impact on Australian law and practice. It is annexed to the *Human Rights and Equal Opportunity Act 1986* (Cth) and is incorporated by reference in the legislation establishing the Australian Law Reform Commission.⁷ Other relevant international human rights instruments that have been ratified by Australia are:

- The Convention on the Elimination of All Forms of Racial Discrimination (CERD);⁸
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);⁹
- The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);¹⁰
- The Convention on the Rights of the Child (CROC).¹¹

These instruments contain provisions that can apply to the disadvantage experienced by Indigenous Australians in matters of law and justice. Taken together, these instruments provide a pattern of significant obligation, binding at international law, in respect of eliminating discrimination and ensuring equality of Indigenous Australians in law and justice as in other matters. Relevant provisions include:

Self-determination

The ICCPR and ICESCR each provide in Article 1 that '[A]ll peoples have the right of self-determination'. Despite attempts by the Australian and other governments to deny or limit the application of this right in respect of Indigenous peoples, it is clear from the decisions and general comments of UN treaty bodies that this right does extend to Indigenous peoples and, further, that it entails a requirement for Indigenous peoples to give their informed consent before decisions directly affecting their lives and welfare are made.

Whilst self-determination does not mean that there is a right to secession or political independence, it does mean that a large measure of autonomy should be accorded Indigenous peoples. In practical terms, this means that where policies and programs affect Indigenous people and communities, mere consultation is not enough. There must be effective participation, dialogue and negotiation; although, ultimately only informed consent or agreement can provide a legitimate basis for decisions.

Equality

Both the ICCPR and ICESCR mandate equality of treatment, and the consequent illegality of discrimination against people on the grounds of race. The prohibition of racial discrimination is set out in detail in the CERD. However, whilst outlawing negative discrimination, equality of treatment does allow for positive or special measures ('positive discrimination') to overcome historic inequalities.¹² The equality sought is a substantive equality, not merely a formal equality which itself can mask or perpetuate long-term and systemic inequalities.

Specific provisions about law, liberty and the treatment of prisoners and detainees

The ICCPR has a number of provisions prohibiting arbitrary arrest or detention; torture; or cruel, inhuman or degrading punishments. These provisions require that:

5. *International Covenant on Civil and Political Rights*, adopted 1966, 999 UNTS 171.

6. *International Covenant on Economic, Social and Cultural Rights*, adopted 1966, 993 UNTS 3.

7. The significance of the ICCPR for Australian common law was noted by Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Further, in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 a majority of the High Court decided that ratification of an international Convention by Australia raises a legitimate expectation that decision-makers will exercise statutory discretions consistent with the provisions of relevant international Conventions. Although in *Teoh* the *Convention on the Rights of the Child* was under consideration, the Court's decision extends to all ratified Conventions including the ICCPR.

8. CERD, adopted 1965, 660 UNTS 195.

9. CEDAW, adopted 1979, 1249 UNTS 13.

10. CAT, adopted 1984, UN Doc. A/39/51; 24 ILM 535 (1985).

11. CROC, adopted 1989, UN Doc. A/44/49; 28 ILM 1448 (1989).

12. Article 2(2) of CERD requires that states, when circumstances warrant, take special and concrete measures to ensure adequate development and protection of certain racial groups or individuals belonging to them.

- those arrested be treated promptly and lawfully;
- persons deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person;
- juveniles be segregated from others in detention; and
- the objective of imprisonment be reform and social rehabilitation.

The minimal requirements for the fair and efficacious operation of courts and tribunals—including free assistance of an interpreter if the accused cannot understand or speak the language of the court—are set out in provisions which emphasise the special needs of juveniles, guarantee a right of review of convictions, allow for compensation when there has been a miscarriage of justice and prohibit retrospective laws and punishments.

Protections against domestic violence

The right to be free from domestic violence is provided by CEDAW. The relevant treaty body has made clear since 1992 that the right to freedom from violence is implicit in the right to freedom from discrimination, and also in the ICESCR, where that Committee has noted that a primary goal of Article 12 (concerning the right to the highest attainable standard of health), in respect of women, is protecting women from domestic violence.¹³

Protection of minorities

As well as provisions of general application, there is specific provision in the ICCPR (Article 27) applying to the rights of minorities, including Indigenous peoples. Article 27 requires that in those states where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their culture, to profess and practise their own religion, or to use their own language. This provision has been extensively considered in a number of cases before the Human Rights Committee. It provides a strong basis for affirming that the rights protected are not merely individual rights but collective rights. This provision is highly relevant to the position of Indigenous peoples *vis à vis* the legal system, including the consideration of the place of Aboriginal customary law in that relationship.

ILO Convention 169

Further support for the protection of the legal rights of Indigenous peoples and, in particular, the recognition of their customary law, is found in ILO Convention 169 concerning Indigenous and Tribal Peoples.¹⁴ This is the only international instrument in force dealing specifically with Indigenous peoples. Australia played a significant role in developing the Convention, but has not to date ratified it. Nevertheless, ILO 169 has become an important source for guidance as to international law norms in respect of Indigenous peoples and to some extent can be seen as reflecting customary international law.¹⁵ It is an authoritative source of guidance on international standards and merits close attention by Australian policy makers.

Article 5 of the Convention makes the general proposition that the social, cultural and spiritual values and practices of Indigenous peoples shall be recognised and protected and that due account shall be taken of the nature of the problems that face Indigenous people both as groups and as individuals. The article also provides that the integrity, practices and institutions of these peoples shall be respected.

Specifically regarding the place of customary law, Article 8 provides:

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs and customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

13. CESCR, *General Comment No. 14: The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4, 11 August 2000, [21].

14. *ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, adopted 1989.

15. See Anaya J, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) 52.

Article 9 deals with the role of custom in dealing with offences and penalties:

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10 provides guidelines for sentencing:

1. In imposing penalties laid down by the general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. Preference shall be given to methods of punishment other than confinement in prison.

Findings of UN treaty bodies

UN treaty bodies, responsible for monitoring compliance with human rights treaties, have made a number of observations over recent years regarding Australia's human rights performance, particularly in the area of Indigenous rights where concerns have been expressed. Some observations by the treaty bodies of relevance to the law and justice area have been:

ICCPR

The Human Rights Committee (HRC) in its July 2000 report on Australia was critical of mandatory imprisonment legislation in Western Australia and the Northern Territory. The HRC reported that such legislation 'leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system'.¹⁶ The HRC further commented that the legislation 'raises serious issues of compliance with various articles of the Covenant'.¹⁷

ICESCR

In its concluding observations of September 2000 on Australia's third Periodic Report under the Convention, the Committee on Economic, Social and Cultural Rights (CESCR) expressed its deep concern that, despite efforts and achievements of the federal government, the Indigenous populations of Australia continued to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights.¹⁸ The CESCR was concerned to ascertain any government initiatives to address domestic violence, particularly in respect of Aboriginal women in remote areas.¹⁹

CERD

The CERD Committee, in its Concluding Observations of March 2000, noted with grave concern that 'the rate of incarceration of indigenous people is disproportionately high compared with the general population'.²⁰ It expressed its concerns about the provision of appropriate interpreter services, socio-economic marginalisation, discriminatory approaches to law enforcement, the lack of sufficient diversionary programs, and mandatory sentencing schemes in Western Australia and, particularly, the Northern Territory. In discussion with the Australian Minister, Phillip Ruddock, CERD's Country Rapporteur commented on the need for the Australian government to define policies and programs and set benchmarks against which its achievements could be measured.²¹

16. Human Rights Committee, *Concluding Observations of the HRC – Australia*, UN Doc. A/55/40, [498]–[528].

17. *Ibid.*

18. Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations Australia*, UN Doc. E/C.12/1/Add.50, [15].

19. CESCR, Pre-sessional Working Group May 2000, *List of Issues to be taken up in connection with the consideration of Australia's third periodic report*, UN Doc. E/C.12/Q/Australia/1, [10].

20. Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations by the CERD: Australia*, CERD/C/304/Add.101, [15].

21. Zifcak, *Mr Ruddock goes to Geneva* (Sydney: UNSW Press, 2003) 13.

It is clear that Australia's performance in respect of meeting its international obligations concerning its Indigenous peoples is under close scrutiny. The widely held expectation is that developed democracies such as Australia will generally meet their human rights obligations. Failure to do so can lead to international concern and criticism.

The particular priority attached to law and justice issues in respect of Indigenous peoples is shown in the work of the UN Special Rapporteur on the human rights of indigenous people, Rodolfo Stavenhagen. In his 2004 Report to the sixtieth session of the UN Human Rights Commission,²² Stavenhagen notes that the Report concentrates on 'the obstacles, gaps and challenges faced by indigenous peoples in the realm of the administration of justice and the relevance of indigenous customary law in national legal systems'²³ and that these are issues that 'indigenous representatives and government delegations, at the Working Group on Indigenous Populations, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the Commission on Human Rights and most recently at the Permanent Forum on Indigenous Issues, have identified repeatedly as being of crucial importance for the full enjoyment of the human rights of indigenous peoples'.²⁴

At the Expert Seminar on Indigenous Peoples and the Administration of Justice, convened by Stavenhagen in November 2003,²⁵ papers covered a wide range of law and justice issues affecting Indigenous people, including the recognition of customary law²⁶ and programs to reduce offence and incarceration rates.²⁷

2. International developments and best practice

Deliberate, concrete and targeted steps

The obligation on states parties to ensure the progressive realisation of rights is set out in ICESCR, and further developed in the Decisions and General Comments of the CESCR. Article 2 (1) requires a state party to undertake to:

[T]ake steps...to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means.

The provision is further elaborated in CESCR's General Comment No 3.²⁸ This makes clear that, while the obligation to 'take steps' means that the full realisation of relevant rights may indeed be achieved progressively over time, nevertheless the taking of such steps cannot be delayed, and, further, the obligation is that those steps should be deliberate, concrete and targeted towards meeting Covenant obligations.²⁹ It also makes clear that the obligation on states parties is to move as *expeditiously* and *effectively* as possible.³⁰ In meeting their obligations states are required to develop strategies, identify indicators and determine benchmarks³¹ as the basis for reporting to CESCR on a regular basis.

The 'progressive realisation' of social, economic and cultural rights has become the paradigm for approaching these matters. At the international level, targets, benchmarks and indicators are an integral feature of programs to address poverty and disadvantage. The integration of human rights principles into the design and delivery of programs of technical assistance for poverty elimination is at the cutting edge of policy and program development. Within the UN system these developments have been fostered by the Human Rights Strengthening Project (HURIST) and the United Nations Development Program (UNDP) Oslo Governance Centre (OGC). The OGC has been established to enhance program activities and the advisory role of UNDP in the area of democratic governance. Targeting programs and setting benchmarks is now central to monitoring progress and ensuring accountability.

22. UN Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples*, UN Doc. E/CN.4/2004/80, 2. See <<http://ods-dds-ny.un.org/doc/UNDOC/GEN/G04/105/28/PDF/G0410528.pdf?OpenElement>>.

23. Ibid.

24. Ibid.

25. UN High Commissioner for Human Rights: Expert Seminar on Indigenous Peoples and the Administration of Justice (Madrid, November 2003). See <<http://www.unhcr.ch/indigenous/madridseminar.htm>>.

26. Ibid. See Anaya J, 'Indigenous peoples' legal systems', paper presented to the Expert Seminar on Indigenous Peoples and the Administration of Justice (Madrid, November 2003). Anaya notes that: '[T]he Indian nations, or 'tribes', of the United States characteristically have their own functioning judicial systems that are at least partly rooted in historical indigenous custom and authority' (p 1) and that '...within the bounds of their federally-recognised authority, tribal courts can be seen to function as principal pillars upon which indigenous peoples in the United States are exercising and developing meaningful self-governance' (p 3).

27. Ibid. See Watson D, 'Discrimination Against Indigenous People in the Justice System', paper presented to the Expert Seminar on Indigenous Peoples and the Administration of Justice (Madrid, November 2003), which notes a number of programs in Canada that address the problem, for example the Urban Aboriginal Strategy (p 4).

28. CESCR, *General Comment No. 3: The nature of states parties obligations*, UN Doc. E/1991/23, 14 December 1990.

29. Ibid [2].

30. Ibid [9].

31. See, for example, CESCR, *General Comment No. 14: The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4, 11 August 2000.

Professor Philip Alston, Chairperson of the CESCR Committee from 1991 to 1998, has noted the importance of the development of benchmarking to the monitoring of progress in realising rights.³² Observing the extensive work done in recent years to elaborate a wide range of economic and social indicators, Alston noted that 'indicators differ in very significant ways from benchmarks'.³³ **Indicators**, for the most part, are essentially statistical in nature, and the need for objectivity, quantifiability and accuracy point in turn to the technical expertise required in order to compile them. The same applies to their subsequent interpretation, which should take account of the known weaknesses of the process, and compensate for any likely biases. Accordingly, as discussed below, caveats and qualifications may be required with the use of indicators.

In contrast, **benchmarks** are targets established by government, on the basis of appropriate consultative processes, in relation to each of the economic, social and cultural rights obligations that apply for the state concerned. Those targets will be partly quantitative (and thus more closely assimilated to indicators) and partly qualitative. They will be linked to time frames, and they will provide a basis upon which the reality of 'progressive realisation' can be measured. Benchmarks should be linked to mechanisms of accountability in the sense that failure to reach a given benchmark should trigger an appropriate remedial response. Lastly, to empower those for whom programs are implemented, Alston states that the proposed beneficiaries need to participate in decisions relating to the steps to be taken towards realising the rights, and to contribute to the monitoring and evaluation processes.³⁴

Thus, if benchmarks are to be a tool of accountability and not just the rhetoric of empty promises they must, according to UNDP, be:

- specific, time bound and verifiable;
- set with the participation of the people whose rights are affected, to agree on what is an adequate rate of progress and to prevent the target from being set too low; and
- reassessed independently at their target date, with accountability for performance.³⁵

UNDP also provides some important qualifications on the use of statistical indicators and notes that statistics provide great power for clarity, but also for distortion.³⁶ UNDP further notes that indicators which are based on careful research and method assist in establishing strong evidence, opening dialogue and increasing accountability.³⁷ However, as UNDP indicates in the information reproduced below, care should be taken:³⁸

Statistical Indicators: 'Handle with care'

Statistical indicators need to be:

- **Policy relevant:** giving messages on issues that can be influenced, directly or indirectly, by policy action;
- **Reliable:** enabling different people to use them and get consistent results;
- **Valid:** based on identifiable criteria that measure what they are intended to measure;
- **Consistently measurable over time:** necessary if they are to show whether progress is being made and targets are being achieved;
- **Possible to disaggregate:** for focussing on social groups, minorities and individuals; and
- **Designed to separate the monitor and the monitored where possible:** minimising the conflicts of interest that arise when an actor monitors its own performance.³⁹

The development of law and justice indicators in the UN system

The OGC supports the implementation of democratic reforms necessary for development goals to be achieved. The OGC has a special focus and competency in the area of access to justice, human rights, civil society, governance and

32. Alston P, 'International Governance in the Normative Areas' in UNDP, *Background Papers: Human Development Report 1999*, reproduced in H Steiner and P Alston, *International Human Rights in Context* (New York: Oxford University Press, 2000) 317.

33. Ibid.

34. Ibid 318.

35. UNDP, *Human Development Report 2000 – Human rights and human development*, UNDP, New York, 2000. 49. See <<http://hdr.undp.org/reports/global/2000/en/>>.

36. Ibid 90.

37. Ibid.

38. Ibid.

39. Ibid.

conflict prevention. Increasingly, the OGC has identified a causal relationship between access to law and justice and the alleviation of poverty. It has questioned an unduly economic perspective of poverty, and noted the 'learned helplessness' that characterises the poor in the face of the legal system.

Justice is an area of increasing importance in development cooperation, and UNDP views it as closely related to human development and poverty eradication, and as a fulcrum for a human rights based approach to programming.⁴⁰

So, law and justice issues are inextricably linked with overall disadvantage and poverty. UNDP's approach to justice sector programs follows a capacity development perspective. According to UNDP, '[c]apacity is understood as "the ability to solve problems, perform functions, and set and achieve objectives"'.⁴¹ Thus '[a] capacity development approach opts for building on existing strengths, rather than substituting them. It stresses the rule of law, freedom from fear, freedom from want, and the right to development'.⁴²

Finally, in respect of evaluating its Access to Justice Programs, UNDP concedes that justice performance is difficult to evaluate. In this context it notes that:

It is important to have *target indicators* – projecting results based on specific objectives as defined in a project document; *benchmarks* – to compare internal data from the justice sector with data from a different sector; *milestones* – establishing intermediate goals; and *situational indicators* – e.g. workload of judges, length of trials etc.⁴³

UNDP further notes that more work is required on developing indicators related to the provision of justice, in the context of the development of general sets of indicators on good governance.⁴⁴ Despite the difficulties, UNDP believes law and justice programs merit priority 'because justice is the first among public virtues in a good society and therefore should be a first charge on the resources of states'.⁴⁵

3. Benchmarking developments in Australia

In Australia the development of benchmarks and indicators has emerged as central to efforts to increase the effectiveness of programs addressing Indigenous disadvantage. The failure of many programs to significantly improve the socio-economic circumstances of Indigenous Australians and the increasing dysfunction experienced by many communities has highlighted the need for innovative and targeted approaches. In particular, there is now a focus on coordination—a 'whole of government' approach—and on setting objectives, monitoring progress, reporting results and applying results to policy and program development. This is essentially a benchmarking approach. These developments, while having features unique to Australian circumstances, parallel the overseas developments outlined above. Opportunities exist for experiences to be drawn on and synergies to be developed between Australian and international benchmarking approaches. This is most likely to occur if Australian developments are made with international standards and developments in mind.

A strategic approach

The emerging importance of benchmarks and indicators in Australia is exemplified by the recent publication of *Overcoming Indigenous Disadvantage – Key Indicators 2003* (the 'Report'),⁴⁶ a report prepared for the Council of Australian Governments (COAG) by the Steering Committee for the Review of Government Service Provision (SCRGSP).⁴⁷ It is intended that the Report will be presented on a regular basis and that it will become the central benchmarking and monitoring instrument in respect of Indigenous programs for all governments in Australia and a key planning tool for all departments and agencies at state, territory and Commonwealth levels. The approach to setting benchmarks and identifying indicators in the Report is set out below.

40. Sudarshan R, 'Rule of Law and Access to Justice: Perspectives from UNDP Experience', paper presented to the European Commission Expert Seminar on Rule of Law and the Administration of Justice as part of Good Governance (Brussels, 3–4 July 2003) 1. See <<http://www.undp.org/oslocentre>>. Sudarshan is Advisor – Justice, UNDP Oslo Governance Centre, Norway.

41. Ibid.

42. Ibid.

43. Ibid 10.

44. Ibid.

45. Ibid.

46. Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage – Key Indicators 2003* (Canberra: Productivity Commission, November 2003).

47. The SCRGSP comprises representatives from all Australian governments and is convened by the Chairman of the Productivity Commission, which also provides the secretariat.

Background to development of the report

In 1999 the Commonwealth Grants Commission (CGC) had been set the task of developing methods of calculating the relative needs of Indigenous Australians in different regions for health, housing, infrastructure, education, training and employment services, to calculate indexes of need and to compare the results with the actual distribution of expenditure on those functions. The need for focussed target setting and effective monitoring was identified by the CGC in its subsequent *Report on Indigenous Funding 2001* (the 'CGC Report').⁴⁸ The CGC Report took a wide view of the issues involved in addressing Indigenous disadvantage, and contained considerable information and analysis concerning Indigenous funding issues.

The CGC Report identified a number of important principles and key areas for action that should guide efforts to promote a better alignment of funding with needs. These included:

- the full and effective participation of Indigenous people in decisions affecting funding distribution and service delivery;
- a focus on outcomes;
- ensuring a long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals;
- ensuring genuine collaborative processes with the involvement of government and non-government funders and service deliverers, to maximise opportunities for pooling of funds, as well as multi-jurisdictional and cross-functional approaches to service delivery;
- recognising the critical importance of effective access to mainstream programs and services, and clear actions to identify and address barriers to access;
- improving the collection and availability of data to support informed decision making, monitoring of achievements and program evaluation; and
- recognising the importance of capacity building within Indigenous communities.⁴⁹

Particularly relevant to the issue of benchmarking was the identification of the need to improve performance in respect of data matters. It was evident to the CGC that much of the required data for analysing service delivery was non-existent, or partial, or unreliable, or not comparable either between regions or over time. As the CGC Report pointed out, access to comparable and reliable data was critical if objective measures of Indigenous need were to be better incorporated in decisions on the allocation of funds.⁵⁰ The CGC Report observed that to achieve good consistent data, the Commonwealth, state and other service providers must, as a matter of urgency:

- identify minimum data sets and define each data item using uniform methods so that the needs of Indigenous people in each functional area can be reliably measured;
- prepare measurable objectives so that defined performance outcomes can be measured and evaluated at a national, state and regional level;
- ensure data collection is effective, yet sensitive to the limited resources available in service delivery organisations to devote to data collection;
- negotiate agreements with community based service providers on the need to collect data, what data should be collected, who can use the data, the conditions on which the data will be provided to others and what they can use it for; and
- encourage all service providers to give a higher priority to the collection, evaluation and publication of data.⁵¹

The CGC Report acknowledged that many of these principles were in fact being followed in work that was underway. It surveyed some initiatives taken to improve data management, including the 1997 request by the Prime Minister for the SCRGSP to oversee the preparation and publication of data on services provided to Indigenous people.⁵²

The identification of a targeted and monitored cross-jurisdictional approach identified by the CGC became the basis of the approach developed through COAG in the context of progressing the reconciliation agenda. COAG, at its

48. Commonwealth Grants Commission (CGC), *Report on Indigenous Funding 2001* (Canberra, 2001).

49. *Ibid.* xviii–xix.

50. *Ibid.* 95.

51. *Ibid.* 96.

52. *Ibid.* 78.

November 2000 meeting, agreed on a number of priority actions including:

[R]eviewing and re-engineering programs and services to ensure they deliver practical measures that support families, children and young people. In particular, governments agreed to look at measures for tackling family violence, drug and alcohol dependence and other symptoms of community dysfunction.⁵³

In agreeing to take a lead role in driving necessary changes, COAG directed Ministerial Councils—established at ministerial level to coordinate federal and state programs—to develop (where they had not already done so) action plans, performance monitoring strategies and benchmarks. In April 2002 COAG took this process a step further and commissioned the SCRGSP to:

[P]roduce a regular report against key indicators of indigenous disadvantage. This report will help to measure the impact of changes to policy settings and service delivery and provide a concrete way to measure the effect of the Council's commitment to reconciliation through a jointly agreed set of indicators.⁵⁴

A draft framework for reporting against indicators in respect of addressing Indigenous disadvantage was developed by the SCRGSP through a consultative process and presented to COAG in 2003. In confirming COAG's endorsement of the framework, the Prime Minister wrote:

The framework will provide relevant and meaningful indicators that can demonstrate the impact of government policies and programmes on outcomes for indigenous people.⁵⁵

Given the central role that is intended for the report to COAG against this framework, it is useful to consider in some detail the approach taken, the indicators selected, and, where relevant, their application to the law and justice area.⁵⁶

A preventive model

As the Chairman of the Productivity Commission, Gary Banks, has pointed out, the commissioning of the SCRGSP *Overcoming Indigenous Disadvantage: Key Indicators Report 2003* (the 'Report') arose from the desire to monitor outcomes in a systematic way that crosses jurisdictional and portfolio boundaries and assists in informing policy developments within jurisdictions.⁵⁷ In this context, Mr Banks has observed that:

The purpose of the Report is to be more than just another collection of data. It seeks to document outcomes for Indigenous people within a framework that has both an agreed vision of what life should be for Indigenous people and a strategic focus on key areas that need to be targeted if that longer term vision is to be realised.⁵⁸

As the Report itself indicates, its structure seeks to facilitate interaction between sectors and between governments on programs, but without detracting from the responsibility and accountability of individual agencies.⁵⁹ The Report further notes that:

It is predicated on the view that achieving improvements in the wellbeing of Indigenous Australians in a particular area will generally require the involvement of more than one government agency, and that improvements will need preventive policy actions on a whole-of-government basis.⁶⁰

The Report is forward-looking, rather than merely being an accounting or measuring device. The Report notes that because of the poor connection between high level measurements (termed 'headline' statistics) of disparity in outcomes, such as life expectancy, and the actions of policy makers and service delivery agencies, high level measurements do not provide an adequate focus for action among relevant policy makers.⁶¹ Indeed, as the Report notes:

Because of necessarily long lead times, current policy interventions which aim to improve, for example, Indigenous health or employment outcomes, may take many years to show up in the 'headline' statistics. In the intervening

53. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, appendix 1.1 'Extract from COAG Communiqué, 3 November 2000', 1–2.

54. Ibid, appendix 1.2, 'Extract from COAG Communiqué, 5 April 2002'.

55. Ibid xix.

56. The information on the COAG Key Indicators Reporting Framework presented here draws on documentation produced by the Productivity Commission, including: Banks G, Chairman Productivity Commission, *Indigenous Disadvantage: Assessing Policy Impacts*, speech delivered at the conference Pursuing Opportunity and Prosperity (Melbourne, November 2003): see <<http://www.pc.gov.au/research/speeches/cs20031113/cs20031113.pdf>>; and SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46.

57. Banks, ibid 1–2.

58. Ibid 2.

59. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, [2.1].

60. Ibid [2.2]

61. Ibid.

period, the statistics of disparity may incorrectly suggest inactivity, when much may be being done to ultimately close the gap.⁶²

The Report reinforces the need to go beyond the 'headline' statistics. Thus:

Such statistics, while important to gauging overall progress in the long term, cannot assist policy makers to target the causes of disadvantage at the key times in the lifecycle when interventions can most effectively be made. In some respects, reporting at the headline level (for example, life expectancy) can create a perception that the problem is too big to handle. The problems being reported on with headline indicators generally arise at the end of long chains of causal factors (for example, birth weight, diet and smoking) that cross many sectoral boundaries.⁶³

Accordingly, indicators must be established to report on progress with respect to these causal factors that underlie the headline statistics. Thus, the framework that has been developed for COAG is based on a preventive model that attempts to tackle outcome inequalities by focussing on the causal factors⁶⁴ that are likely to result in the greatest impact on population-wide differentials.⁶⁵ It encourages policy makers and service delivery staff to look to those areas for the factors that are ultimately causing disadvantage at the headline level.

A tiered approach

The framework for the Report takes a tiered approach.⁶⁶ At the apex of this framework are three overarching priorities. They reflect a vision for Indigenous people that is shared by governments and Indigenous people (based on the SCRGSP's consultative process). They are:

- safe, healthy and supportive families with strong community and cultural identity;
- positive child development and prevention of violence, crime and self-harm; and
- improved wealth creation and economic sustainability for individuals, families and communities.⁶⁷

'Headline indicators' – a snapshot

Below these overarching (and overlapping) priorities, a first tier of 'headline indicators' has been developed to provide a snapshot of how actual outcomes for Indigenous people measure up against these overarching priorities.⁶⁸ The framework is illustrated in Figure 1 below (p 132).⁶⁹

Mr Banks has stated that the choice of the headline indicators, while subjective, was generally accepted as meaningful by Indigenous people in the consultation process for developing the framework.⁷⁰ The Report identified 12 indicators of social and economic status of Indigenous people relative to other Australians. Mr Banks points out that the framework and report could rest there. However, this would provide little assistance for policy-makers, or those who wish to monitor the impact of programs. Headline indicators do not provide a sufficient policy focus and are only blunt indicators of policy performance.⁷¹

Strategic areas for action – the second tier

At the second tier of the framework, there are seven 'strategic areas for action'. The Report notes that:

They have been chosen for their potential to have a significant and lasting impact in reducing Indigenous disadvantage and for their amenability to policy action. They can assist policy makers to address the causes of disadvantage so that, over time, improvements in the headline indicators and priority outcomes will be achieved. While it may take some time for improvement in the strategic areas to show up in the headline indicators, they serve as intermediate measures of progress.⁷²

62. Ibid.

63. Ibid.

64. The terminology adopted by the *Overcoming Indigenous Disadvantage – Key Indicators 2003 Report* for these causal factors is 'strategic areas for action'.

65. See Banks, above n 56, 2.

66. Compare to the discussion by Professor Alston, above, of the distinction in the UN system between benchmarks and indicators.

67. Banks, above n 56, 2.

68. Ibid 3.

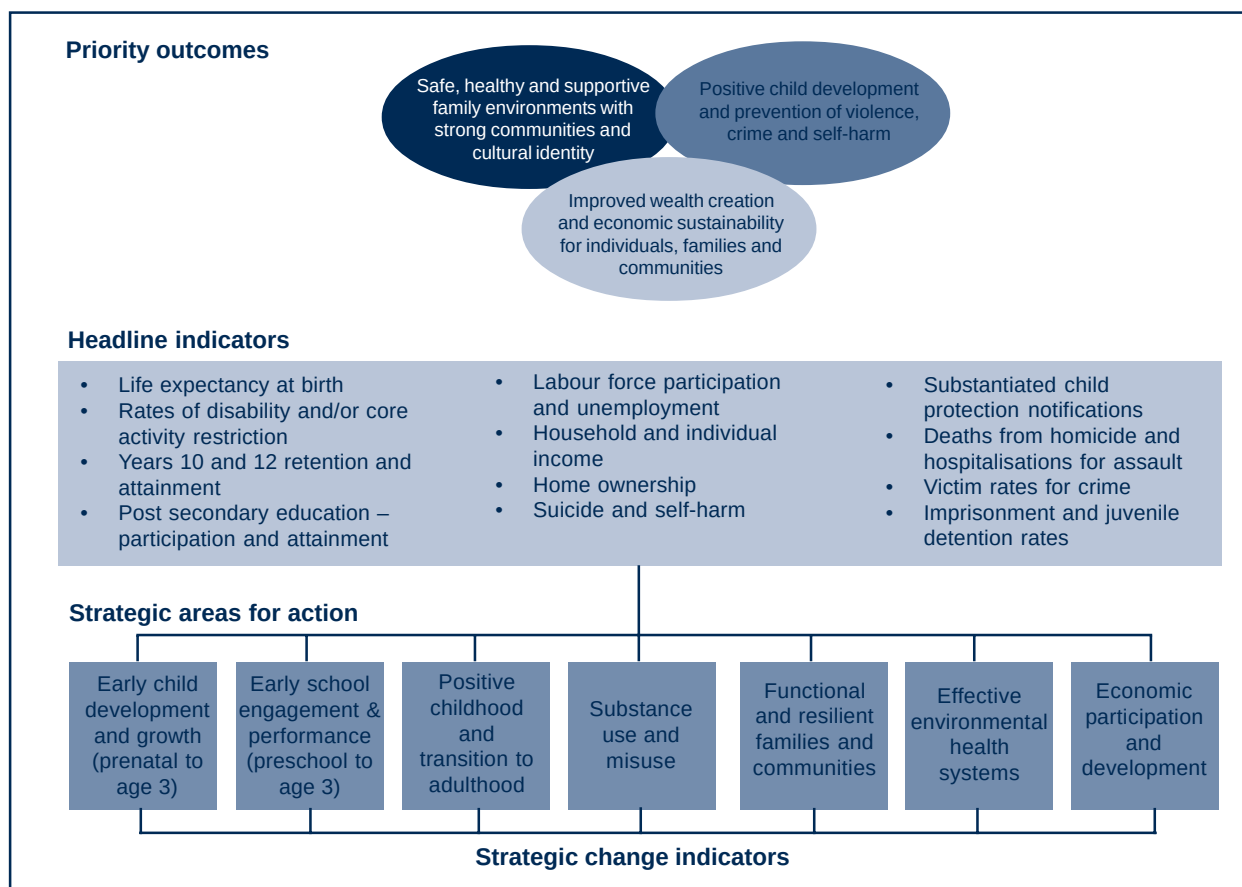
69. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003, Overview*, above n 46, 2. Figure 1 is reproduced here by kind permission of the Steering Committee for the Review of Government Service Provision. For the full overview document see <<http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2003/overview.pdf>>.

70. Banks, above n 56, 3.

71. Ibid.

72. Ibid.

Figure 1: The Framework



The Chair of the SCRGSP, Gary Banks, has said:

The strategic areas for action are not 'rocket science': they sensibly focus on young people, the environmental and social factors bearing on quality of life, and material wellbeing. They – and the indicators that relate to them – have been developed with advice and feedback from governments, experts in the field and, most importantly, Indigenous people and organisations.⁷³

Strategic change indicators – the third tier

The Report notes that 'for each of the strategic areas for action, a few **key indicators** have been developed with their potential to be affected by government policies and programs in mind'.⁷⁴ These indicators are based on actual *outcomes* for Indigenous people, rather than reporting on the operations of specific policy programs.⁷⁵ Relevant indicators are discussed below.

Data limitations

As indicated by the Commonwealth Grants Commission and in UN discussions, validity and reliability of data is a constant difficulty in establishing and measuring benchmarks and indicators. Whilst significant improvements have been achieved in recent years, the Report notes the significance of data limitations.⁷⁶ The data for the Report has been

73. Ibid.

74. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, xxii.

75. Ibid.

76. Ibid xxiii.

drawn from three types of sources—census, survey and administrative data—each of which has strengths and weaknesses that should be taken into account.⁷⁷ Further, the Report notes that '[p]articular limitations arise from variability in the identification of people as being of Indigenous origin, both across collections and over time'.⁷⁸

4. Findings of the 2003 Overcoming Indigenous Disadvantage Report

The Report was the first of its kind submitted under the new reporting framework. The first part of the Report focuses on the 12 headline indicators. Five of these are directly related to law and justice, indicating the centrality of law and justice issues in addressing overall Indigenous disadvantage in Australia. These five are:

- Suicide and self-harm.
- Substantiated child protection notifications.
- Deaths from homicide and hospitalisations for assault.
- Victim rates for crime.
- Imprisonment and juvenile detention rates.

The Report's findings in respect of these headline indicators in the law and justice area are relevant to the potential to apply a benchmarking/indicator framework to the interaction of the Aboriginal people and the Western Australian legal system. A brief summary of these findings follows.

Suicide and self-harm

The Report found that the suicide rate for Indigenous people (35.5 per 100,000) was considerably higher than the rate for other Australians (13.1 per 100,000⁷⁹) and that the rates for the Indigenous population were particularly high in the 25–34 year age group (67.2 per 100,000).⁸⁰ As well, the non-fatal rate for hospitalisation for intentional self-harm was significantly higher for Indigenous people. The Report noted a number of risk factors, including the fact that suicide and self-harming behaviours in Aboriginal communities are often associated with alcohol and other mental disorders.⁸¹

Substantiated child protection notifications

The Report notes that this headline indicator has been chosen because of evidence indicating that many Indigenous children are at risk.⁸² Information on substantiated child protection notifications provides insight into the extent of abuse, neglect and/or harm to children in the family environment.⁸³ As the criteria for substantiation varies across jurisdictions, care has to be taken in interpreting this data. Further, the Report notes that 'the number and rate of substantiations are a proxy indicator because no credible data exists on actual levels of child abuse or neglect'.⁸⁴ As well, increases in notifications may be the result of reduced tolerance to, or increased willingness to take action about, abuse or neglect. These problems with data are indicative of the need to 'handle with care' the information provided by statistical indicators.

The Report found that in the reporting period 2001–2002 the rate of substantiated notifications in all jurisdictions was higher for Indigenous children; the ratio of Indigenous to non-Indigenous notifications being the highest in Western Australia and Victoria.⁸⁵ At the same time, the most common type of substantiation in Western Australia and some other jurisdictions was neglect rather than abuse.

Deaths from homicide and hospitalisations for assault

The Report found that 'although Indigenous people account for around 2.4 per cent of the total population, they comprised 15.1 per cent of all homicide victims, and 15.7 of all homicide offenders'.⁸⁶ It also found that:

77. Ibid.

78. Ibid.

79. Based on Queensland, Western Australia, South Australia and the Northern Territory.

80. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, [3.39].

81. Ibid [3.39]. On this matter the report cites Swan P & Raphael B, *Ways Forward, National Aboriginal and Torres Strait Islander Mental Health Policy, National Consultancy Report* (Canberra: AGPS, 1995).

82. Ibid [3.9].

83. Ibid [3.44].

84. Ibid.

85. Ibid [3.45] (Table 3.9.1).

86. Ibid [3.47].

Substance abuse is a key factor in deaths from homicide and hospitalisation for assaults. A much larger share of Indigenous homicides involved both the victim and the offended having consumed alcohol at the time of the offence, compared with non-Indigenous homicides.⁸⁷

Hospital separation rates for assault in 2001–02 were 13.3 per 1000 for Indigenous people compared to 1.0 per 1000 for non-Indigenous people.⁸⁸

Victim rates for crime

This headline indicator has been used, despite considerable data difficulties, because 'violence and criminal behaviour have demonstrable impacts on health outcomes, safety and positive child development'.⁸⁹ That is to say, they impact significantly on rights to an adequate standard of living and to the highest attainable standard of physical and mental health as set out in the ICESCR. The Report draws only on data from New South Wales and Western Australia, and notes that even then the data is not comparable between the two jurisdictions. Nevertheless, the Report is able to conclude on the limited data available, that 'Indigenous people were much more likely to be the victims of murder, assault, sexual assault and domestic violence than non-Indigenous people'.⁹⁰

In respect of the Western Australian data, it was noted that 'Indigenous people were nearly seven times more likely to be a victim of assault than non-Indigenous, while Indigenous females were almost 13 times more likely to be victims'.⁹¹ Indigenous people were also nearly seven times more likely to be a victim of homicide. Outside of Perth, Indigenous people were approximately 40 times more likely to be victims of domestic violence than non-Indigenous people.⁹²

Imprisonment and juvenile detention rates

As the Report notes, over-representation of Indigenous people in the criminal justice system has been an issue of long standing.⁹³ Of all the headline indicators in respect of law and justice issues, it is the one that shows in most marked contrast the dissonance between Indigenous people and the legal system that has displaced or overshadowed their own systems for maintaining law, social coherence and control. The problems of over-representation of Indigenous people in the justice system and in detention facilities were highlighted by the 1991 Royal Commission into Aboriginal Deaths in Custody.

Drawing on data from the Australian Bureau of Statistics and the Australian Institute of Criminology the Report notes that Indigenous males were some 15 times more likely to be in prison and Indigenous females 20 times, and that although the rate of juvenile detention has declined over the past five years, Indigenous juveniles were still 19 times more likely to be detained than non-Indigenous juveniles.⁹⁴

The highest ratio of Indigenous to non-Indigenous prisoners can be found in Western Australia – a ratio of just over 19. While the highest Indigenous imprisonment rate of approximately 2,400 prisoners per 100,000 adult Indigenous population was recorded in Western Australia, this was actually well below the 3,000 prisoners per 100,000 adult Indigenous population recorded a year earlier in that state.

The Report also points out that detention data for juveniles only illustrate one aspect of the juvenile justice system and that 'the vast majority of juveniles in the care of juvenile justice agencies are not placed in detention but rather are placed on community service and other types of order'.⁹⁵ This illustrates the need not to rely solely on one indicator, as important as that might be, in assessing the state of the interaction between Indigenous people and the justice system.

In summary, the headline indicators provide an important 'snapshot' of the state of Indigenous disadvantage, and are suggestive of causal factors. Below the headline indicators sit the strategic areas for action, with their concomitant strategic change indicators.

87. Ibid.

88. Ibid [3.51].

89. Ibid [3.53].

90. Ibid [3.54].

91. Ibid [3.56].

92. Ibid [3.57].

93. Ibid [3.57].

94. Ibid [3.58]–[3.59].

95. Ibid [3.58], citing Bareja M & Charlton K, *Statistics on Juvenile Detention in Australia: 1981-2002*, Technical and Background Paper Series No 5 (Canberra: Australian Institute of Criminology, 2003).

The role of strategic change indicators

As indicated above, the Report notes that:

Under the framework seven strategic areas have been chosen for their potential to have a significant and lasting impact on Indigenous disadvantage, with the aim of assisting policy makers to focus on the causes of social and economic disadvantage. None of these strategic areas are portfolio specific. Key indicators have been developed for each strategic area with their potential relevance to government policies and programs in mind.⁹⁶

These key indicators are amenable to policy interventions. Examples include alcohol related crime and hospital statistics (strategic area 'substance use and misuse'), repeat offending (strategic area 'functional families and resilient communities') and children on long term care and protection orders (same strategic area). For the most part they are outcome indicators that are likely to reflect the collective efforts of governments and agencies. Although the framework is predicated on reporting quantitative data against each indicator, some indicators are not altogether quantifiable, and qualitative data including case studies can contribute. Without going into the rationale for the selection of each of the indicators, it can be seen that this approach provides a way of building data from the ground up, providing linkages to strategic interventions and programs, and showing a chain of causality to the headline indicators and eventually the priority outcomes.

The greatest challenge in this approach is to articulate the linkages between indicators and programs. Experience and expertise will be required to turn the Key Indicators Framework into a practical and effective tool for developing and improving programs, policies and coordination. Nevertheless, this approach provides a model for the application of a benchmarking approach to reducing Indigenous disadvantage in the law and justice area. The particular findings of the Report against selected strategic change indicators, particularly in respect of Western Australia, are referred to in the following section.

5. The value of the application of a benchmarking approach to the reduction of Indigenous disadvantage in the law and justice area in Western Australia

In applying a benchmarking approach, including in respect of law and justice issues in Western Australia, the following key questions need to be kept in mind:

- Who is looking?
- What do we see?
- What do we look at?
- What do we not see?
- How do we create meaning from what is seen?
- How do we ensure that new insights are shared and applied?

Participation by all stakeholders is essential to the success of a benchmarking approach. Externally-driven monitoring and evaluation of programs can in fact increase the marginalisation and alienation of those who are disadvantaged (even though the programs are designed to assist them) and can fail to provide valid and reliable data. This is particularly the case in respect of Indigenous people. When it comes to law and justice issues, the legacy of a focus on Indigenous offending and heavy policing adds to the difficulty, given the resentment and distrust that may be present.

Participation by Indigenous people in implementing a benchmarking framework in Western Australia will depend on ensuring the relevance of the process for them. It requires policy makers to take into account the questions raised above. For Indigenous people, benchmarking must sit within the context of self-determination – it needs to be seen as a tool for improved outcomes including autonomy and self-reliance. The substance of developing a partnership with Indigenous people in addressing disadvantage in the law and justice area will include:

96. Ibid [4.1].

Partnership Building

- working through the objectives of the partnership, viewed from the perspectives of both the Indigenous community and of the Western Australian government and its agencies;
- prioritising the objectives for monitoring purposes;
- determining the most useful indicators for tracking progress (taking into account the COAG framework);
- identifying the best methods for collecting and recording information to suit the indicators identified and the local cultural context; and
- establishing collaborative mechanisms for analysing and interpreting data and for considering changes that should result.

The Law Reform Commission of Western Australia's Aboriginal customary law project is based on a participatory model. The terms of reference for the project were designed to 'give room for the incorporation of indigenous perspectives, classifications and priorities'.⁹⁷ A community consultation phase conducted by the Law Reform Commission (the 'Commission') has provided opportunities for Indigenous communities to have wide-ranging discussions of the impact of law and justice issues. Drawing on notes from that consultation phase, this paper identifies some tentative priority objectives in law and justice matters, and discusses the implications for developing relevant benchmarks and indicators, noting also relevant data from the SCRGSP's *Overcoming Indigenous Disadvantage – Key Indicators Report 2003* (the 'Report').

Key themes arising from the Commission's community consultations

Alcohol abuse

A number of the community consultations identified substance abuse in general, and alcohol abuse in particular, as a key concern fundamentally affecting the interaction of Indigenous people with the criminal justice system. Alcohol was also seen as undermining the continued practice of Aboriginal customary law. Thus alcohol abuse is a cross-cutting issue impacting on the maintenance of culture, social order, the personal security of individuals and relations with the criminal justice system. The destabilising influence of alcohol is felt whether communities rely on the introduced western system of law, or the traditional system of customary law, or a combination of the two.

Alcohol has in the past been seen as a *symptom* of social disadvantage and alienation. However, in recent times alcohol has come to be identified itself as a *cause* as much as a *symptom* of Indigenous disadvantage and distress.⁹⁸ As such, alcohol abuse can be targeted directly under a preventive model. Significant community concern over the effects of alcohol and substance abuse on community members emerged from the consultation process. For example, in the consultations conducted by the Commission in the Pilbara region alcohol was named as 'the greatest problem'.⁹⁹ It was said to undermine the effective operation of customary law in that region. Alcohol abuse was also linked with fighting and domestic violence. The inability of the police and courts to make an impact on the situation was noted.¹⁰⁰ The communities that participated in the Commission's consultations at Wiluna and Meekatharra called for increased restrictions on the sale of alcohol; they also complained that parents feel powerless and that alcohol undermines the vitality of the community.¹⁰¹ At the Kalgoorlie consultation it was observed that there is insufficient recognition of the seriousness of the problem at government level and that Aboriginal customary law has no simple answer to problems of alcohol or drugs.¹⁰²

97. Blagg H, Morgan N & Yavu-Kama-Harathunian C, 'Aboriginal Customary Law in Western Australia' (2002) 80 *Reform* 11, 13.

98. See, for example, Pearson N, *On the Human Right to Misery, Mass Incarceration and Early Death* (Charles Perkins Memorial Lecture, University of Sydney, 2001); Anderson A, speech delivered to the ATSIC International Women's Breakfast, 8 March 2004 <www.atsic.gov.au>, 1. Anderson commented in respect of remote communities in the Northern Territory: 'Personally, I think the misuse of alcohol has been a major factor in the increase of violence. The generation before grog took a hold on people were unscarred – now both women and children are scarred by violence'.

99. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara Region*, 6–11 April 2003, 11–12.

100. *Ibid* 23.

101. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wiluna and Meekatharra*, 27–28 August 2003, 4.

102. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 5.

The priority of the issue of alcohol and other substance abuse has also been recognised in research undertaken by the Department of Justice (Western Australia) as part of the Kimberley Regional Justice Report. This research found that 'the overwhelming causal factor behind offending behaviour was misuse of alcohol and drugs and that this led to fighting, stealing and abuse'.¹⁰³ The COAG Key Indicators Framework identifies 'substance abuse and misuse' as a strategic area for action, and notes the potential impact of substance misuse on all the headline indicators discussed in the Report. Three strategic change indicators were identified in the Framework for this strategic action area.¹⁰⁴ They are:

- Alcohol and tobacco consumption (indicator 8.1).
- Alcohol related crime and hospital statistics (indicator 8.2).
- Drug and other substance abuse (indicator 8.3).

The Report notes that reducing substance misuse can significantly reduce the level of assaults and homicides, and that it might also reduce crime and imprisonment rates.¹⁰⁵ However indicator 8.1 (alcohol and tobacco consumption) yields limited information on alcohol abuse, suggesting that the alcohol risk levels (based on average daily consumption) are not significantly higher for Indigenous people than non-Indigenous. This finding does not reflect community concerns and perceptions. Rather, it may reflect insufficient differentiation by consumption patterns between Indigenous and non-Indigenous or insufficient disaggregation by region. As the Report notes, only limited data is currently available on the prevalence of Indigenous drug and other substance use, both by type of drug and jurisdictional or geographic region. There is a need to improve the quality and quantity of this data.¹⁰⁶

In recognising this need, the Ministerial Council on Drug Strategy at its August 2003 meeting recommended 'a stronger focus on prevention, particularly in relation to Indigenous communities, with a more strategic approach to research and use of data'.¹⁰⁷ It endorsed an Aboriginal and Torres Strait Islander Peoples' Complementary Action Plan 2003 2006 with performance indicators that will be used to provide valid and reliable measures of harm or the reduction in harm caused by drug use (including alcohol). As the Report notes, the data collected for the Complementary Action Plan indicators might be useful for reporting against indicators 8.1 and 8.3 (drug and other substance abuse).¹⁰⁸ What these developments highlight is the need to cross reference with developments in a number of portfolio areas and Ministerial Councils in developing benchmarks and indicators.

In the context of Western Australia, a benchmarking framework in reference to the impact of alcohol and substance abuse on crime and safety would appear a high priority and would provide data for evaluating programs to reduce alcohol abuse. The COAG framework provides a starting point for considering this issue. In respect of strategic indicator 8.2 (alcohol related crime and hospital statistics) this would appear to be of central significance, if Indigenous disadvantage in respect of law and justice is to be effectively addressed. However, as the Report notes, there are no reliable data on the overall extent of alcohol related crime.¹⁰⁹ There is however data on alcohol related homicide, so this can provide a proxy for the wider issue of the relationship between criminal behaviour and alcohol. As homicide is at the extreme end of criminal behaviour, the situation is not altogether satisfactory. There is a need to expand the data to cover crimes that do not result in homicide. What the data does show is a marked contrast between Indigenous and non-Indigenous homicides as far the involvement of alcohol. For instance, just under three-quarters (72.9 per cent) of Indigenous homicides involved both the victim and offender having consumed alcohol at the time of the offence, compared with 18.2 per cent of non-Indigenous homicides.¹¹⁰ Alcohol may also be a key factor in other crimes. An indicator to measure the correlation of alcohol with a wider range of crimes could yield valuable data.

Community control

Whilst indicators measuring, for example, alcohol related homicides, provide key data, they do not specifically address some of the major concerns about alcohol and social cohesion reflected in the Commission's community consultations. These concerns revolved around not just the consequences of alcohol abuse but specifically control of supply issues, including restrictions, prohibition and community empowerment. Given expressed concerns about the difficulties and

103. The Hon Jim McGinty, Attorney-General (WA), *Joint Approach to Tackling Kimberley Crime*, Media Release, 27 May 2003.

104. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, ch 8.

105. *Ibid* [8.1].

106. *Ibid* [8.17].

107. Ministerial Council on Drug Strategy, Joint Communiqué, 1 August 2003. See <www.nationaldrugstrategy.gov.au/mcds/communique_0108.htm>.

108. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, [8.17].

109. *Ibid* [8.8].

110. *Ibid*.

frustrations experienced by communities in exercising control over the availability of alcohol, it may be helpful to go behind statistics on alcohol consumption and effects on crime and violence, to instead measure the progress by communities in gaining a degree of control over alcohol availability and supply. Relevant indicators would attempt to monitor progress at community level in having controls imposed, in cooperation with the authorities, on alcohol availability. Although difficult to establish and measure, such indicators would emphasise the preventive approach.

Whilst a statistical base for indicators is desirable, this is a situation where developing descriptive or subjective indicators may yield useful information. For example, the Report has identified the possibility of using case studies in respect of measuring changes in governance arrangements.¹¹¹ A similar approach could be developed to provide a measure or reporting tool on community empowerment in respect of alcohol control. Other techniques of social science research may be relevant, such as surveys, questionnaires or focus groups. The area of social control and cohesion has a major socio-psychological dimension and subjective responses or perceptions have their own importance as part of a measure of wellbeing. This suggests that even in an area such as alcohol control, indicators can and should reflect progress in establishing self-determination and community empowerment.

Criminal justice issues

Issues relating to policing, the courts and prisons emerged as major themes in the Commission's community consultations. For example, the consultations in the Pilbara region expressed concerns about the treatment of Aboriginal people by the police in terms of lack of cross-cultural training and sensitivity, intrusive policing and interference in traditional punishments. With respect to the courts, significant problems for Aboriginal people were expressed, including understanding of legal processes, differences in approach between the two societies, lack of sufficient participation by Indigenous people and sentencing issues. Concerns with prisons included lack of cultural sensitivity in their administration (arrangements for attendance at funerals seeming to be a particular concern), and at a more significant level, the view that prison in fact only worsens the incidence of delinquency and social breakdown:

Young men treat gaol like a holiday camp, get well fed and television, they have no fear of white law, Aboriginal law is harder. Gaol creates more violence, the young men come back worse. Gaol makes them big fellas, they don't listen to Elders. Instead of sentencing someone to six months in prison why not send them out to live in the bush for six months to do the law.¹¹²

Much of the interaction of Indigenous people in Australia with the criminal justice system has been negative, and rates of offences, convictions and incarceration have been the focus of concerns in public consideration and discussion of such issues. From one perspective, without condoning criminal or delinquent behaviour, these outcomes are very much a measure of Indigenous disadvantage reflecting marginality, powerlessness and social and personal dysfunction. Consequently, statistical indicators are of key importance in tracking trends in the interaction of Indigenous peoples with the criminal justice system, and identifying key strategic areas for interventions.

The Report has identified a number of relevant strategic indicators, and these would need to be taken into account in developing a benchmarking approach in Western Australia in respect of criminal justice matters. For example, under 'functional and resilient families and communities'¹¹³ the indicators 'children on long term care and protection orders'(9.1) and 'repeat offending' (9.2) can provide important data. In respect of repeat offending, ABS data on prior imprisonment provides a proxy measure. Whilst there are significant statistical problems with this data and, in the main, the level of repeat offending is under-represented, nevertheless the Report found that approximately four in every five Indigenous prisoners had previously been in prison, compared to 55 per cent of non-Indigenous prisoners.¹¹⁴ Repeat offending, combined with the relatively high proportion of Indigenous prisoners (see above), is one of the main parameters of the present parlous state of the interaction between Indigenous people and the legal system, so interventions aimed at reducing recidivism need to be tracked and evaluated.

As well, under the strategic area of 'positive childhood and transition to adulthood'¹¹⁵ the indicator 'juvenile diversions as a proportion of all juvenile offenders' provides an indication of the nature of the interaction of juveniles with the criminal justice system. As the Report notes:

111. Ibid, ch 11.

112. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara Region*, 6-April 2003, 21.

113. SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003*, above n 46, ch 9.

114. Ibid [9.7].

115. Ibid, ch 7.

The use of diversions can have a critical influence on the extent of an individual's involvement in the criminal justice system.¹¹⁶

However, there is no national data set on the extent of Indigenous juvenile diversions,¹¹⁷ and the Report notes that the importance of diversions in Indigenous juvenile justice outcomes necessitates the collection of better data.¹¹⁸ The value of developing a benchmarking approach in such an area is clear.

The consultations also refer to a number of positive and constructive developments in criminal justice areas such as early intervention programs by the police and other agencies in relation to juvenile crime. However, the issue is that the concerns raised by the communities represent deep-seated problems symptomatic, in Australia and other countries, of the relationship between minority groups and the legal system, problems which are often exacerbated in the case of Indigenous peoples. For example, as Robert Reiner has pointed out, powerless minorities tend to become 'police property' and 'tend to be over-policed and under-protected'.¹¹⁹ To the Indigenous minority this appears as racial discrimination. The UN World Conference against Racism held in Durban in 2002 noted, in the context of combating racism, 'the need to promote effective access to justice'.¹²⁰ In its Program of Action:

The World Conference underlines the importance of fostering awareness and providing training to the various agents in the criminal justice system to ensure fair and impartial application of the law. In this respect it recommends that anti-discrimination monitoring services be established.¹²¹

Customary law

As well, the difficulty in understanding and accommodating Indigenous customary law and procedures reflects an inability to acknowledge and proceed on a basis of legal pluralism. Community concerns surrounding the recognition and application of customary law (including punishments) are recorded throughout the Commission's consultation reports. These problems, and some of the possible responses to them, have also been considered in UN forums and reports. As the UN Special Rapporteur Rodolfo Stavenhagen has pointed out:

The widespread lack of access to the formal justice system due to ingrained direct or indirect discrimination against indigenous people is a major feature of the human rights protection gap...it may signal the fact that the official legal culture in a country is not adapted to deal with cultural pluralism and that the dominant values in a national society tend to ignore, neglect and reject indigenous cultures.¹²²

Stavenhagen proceeds to make the following recommendation:

The Special Rapporteur recommends that indigenous law be accorded that status and hierarchy of positive law within the framework of the right to self-determination, and the States that have not yet done so undertake ways and means, in consultation with indigenous peoples, of opening their judicial systems to indigenous legal concepts and customs.¹²³

Implications for a benchmarking approach

The high priority attaching to criminal justice matters by Indigenous communities, suggests that their inclusion in a benchmarking and indicators framework should be given close consideration. Possible benchmarks would relate to areas such as recognition of customary law and indigenous values; participation and responsibility in the court system; and training for police and law officers to take a non-discriminatory approach in carrying out their duties.

The strategic indicators chosen would rely on the benchmarks, but could include participation statistics such as the numbers of Aboriginal Justices of the Peace, progress in including elders in court processes, courses and training for police and court officials, and education arrangements for explaining legal processes to Indigenous communities.

116. Ibid [7.25].

117. Ibid.

118. Ibid [7.26].

119. Reiner R, 'Poaching and the Police', in Maguire M, Morgan R & Reiner R (eds), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 1994) 716, 726.

120. UN Commissioner for Human Rights, *Discrimination Against Indigenous Peoples in the Justice System – Note by Secretariat*, Expert Seminar on Indigenous Peoples and the Administration of Justice (Madrid, November 2003), HR/MADRID/IP/SEM/2003/BP.13, 2.

121. Ibid 3.

122. Commission on Human Rights, *Indigenous Issues – Human Rights and Indigenous Issues, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, Rodolfo Stavenhagen, UN Doc. E/CN.4/2004/80, [23].

123. Ibid [69].

Benchmarking can contribute in criminal justice areas by:

- focussing on the need for a logical framework, rather than ad hoc interventions;
- highlighting inter-relationships and cross-portfolio aspects;
- identifying the need for major commitment of time and resources; and
- providing a tool for ongoing dialogue and evaluation with Indigenous communities and representatives.

Summary

This discussion about the possible value of a benchmarking approach to law and justice issues in Western Australia has been highly selective, touching on a few key areas that have emerged in the Commission's community consultation process. It is intended to be indicative of the need to:

- build on community priorities;
- incorporate existing developments at the COAG level;
- identify in a comprehensive manner indicators relating to preventive measures and community empowerment;
- identify the need to take account of data shortfalls and institute remedial action; and
- establish ongoing consultative mechanisms for interpreting data and reviewing programs.

6. Coordination, integration and implementation

In developing a benchmarking approach it will be desirable to integrate and coordinate developments at the state level with developments through the COAG framework. This is essential to incorporating the COAG framework 'into policy design and programs across governments and between departments'.¹²⁴ As Gary Banks, Chairman of the SCRGSP has noted, the *Overcoming Indigenous Disadvantage Report* is essentially informational and does not and cannot provide policy answers. Rather it is intended to help governments and Indigenous people identify where programs need to deliver results, and to assess whether they are succeeding.¹²⁵ Banks observes that:

For it to be effective in this, it will be important that governments integrate elements of the reporting framework into their policy development and evaluation processes.¹²⁶

The Social Justice Commissioner, Dr Bill Jonas, has emphasised the importance of this linkage:

This is the most critical issue in relation to the [SCRGSP] report – ultimately it does not matter how refined the statistics that are reported are if the report is not utilised by governments to inform and change the way they go about delivering services to Indigenous peoples.¹²⁷

Although the elaboration of this linkage is yet to be fully developed, indicators relating principally to service delivery are to be elaborated by relevant Ministerial Council action plans, which are intended to link service delivery with the COAG reporting framework. For justice related areas the Standing Committee of Attorneys-General has agreed to develop performance indicators in a number of areas including crime prevention, community safety, improved access to justice related services and enhanced participation by Indigenous peoples in justice administration schemes.

For its part, the Western Australian Government has entered into a Statement of Commitment with Aboriginal Western Australians¹²⁸ which sets out the following partnership framework:

124. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, (Sydney: Human Rights and Equal Opportunity Commission, 2004) 32.

125. Banks, above n 56, 9.

126. Ibid.

127. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, above n 127, 32.

128. Department of Indigenous Affairs, *Statement of Commitment*, 10 October 2001, <<http://www.dia.wa.gov.au/Policies/StateStrategy/StatementOfCommitment.aspx>>.

Western Australian Partnership Framework

The parties agree that between Aboriginal people and the Western Australian Government there will be negotiated partnerships which:

- will be based on shared responsibility and accountability of outcomes;
- should be formalised through agreement;
- should be based on realistic and measurable outcomes supported by agreed benchmarks and targets;
- should set out the roles, responsibilities and liabilities of the parties; and
- should involve an agreed accountability process to monitor negotiations and outcomes from agreements.

It was agreed that:

[T]he Partnership Framework will establish state-wide policies and administrative arrangements to support negotiations and agreements at the regional and local level; will support Aboriginal people to negotiate regional and local agreements according to the priorities of Aboriginal people in partnership with other stakeholders; and should incorporate and be informed by separate agreements in the health, housing, essential services, native title, justice and other issues that impact on Aboriginal people in this state.¹²⁹

A communiqué signed in June 2002 between the Commonwealth Minister for Immigration and Multicultural and Indigenous Affairs, the Western Australian Minister of Indigenous Affairs and the Chairman of the ATSIC (WA) State Council committed the parties to development of formal processes for strategic coordination of planning and program delivery across all levels and sectors of government, linking Commonwealth and state agencies and involving Aboriginal communities in a collaborative approach.¹³⁰

The Western Australian Government has further indicated its commitment to integrating its approach with the COAG framework and with the Commonwealth government in its submission of July 2003 to the Senate *Inquiry into the Progress Towards National Reconciliation*.¹³¹ Mr Kobelke, the Minister for Indigenous Affairs, wrote to the Inquiry, observing that:

Jointly agreed national targets, benchmarks and indicators enable progress at the national and jurisdictional levels to be measured. This approach facilitates a linking of Commonwealth and State government activities around a common purpose that leads to a reduction of duplications and gaps in program development and service delivery.¹³²

The submission noted the need for more work in terms of:

Using the strategic areas for action (developed under the COAG framework) in planning and performance management and evaluation frameworks and processes across government to measure, drive changes to policy settings and inform future policy making.¹³³

7. Conclusion

It is apparent that at both the federal and state levels significant progress has been made in developing the basis for a benchmarking approach to monitoring and evaluating programs and policies for reducing Indigenous disadvantage. At the COAG level a framework for reporting on Indigenous disadvantage has been put in place and the first report presented. At the state level there is a commitment, in the context of a 'whole-of-government' approach to service delivery, to benchmarks and targets as tools for improved policy development and effective program implementation.

129. Ibid.

130. Indigenous Affairs Advisory Committee, *Communiqué*, 7 June 2002. See <<http://www.dia.wa.gov.au/Policies/StateStrategy/IAACSignedCommunique070602.pdf>>.

131. Submission of the Government of Western Australia to the Commonwealth Senate Inquiry into the Progress Towards National Reconciliation (July 2003). See <<http://www.aph.gov.au/senate/committee>>.

132. Ibid.

133. Ibid.



The consultation process of the Commission's Aboriginal customary law project has provided important information for the mutual elaboration of a benchmarking framework for addressing Indigenous disadvantage in law and justice matters in Western Australia. The development of a state-based framework in the law and justice area will require coordination with the COAG approach, and negotiation with Indigenous organisations and communities. A comprehensive approach is required, with benchmarks set at a high, system-wide level.

For a benchmarking approach to apply to the law and justice area, including to the recognition of Indigenous customary law, significant challenges will need to be recognised and met. These include:

- the unsuitability of some key indicators in this area to purely statistical quantification and the consequent need to look for a combination of statistical and qualitative indicators as appropriate;
- the need to improve data sets and to be able to disaggregate indicators to allow for regional measurement and interpretation;
- the paramount need to develop benchmarks and indicators that reflect Indigenous understandings, world view and legal perspectives arising from Indigenous peoples' own laws and customs, priorities and goals; and
- the need to continually reflect on the international human rights standards applying to Indigenous peoples in respect of law and justice issues in order to ensure that the approach taken is consistent with Australia's human rights obligations.

Indigenous disadvantage in the area of law and justice is central to the significant problems facing Indigenous Australians. It impacts directly and adversely on community cohesion and progress and on Indigenous Australians' personal security and sense of wellbeing. Reducing disadvantage in law and justice matters, including through acknowledgement and recognition of the role of customary law, is a priority human rights obligation. A benchmarking approach has significant potential to contribute to this goal in respect of law and justice matters.

background paper 4

Family law and customary law

Tony Buti* and Lisa Young**

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Introduction

Aborigines inhabited the state of Western Australia for well in excess of 30,000 years prior to European settlement and for at least 31,000 years in the south west of Western Australia prior to Captain Stirling's arrival.¹ In the traditional Aboriginal society that existed prior to European settlement—and which continues for many Aboriginal families today—children had a special place in the extended family network developed on kinship lines.² This was unlike European-British society at the time of settlement, in which a father was generally the guardian of his children and so held parental legal power. Despite this legal arrangement, in most cases the mother undertook the role of nurturing and caring for children. The pattern of the biological family being predominantly responsible (both legally and in fact) for child-rearing remains the norm in contemporary non-Aboriginal Australian families. In contrast, in traditional Aboriginal society child-rearing was, and is, the responsibility of the extended family or other members of the tribe. However, the fact that, at some particular stage, someone other than the biological parents may undertake the primary care of a child does not mean that parental ties are severed or that the parents have relinquished their parental rights or love for that child. Another key cultural difference in family life is that Aboriginal children have traditionally been allowed greater freedom of movement than in non-Aboriginal families and less attention is placed on material comfort, discipline and training.³

Likewise 'customary' marriage between Aborigines (also often referred to as 'traditional' or 'tribal' marriage) is significantly different to the form of 'legal' marriage that has developed through the dominant legal-political system in Australia. The actual forms—and the underlying importance—of marriage in Aboriginal society differ from that reflected in current Australian law. The Australian and Western Australian laws dealing with marriage reflect an ethos of marriage that is underpinned by freedom of choice of intending partners, as if this is vital for marital stability. Yet in Aboriginal society, marriage is viewed more along utilitarian lines – that is, regard is had to the contribution marriage makes to the Aboriginal 'social structure rather than as a form of individual autonomy and self-expression'.⁴

Traditional customs and arrangements in Aboriginal communities often exist without the imprimatur of the Australian legal system. At times, this disjuncture can create serious legal disadvantages for Aboriginal people. An obvious historical example in respect of family law was the adverse consequences of illegitimacy for children of parents married under traditional Aboriginal custom.

Further, a lack of understanding of traditional Aboriginal family life has prompted inappropriate government action. For example, the relative freedom that the child in a traditional Aboriginal society is granted and the lack of emphasis on 'western style' training has led to perceptions that Aboriginal children are often neglected. Sadly, this failure of European Australia to understand the kinship family arrangements, child-rearing traditions and learning methods of traditional Aboriginal society has been the cause of intense state intervention in the welfare of Aboriginal children.⁵

Traditionally, Aboriginal children are not educated in a structured school situation; rather, they learn by observing adults and elders and by participating in particular activities. Also, the passing of knowledge from adults to children in traditional Aboriginal society is governed by strict tribal rules as to who is to do the passing and who is to receive the knowledge. Depending on factors such as clan, sex and age, some children receive more or different information or knowledge than other children. The knowledge that is passed to children in relation to their beliefs, language, culture and law is crucial for the survival of Aboriginal culture as children are the key ingredient in maintaining and preserving cultural integrity and identity.⁶ Indeed, it is the right of all parents and families to pass such knowledge on to children, as they form the next generation of any particular racial or ethnic group. This right is violated when another group or institution interferes with the traditional process of transferring the societal or group norms, knowledge and culture to the next generation.⁷

1. Howard MC, *Aboriginal Politics in South-Western Australia* (Perth: University of Western Australia Press, 1981).

2. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Aboriginal Customary Law: Child Custody, Fostering and Adoption*, Research Paper No 4 (1985) 1.

3. EommerladE, 'Aboriginal Children Belong in the Aboriginal Community: Changing Practices in Adoption' (1977) 12 *Australian Journal of Social Issues* 167; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (Vol 1, 1986) [344]; Australian Law Reform Commission, *Aboriginal Customary Law: Child Custody, Fostering and Adoption*, ibid 1–2.

4. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Promised Marriage in Aboriginal Society*, Research Paper No 1 (1985) v.

5. This has been well documented in recent years and these children have become known as the 'stolen generations'. A national inquiry into the practice of separating Aboriginal children from their families was held in the mid 1990s resulting in the publication of a comprehensive report: Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

6. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Aboriginal Customary Law: Child Custody, Fostering and Adoption*, above n 2, 1.

7. Brandl M, 'The Aboriginal Children and Families Heritage Project' (1980) 5 *Australian Child and Family Welfare* 20, 20.

Traditional Aboriginal society was deeply alien to the British settlers that established the Swan River colony. The misunderstandings that followed have, in varying degrees, continued to the present day, none more so than in the area of child welfare and child-rearing. The political and economic power so quickly seized by the European settlers left the original inhabitants of Western Australia extremely vulnerable to interference in their way of life. This vulnerability was exploited through the legislation, policies and practices of successive governments from the time the Swan River was settled by the British in 1829, though the intensity of intervention into, and interference with, traditional Aboriginal society by the state (and other European institutions such as the Christian churches) varied over time. Thus, in family law, like other areas, it is the current legislation, policies and practices that require re-evaluation by processes such as that currently being undertaken by the Law Reform Commission of Western Australia ('the Commission').

This Background Paper is presented in three parts. The first part seeks to provide an overview of customary Aboriginal family law. Here we examine issues such as customary marriage, child-rearing, custody, fostering and adoption. The second part of the paper reviews family law, practice and policy in Western Australia, and the extent to which that law, practice and policy does, or might, accommodate customary Aboriginal family law. The final part investigates proposals for reform in these areas in other jurisdictions, specifically Canada and New Zealand.

As non-Aboriginal lawyers and academics, we do not profess to have extensive first-hand knowledge of Aboriginal customary family law; however, we do possess considerable expertise in the areas of general family law and child welfare law. We also have had extensive experience in relation to Aboriginal child welfare law and policy in Western Australia.⁸

Part I: A brief overview of customary Aboriginal 'family law'

To begin thinking about how Aboriginal customary law might be accommodated in the non-Aboriginal legal system it is useful to remind oneself of the core features of Aboriginal customary law in so far as they relate to what we know as 'family law' in Australia. Those features have been well documented elsewhere and it is not the intention of this Background Paper to cover this topic in detail yet again. The aim is simply to provide a brief description of these key features to place in context the discussion in Part II of this Background Paper. Thus, the discussion of how the nature of Aboriginal customary family law sits with non-Aboriginal family law is left to Part II.

1. Marriage in Aboriginal social organisation

As in non-Aboriginal society, the basic social unit in Aboriginal society is the family. In addition to this unit there is a 'band', which is made up of a group of families. A group of bands makes a tribe.⁹ There is also the clan, which is a descent group, membership of which is determined at birth.

Traditional Aboriginal society is also characterised by kin relationships, which transcend bands and tribes.¹⁰ Kin relationships extend beyond familial blood groups. Kin relationships are crucial to Aboriginal society as they provide the basic core of all social relationships: '[i]t is the anatomy and physiology of Aboriginal society and must be understood if the behaviour of Aborigines as social beings is to be understood'.¹¹ As John Toohey has observed: '[t]he kinship system is critical to an understanding of so much of Aboriginal society, including law'.¹² This applies equally in the area of 'family law' as rules of kinship govern many obligations and relationships, such as marriage.

The concept and practice of marriage are tenets central to traditional Aboriginal societies.¹³ However, customary Aboriginal marriage is not something that necessarily develops according to the free choice of the individuals concerned. Freedom of marriage in traditional Aboriginal society is restricted by rules that prohibit marriage of certain close relatives and by the 'rule of exogamy', which prohibits marriage outside one's clan.¹⁴ In Aboriginal society, it is important

8. The discussion and conclusions that follow have been informed by the extensive literature review conducted by the authors. This includes the wealth of information provided by the Australian Law Reform Commission's 1980s reference on Aboriginal customary law. In researching this paper the authors had discussions with a number of Aboriginal groups and individuals. The authors have also relied upon the notes of the Commission's extensive consultations with Aboriginal communities throughout Western Australia.

9. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Aboriginal Australians and the Law* (Sydney: Cavendish Publishing (Australia) Pty Ltd, 1997) 81, 83.

10. *Ibid.*

11. Elkin AP, *The Australian Aborigines* (Sydney: Angus and Robertson, 1976) 114.

12. Toohey J, 'Understanding Aboriginal Law' (unpublished paper, 1999), reproduced below pp 186–212, 197.

13. Berndt RM & Berndt CH, *The World of the First Australians* (Canberra: Aboriginal Studies Press, 1988) 196–197.

14. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, 166.

that the 'right' marriages take place so that the offspring of marriage are the product of the correct family groups and affiliations.¹⁵ This was consistent with the information gathered in the Thematic Summary for the Commission's consultations in Kalgoorlie.¹⁶

Other factors also affect marriage arrangements. The issues of connection to land, attending to sites and traditional rituals, and inheritance of land can affect whether two Aboriginal people are considered to be appropriate marriage partners. Thus one can see that individual choice in selecting a marriage partner assumes a subsidiary role to the importance given to the various groupings and affiliations of any particular traditional society.¹⁷ In its 1986 report on *The Recognition of Aboriginal Customary Laws* the Australian Law Reform Commission ('the ALRC') noted the comments of Dr Bell (an expert witness):

Perhaps the most important difference between Aboriginal marriage patterns and those of white Australia is that marriage is not seen as a contract between individuals but rather as one which implicates both kin and country men of the parties involved. If we explore the web of relations which surround an arranged marriage entered into at the time of initiation of a young male, we find at least three generations are implicated.¹⁸

2. Customary Aboriginal marriages

In defining traditional or customary Aboriginal marriages, Professor RM Berndt offers the following:

1. The couple are eligible to marry according to local rules which define preferred and acceptable alternative kin relationships between which marriages may be contracted.
2. The two kin groups concerned (husband's and wife's) have come to acceptable betrothal arrangements, which may have involved the exchange of gifts.
3. Although betrothal shades into marriage, actual marriage is involved when the couple live together publicly, both attending to their marital obligations including sexual relations.
4. The birth of the first child strengthens the union.¹⁹

The above definition shows that customary Aboriginal marriage involves a number of stages. Firstly there is the consideration of eligibility for marriage, then the negotiation of the betrothal. Only then can consenting couples proceed to the marriage stage. Clearly, whilst living together may constitute evidence of a customary marriage, not all cohabiting couples are married.²⁰

However, one has to be careful when attempting to identify the existence of a customary marriage. There are no precise Aboriginal translations of European notions of 'custom' or 'tradition' or 'tribal' or 'husband' or 'wife'. Likewise the term wife may also include a wife's sister.²¹ As Peter Sutton warns, '[s]imply asking an Aboriginal person if a certain marriage was 'traditional' or 'tribal' is not an adequate method of investigating the issue at hand'.²²

The issue of divorce is often neglected when discussing Aboriginal customary law. Under customary law, divorce can only take place with the mutual consent of the parties to the marriage and the affirmation of that consent by the parents of the husband and wife.²³ The Aboriginal community recognises the divorce upon the termination of cohabitation.

If a divorce takes place it is not unusual for the parties to remarry another person. In fact this is also the case in relation to widows and widowers. The ALRC has noted that:

[i]n Aboriginal societies it was usual for a person to be married a number of times over a lifetime, and it was uncommon to find unmarried widows, widowers or divorcees. Under the kinship system there was always a second or third alternative partner available.²⁴

15. Berndt CH & Berndt RM, *Pioneers and Settlers* (Melbourne: Pitman Australia, 1978) 51.

16. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 3.

17. Elkin AP, *The Australian Aborigines* (Sydney: Angus and Robertson, revised ed, 1979) 155; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, 166.

18. Australian Law Reform Commission, *ibid*.

19. Berndt RM 'Tribal Marriage in a Changing Social Order' (1962) 5 *University of Western Australia Law Review* 326, 338–339.

20. Sutton P, 'Aboriginal Customary Marriage – Determination and Definition' (1985) 1(12) *Aboriginal Law Bulletin* 13, 13.

21. On the problem of translation see: Australian Law Reform Commission, *Reference on Aboriginal Customary Law – The Recognition of Aboriginal Customary or Tribal Marriage*, Research Paper No 2 (1982) 4.

22. *Ibid*.

23. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, 167.

24. *Ibid* 200 (footnote omitted).

The ALRC also notes that the extended family network system provides a readily available support when a marriage comes to an end through divorce or where one of the partners dies. This is of particular importance in relation to a female who is left with the burden of supporting her children. The extended family traditionally provides assistance. This was stated by a number of Aboriginal people who were involved in the Commission's community consultations. For example, in the Thematic Summary of consultations held in the Pilbara region, reference was made to the role the extended family may play, 'even though they may not be blood relations'.²⁵ It was also commented that:

Often children are brought up by grandmother, uncle or aunty who may live in a different region, town or different community and may not be blood related but are skin related. They are away from mother or father and are being cared for by the relation on either the father's or mother's side by blood or skin-related way.²⁶

Types of Aboriginal marriages

Aboriginal societies recognise a number of types of Aboriginal marriages. One form of marriage is where one or both potential spouses are selected while still infants or, in some cases, even before birth. This is known as a promised marriage (or betrothal) and it formed an important part of traditional Aboriginal society.²⁷ Nearly all promised marriages are settled before the girl reaches puberty, many much earlier. The promise remains in existence with continuing family agreement from both sides and is regulated through kinship rules. The ALRC has remarked that these rules 'ensured, in the small communities of hunter-gatherers, the genetic integrity and survival of the people'.²⁸

Even though promised marriages are governed by a complex network of social relationships and rules, there is some flexibility that permits marriages which do not comply strictly with the rules. For example, in some cases it is possible for a couple that have eloped (in order to avoid a promised marriage for one of the pair) to become married or be considered married under traditional Aboriginal custom. Also, in promised marriage relationships, there may be some tolerance of extra-marital sexual relationships. It is this flexibility that has allowed for the survival of promised marriages in traditional Aboriginal society.²⁹

It should be noted that it is possible for a young girl to live with, and be the wife of, her promised husband without there also being a sexual relationship. Arguably, in such cases there is no customary marriage in its fullest sense. Conversely, there may be a sexual relationship between the promised spouse and the future husband before there is a public cohabiting relationship, which under traditional or customary law means the couple are not 'properly married'.³⁰

However, most marriages in traditional Aboriginal communities today are not of the promise or betrothal type.³¹ Such marriages have declined over time. The more typical customary marriage is one which has its genesis in a non-marital union that is eventually accepted over time as marriage by the relevant kin. However, a marriage which involves children will in general have greater customary status than a childless marriage.³² This would appear to be based on the concern to preserve the kin and the survival of the group.

Customary Aboriginal law allows for the practice of polygamy but the authors have no evidence that such practice is encouraged in traditional societies. The incidence of polygamous marriages (where a man marries more than one woman) in traditional Aboriginal societies in Western Australia is unclear. The ALRC has noted that 'pressures have been placed on Aboriginal marriage practices by government policy and the activities of missionaries'.³³ However, Sutton points out that it is not unheard of for second and third marriages to be concealed from the relevant authorities.³⁴

It is possible that a polygamous marriage may include an Aboriginal customary marriage and another 'legal' marriage to a non-Aboriginal spouse. This raises two questions: firstly, does the first customary marriage retain its status in the Aboriginal community; and secondly, can an Aboriginal/non-Aboriginal marriage be recognised under Aboriginal customary law? The answers to these questions are unclear and are likely to vary between regions. Writing in 1962, Berndt commented:

25. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 5.

26. *Ibid.*

27. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Promised Marriage in Aboriginal Society*, above n 4, 1.

28. *Ibid.*

29. *Ibid.*

30. Warner WL, *A Black Civilization: A Study of an Australian Tribe* (Chicago: Harper and Brothers, 1958) 75.

31. Sutton, above n 20.

32. Warner, above n 30, 77; Berndt RM 'Tribal Marriage in a Changing Social Order', above n 19, 335; Berndt RM & Berndt CH, *The World of the First Australians* (Aboriginal Studies Press: Canberra, 1988) 200.

33. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, 168.

34. Sutton, above n 20, 14.

In 'outback' areas, in fact, in many cases a quasi-polyandrous (polyandrous = woman with more than one husband) situation developed. An aboriginal woman might be the mistress of a 'white' station manager, stockman, drover, etc., attracted to him partly at least by the material goods he could offer her – which meant, in such circumstances, prestige as well. At the same time her aboriginal husband was forced to accept the situation or relinquish her altogether, since he was powerless to take action.

...the assumption is that a 'tribal' marriage holds good only when it does not conflict with European interests, and that an aboriginal husband (or wife, although this situation is less likely to arise) has no rights in regard to his wife should a 'white' man take a fancy to her.³⁵

Another type of customary Aboriginal marriage is marriage based on inheritance; that is, inheritance of a spouse. Examples of this include sororate marriages and levirate marriages. The former involves marrying a deceased wife's sister; the latter involves marrying a deceased husband's brother.³⁶

Who decides?

As noted above, under Aboriginal traditional or customary law, the Western focus on the individuality of marriage is usurped by the community and kinship importance of marriage. Thus, an Aboriginal couple's respective families play a major role in the formation of marriage. Sutton writes that, irrespective of the type of marriage, 'it seems that approximately the same members of the respective families are involved'.³⁷ He adds:

There are distinct regional traditions as to who these people should be (those who have a customary primary jural status in recognising marriages), and there is also likely to be incomplete overlap of this set of people with those whose views actually count in the real process of recognition. The available generalisations about whose views count in recognising marriages are mostly guarded, suggesting that each case or each area requires specific investigations before one can make detailed statements on the subject.³⁸

It has been said that in the North-West of Australia, the views that count 'would, generally, be the parents, mothers' brothers, and fathers' sisters of each [partner], the girl's brothers and her male cross-cousins and parallel cousins'.³⁹ In other regions, the mother had the predominant role in bestowing a woman in marriage and would consult with other family members in making her decision.⁴⁰ Even accounting for regional differences, what is common is that in deciding whether a couple should marry under Aboriginal customary law, the opinion of more than one person or one gender is involved.⁴¹ But in general it can be said that it is the views of the families of the two individuals that are most important to the recognition of a customary law marriage.⁴²

3. Child custody, fostering and adoption

As noted in the introduction to this Background Paper, the historical systematic removal of Aboriginal children from their families has had enduring consequences for Aboriginal society. When the ALRC conducted public hearings for its customary law reference in the early 1980s, it became aware of the myriad problems resulting from Aboriginal children being removed from their families and placed in the care of non-Aboriginal families and institutions.⁴³ Of course, Aboriginal children are still being separated from their families at a greater rate than non-Aboriginal children.⁴⁴ The National Inquiry into the Separation of Aboriginal and Torres Strait Children from their Families recognised the harmful effects of family child separations.⁴⁵

The importance of Aboriginal children retaining a connection to their culture has been recognised by the Full Court of the Family Court of Australia in the case *In the Marriage of B and R*:

35. Berndt RM 'Tribal Marriage in a Changing Social Order', above n 19, 342–343.

36. Berndt RM & Berndt CH, *The World of the First Australians*, above n 13, 199. Historically there were also other forms of marriage that are no longer in existence. These included marriages resulting from the abduction of a woman in the same group or capture of a woman after a successful inter-tribal skirmish.

37. Sutton, above n 20, 14.

38. Ibid.

39. Berndt RM, 'Tribal Marriage in a Changing Social Order', above n 19, 334.

40. Hiatt LR, *Kinship and Conflict: A Study of an Aboriginal Community in Northern Arnhem Land* (Canberra: ANU Press, 1965) 41–44; see also Hamilton A, 'The role of women in Aboriginal marriage arrangements' in Gale F (ed), *Women's Role in Aboriginal Society* (Canberra: Australian Institute of Aboriginal Society, 1978) 31.

41. Sutton, above n 20, 14.

42. Ibid; and Bell D & Ditton P, *Law: The Old and the New – Aboriginal Women in Central Australia Speak Out* (Canberra: Aboriginal Legal Aid Service, 1980) 92.

43. Australian Law Reform Commission, *Aboriginal Customary Law – Marriage, Children and the Distribution of Property*, Discussion Paper No 18 (1982) 11.

44. Lynch P, 'Keeping Them Home: The Best Interests of Aboriginal Children and Communities in Canada and Australia' (2001) 23 *Sydney Law Review* 501, 504.

45. Human Rights and Equal Opportunity Commission, above n 5, 13.

The history of Aboriginal Australians is a unique one, as is their current position in Australian life. The struggles which they face in a predominantly white culture are...unique. Evidence which makes reference to these types of experiences and struggles travels well beyond any broad 'right to know one's culture' assertion. It addresses the reality of Aboriginal experience, relevant as that experience is to any consideration of the welfare of the child.

...

The first step in the admissibility of this type of evidence is, we think, now beyond controversy. This is the devastating long term effect on thousands of Aboriginal children arising from their removal from their Aboriginal family and their subsequent upbringing within a white environment.⁴⁶

The Court identified constant themes which are raised in the now considerable body of literature on Aboriginal history and welfare issues:

The constant themes from the writings referred to...and from daily Aboriginal experiences include the following:

- A. In Australia a child whose ancestry is wholly or partly Aboriginal is treated by the dominant white society as 'black', a circumstance which carries with it widely accepted connotations of an inferior social position. Racism still remains a marked aspect of Australian society. Daily references in the media demonstrate this. Aboriginal people are often treated as inferior members of the Australian society and regularly face discriminatory conduct and behaviour as part of their daily life. This is likely to permeate their existence from the time they commence direct exposure to the outside community and continues through experiences such as commencing school, reaching adolescence, forming relationships, and seeking employment and housing.
- B. The removal of an Aboriginal child from his/her environment to a white environment is likely to have a devastating effect upon that child, particularly if it is coupled with a long term upbringing in that environment, and especially if it results in exclusion from contact with his/her family and culture.
- C. Generally an Aboriginal child is better able to cope with that discrimination from within the Aboriginal community because usually that community actively reinforces identity, self-esteem and appropriate responses. Racism is a factor which Aboriginal children may confront every day. Because non-Aboriginals are largely oblivious of that, they are less able to deal with it or prepare Aboriginal children for it.
- D. Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances which deny or belittle their Aboriginality. This is likely to have a significant impact upon their self-esteem and self-identity into adult life.⁴⁷

Similarly, in the case *Re CP*⁴⁸ the Family Court of Australia took judicial notice of the spiritual and emotional disadvantage to an Aboriginal child resulting from the child's severance from its community. The Court said:

[T]he loss of relations with a vast range of kin who will perform a wide variety of roles associated with social relations, emotional and physical support, educative knowledge, economic interactions and spiritual training...loss of knowledge which stems from the social interactions, mentioned above; ambiguities in or loss of identity with one's own kin and country, features I understand as essential to identity from an Aboriginal point of view.⁴⁹

Aboriginal children, like non-Aboriginal children, are born into a biological family. They are also born into a kinship group or band.⁵⁰ Lynch claims that '[i]t is the extended family that can give true shape to the First Nations or Aboriginal child's character and identity, both as an individual and as part of a community'.⁵¹ Both Lynch and the National Inquiry into the Separation of Aboriginal and Torres Strait Children from their Families noted that 'there is nothing more vital to their [Aboriginal communities'] dignity, integrity and continued existence than their children'.⁵²

Child care and custody of children

It is understandable, given the past history of removing Aboriginal children from their families, that Aboriginal people are sensitive and concerned about government action and intervention in areas of child care and custody. In order for the dominant political and legal institutions of the state to ease these concerns it is imperative that they understand the extended family network involved in the care and custody of Aboriginal children. Traditional or customary child-

46. (1995) 19 Fam LR 594, 602.

47. (1995) 19 Fam LR 594, 604–605.

48. (1997) 21 Fam LR 486.

49. (1997) 21 Fam LR 486, 502.

50. Lynch, above n 44, 510. This is also true in relation to Aboriginal in other countries. Refer to Uthe LK, 'The Best Interests of Indian Children in Minnesota' (1992) 17 *American Indian Law Review* 237, 252.

51. Lynch, *ibid*. First Nations is common usage to describe the Aboriginal peoples of Canada, although it does not encompass the totality of the Aboriginal population of Canada.

52. *Ibid* 519; Human Rights and Equal Opportunity Commission, above n 5, 212–221.

rearing arrangements in Aboriginal society are governed by kinship groupings and rules in relation to gender roles and responsibilities.

It is important to keep these family arrangements intact in order to pass on cultural traditions from one generation to the next. For example, '[f]rom one's father and father's father come the rights and responsibilities of kirda (or mingirringi). Through one's mother and mother's father come those of *kurdungurla* (or *djunggayi*)'.⁵³

Children, in traditional Aboriginal society, are seen as an 'essential "community resource"'.⁵⁴ It is therefore not surprising that the extended family has an important role in the upbringing of the child in traditional Aboriginal society. In this regard the ALRC noted that:

The concept of the family in...[non-Aboriginal Australian society]...is generally based on the nuclear family, i.e. father, mother and their own children. In Aboriginal society, on the other hand, the role of the extended family, based on the often complex system of kinship relationships and obligations, is of fundamental importance in bringing up children.⁵⁵

This extended family responsibility for children has not always been understood by non-Aboriginal society and has led to misunderstandings as to the quality of care being provided in Aboriginal families. In non-Aboriginal society, one focuses on the parents of the child to determine the quality of parenting and care being provided. Applying the same focus to traditional Aboriginal society may provide a distorted or false impression. It is possible that at any particular time the child may not be in the immediate care of his or her biological parents. But this does not necessarily equate to negligent care as the child may be under the care of someone else in the extended family. In fact, the child may drift in and out of different care arrangements.

In order that we avoid reproducing the mistakes of history, it is imperative that in considering any reforms in the area of family law, greater weight be given to the particular child care and custody arrangements of traditional Aboriginal society. Further, if an Aboriginal child must be removed from its family—which should always be a measure of last resort—the Aboriginal Child Placement Principle⁵⁶ must be complied with. Some Aboriginal people still fear welfare agencies⁵⁷ and the possibility of another 'stolen generations' scenario.⁵⁸ Among some Aboriginal communities there is strong support for the Aboriginal Child Placement Principle.⁵⁹

The Aboriginal Child Placement Principle is made up of two components. The first is a set of preferences in relation to placing an Aboriginal child outside his or her family. If circumstances permit, that preference is given to placement with an Aboriginal family or carer. The second component relates to the process in deciding the placement. Under the principle 'decisions about the placement of Indigenous children should be made by, or in consultation with, appropriate Indigenous people or organisations'.⁶⁰

Adoption

Retired Chief Justice of the Family Court of Australia, Justice Alistair Nicholson, has noted that 'Aboriginal custom did not recognise a concept of adoption as it is understood in the white community'.⁶¹ It is necessary to seek out the views of Aboriginal people in relation to adoption issues. For example, in the Thematic Summary of the Commission's

53. Toohey, above n 12, 24. Writing on the 'Top End' and desert regions Toohey commented (at 19–20): 'In what is usually referred to as the Top End, the local descent group responsible for an area of land generally comprises *mingirringgi* and *djunggayi*. The *mingirringgi* are those whose descent is traced patronymically. The *djunggayi* for an estate in land are the children of the female members of the patronymic clan. Questions have arisen during the hearing of land claims under the *Land Rights Act* whether *djunggayi* and *mingirringgi*, or *mingirringgi* alone, should be identified as the traditional Aboriginal owners of the land being claimed. It is the *djunggayi* who control ceremonies and it is they who have the ultimate responsibility to ensure that knowledge is maintained for the benefit of the *mingirringgi*. In desert areas, and again I am generalising, there is a similar relationship. The terms used are *kirda* and *kurdungurla*, the first equating with *mingirringgi* and the second with *djunggayi*. The *kurdungurla* are the sons and daughters of the female members of the patriline and they are *kurdungurla* for the country of the patriline. In the desert they are sometimes referred to as managers; this points up their responsibility for the land and the ceremonies performed on it and the knowledge which goes with it, though they may not answer the description of traditional owners in terms of the *Land Rights Act*.'

54. Australian Law Reform Commission, *Aboriginal Customary Law – Child Custody, Fostering and Adoption*, above n 2, 1.

55. *Ibid.*

56. Chisholm R, 'Destined Children: Aboriginal Child Welfare in Australia: Directions of Change in Law and Policy' (1985) 14 *Aboriginal Law Bulletin* 6; D'Souza N, 'Aboriginal Child Welfare: Framework for a National Policy' (1993) 35 *Family Matters* 40; Wilkinson D, 'Aboriginal Child Placement Principle' (1994) 3 (71) *Aboriginal Law Bulletin* 13; New South Wales Law Reform Commission, *The Aboriginal Child Placement Principle*, Report No 7 (1997) app 1.

57. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 6.

58. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 23.

59. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 4.

60. Chisholm R, 'Placement of Indigenous Children: Changing the Law' (1998) 21 *University of New South Wales Law Journal* 208, 210. Also refer to New South Wales Law Reform Commission, *ibid.*

61. Nicholson A, 'Customary Law and Family Law' (1995) 42 *Family Matters* 25, 27.

consultations in the Pilbara region, the local community remarked that the judiciary must be aware of how Aboriginal people deal with adoption issues.⁶² Prominent Aboriginal activist and commentator Brian Butler has further remarked:

Adoption is alien to our way of life. It is a legal status which has the effect of artificially and suddenly severing all that is part of a child with itself. To us this is something that cannot happen even though it has been done.⁶³

Given the status of the child in traditional Aboriginal society, to allow adoption, particularly outside the child's community, is to deplete severely the resources of the community as well as the immediate family. The incompatibility of the Western notion of adoption with Aboriginal culture should not be underestimated. Moreover, the ramifications for the child and its parents and family are even greater if the Aboriginal child is adopted by non-Aboriginal parents.

Part II: The legal recognition of Aboriginal customary family law

This Part is divided into two sections. The first sets out the limits of the Western Australian Parliament's powers to make changes in the area of family law. This section essentially defines what family law matters are open to consideration by the Commission. The second section outlines the core matters covered by Australian family law and discusses, within each of those areas, the extent to which Western Australian family law, practice and policy have accommodated customary Aboriginal law or the needs of Aboriginal families in general.

Space constraints have meant this Background Paper cannot cover the area of state regulated adoptions as a separate topic. However, the resolution of parenting disputes can often involve outcomes not dissimilar to an adoption and this is discussed below.

1. The scope of Western Australia's legislative power in relation to family law

Terminological considerations

The term 'family law' is generally given a specific and narrow legal content in Australian law, though there is no necessary reason for this. This term does not generally mean all legal matters that might affect a family. In Australia, it is usually used to refer to the laws that govern marriage (both legal and de facto) and the laws which can be accessed to resolve disputes when a couple—either in a legal or de facto marriage—separate. The latter broad area includes division of property, spousal and child support, parenting disputes and matters directly related to these things.

Aboriginal customary law, based as it is on different social structures and historical considerations, does not package these matters together in the same way. However, given the authors' areas of expertise and the necessary limits on what can be achieved in a paper such as this, this Background Paper focuses on the extent to which Aboriginal customary law has been, or could be, accommodated in those areas traditionally designated as 'family law'.

Introduction to the constitutional legislative context

Family law is one of the matters where the Australian Commonwealth Parliament has constitutional power to legislate.⁶⁴ However, because of the wording of the relevant sections of the Constitution, the Commonwealth's legislative powers are limited to relationships that have a connection to marriage.

As the federal government has chosen to legislate on various matters having a connection to marriage, and as it has 'covered the field' in those areas, those matters do not fall within the Western Australian government's legislative power. The areas of federal legislative coverage are:

- marriage;
- divorce; and
- all disputes of couples who at some time have been married to one another and which involve children, division of property, spousal maintenance, adult child maintenance and child support.

62. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 5.

63. Butler B, 'Adopting an Aboriginal Approach' (1989) 13(2) *Adoption and Fostering* 28, 28.

64. Under the marriage and divorce powers contained in s 51(xx) and (xxii) of the Australian Constitution.

All of the above matters have been the subject of consideration by the ALRC in relation to Aboriginal customary law.⁶⁵ This Background Paper does not address the issues directly covered by the ALRC except to the extent that there are legislative implications for Western Australia.

The family law matters that remain within the Western Australian government's legislative domain are therefore:

- parenting disputes involving ex-nuptial children;⁶⁶
- de facto marriage financial disputes; and
- child support in respect of ex-nuptial children.

Unlike other Australian states and territories, Western Australia has not conceded its powers to the Commonwealth in relation to these matters. All other states and territories have referred to the Commonwealth their legislative powers in respect of parenting disputes involving ex-nuptial children. New South Wales has also referred its powers in respect of de facto marriage property disputes⁶⁷ and other states and territories—except Western Australia—are expected to follow suit. The Commonwealth government has made it clear that in relation to de facto property disputes it will only accept a reference in respect of heterosexual couples. Under the New South Wales legislation, two separate references exist in relation to same-sex and opposite-sex couples⁶⁸ and s 5 of the referring Act permits the revocation of any reference. Thus, it is likely that if the federal government does legislate in this area, different laws will apply in respect of heterosexual and homosexual de facto property disputes.

One of the obvious consequences of these jurisdictional issues is that changes to the law in Western Australia create the potential for different laws within Western Australia for married and unmarried couples and that the laws for unmarried Western Australian couples will be different to the laws applying to such couples in other states and territories.

The Commission's community consultations have identified the problems this creates for providing any effective solution to the problems of Aboriginal people as a whole. For example, the notes of the Manguri consultation meeting conducted in November 2002 express the concerns of Aboriginal people in that area, including that:

- any attempt to address areas without reconsideration of national laws, including the Commonwealth Constitution, would be superficial; and
- limitations arising out of state border boundaries would be artificial as the issues in questions arise across Australia as they are about 'total dreaming'.

Thus, a key issue for the Commission is the extent to which it wishes to recommend changes that will result in a patchwork of different laws for communities separated by state and territory boundaries and according to their marital customs. This Background Paper will now turn to look in more detail at each of the legislative powers of the Western Australian Parliament in the family law area.

Parenting disputes involving ex-nuptial children

As previously indicated, all states and territories except Western Australia have referred to the Commonwealth their legislative power over parenting disputes concerning ex-nuptial children. Therefore, the *Family Law Act 1975* (Cth) ('the FLA') applies to parenting disputes involving ex-nuptial children in all other Australian jurisdictions. In contrast, in Western Australia parenting disputes concerning ex-nuptial children are governed by the *Family Court Act 1997* (WA) ('the FCA'). The provisions governing the resolution of a dispute concerning an ex-nuptial child under the FCA⁶⁹ are substantially similar to those governing parenting disputes concerning nuptial children under the FLA.⁷⁰ Thus, the case law interpreting the provisions of Part VII of the FLA—which deals with parenting disputes—is generally applicable to ex-nuptial child disputes in Western Australia.

While the Western Australian parliament is free to amend the provisions of the FCA in this area, it would result in ex-nuptial and nuptial children (the subject of parenting disputes) being treated differently within Western Australia.

65. See generally Part III of Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (Vol 1, 1986).

66. That is, children of parents who have never been married to each other.

67. *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW).

68. *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) s 4.

69. See *Family Court Act 1997* (WA) Part 5.

70. See *Family Law Act 1975* (Cth) Part VII.

Further, ex-nuptial children in Western Australia would be treated differently from all children in other Australian jurisdictions.

De facto marriage property disputes

Until December 2002 Western Australia had no laws specifically governing the resolution of property and spousal maintenance disputes between de facto spouses. Therefore, matters had to be resolved in the Supreme Court of Western Australia utilising predominantly equitable remedies.⁷¹

This was changed with the enactment of Part 5A of the FCA, which saw the introduction of de facto relationship legislation similar to, but not the same as, that found in other Australian jurisdictions. Now, where couples have separated after 1 December 2002 (and the other criteria referred to below are met), parties may⁷² seek any remedy under Part 5A of the FCA. Part 5A of the FCA essentially replicates the equivalent provisions of the FLA⁷³ in so far as it regulates the division of property and awards of spousal maintenance.

For those having separated after the relevant date, there are a number of further pre-requisites to the application of Part 5A. Firstly, there is a required geographical nexus.⁷⁴ At least one party must be resident in Western Australia on the day the application is filed, *and* both parties must have lived in Western Australia for at least one-third the duration of the de facto relationship *or* the applicant must have made substantial contributions in this state.⁷⁵ Secondly, the court is only entitled to make an order where:

- the de facto relationship has been in existence for more than two years;⁷⁶ or
- the parties have a minor child and it would cause the carer parent hardship not to make the order; or
- the applicant has made substantial contributions and it would result in serious injustice to them if no order were made.⁷⁷

Finally, the parties must have been in a recognised 'de facto relationship'. This term is defined in s 13A of the *Interpretation Act 1984* (WA) to be a relationship, other than a legal marriage, between two persons who live together in a marriage-like relationship. Section 13A(2) then sets out indicators of a de facto relationship, none of which are essential, but all of which are relevant. These indicators are:

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

Accordingly, in Western Australia, property/spousal maintenance disputes of married couples must be dealt with under the FLA and property/spousal maintenance disputes of unmarried couples must be dealt with under the FCA (where that Act applies). Where neither the FCA nor the FLA applies, then the parties' only resort remains equitable remedies in the Supreme Court.

As a consequence of these recent amendments to the FCA, most separating de facto spouses in Western Australia now have remedies similar to those for married couples. This is not necessarily true in other Australian jurisdictions where there is considerable variation in the laws in force. Thus, if de facto relationship laws in Western Australia were changed in relation to Aboriginal de facto spouses, those de facto spouses would be treated differently from Aboriginal

71. Constructive trusts, promissory estoppel and resulting trusts were the key remedies utilised.

72. *Family Court Act 1997* (WA) s 205V.

73. See *Family Law Act 1975* (Cth) Part VIII.

74. *Family Court Act 1997* (WA) s 205X.

75. The contributions referred to here are substantially similar to the contributions considered under s 79 of the *Family Law Act 1975* (Cth); see *Family Court Act 1997* (WA) ss 205ZG(4)(a), (b) and (c).

76. See *Family Court Act 1997* (WA) s 205Z(2) regarding breaks in the relationship.

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

spouses that were legally married. However, the issue of different treatment from other de facto Aboriginal spouses in other Australian jurisdictions seems less problematic given the variation in these laws across the country. The difference in treatment between married and unmarried couples is arguably of greater concern.

Child support for ex-nuptial children

Western Australian ex-nuptial children are the subject of the Commonwealth administrative scheme of child support assessment by virtue of the *Child Support (Adoption of Laws) Act 1990* (WA) which adopts the *Child Support (Assessment) Act 1989* (Cth). However, the Western Australia Parliament can terminate that adoption.⁷⁸ Therefore, if changes were made for ex-nuptial Aboriginal children, then we would again see such children treated differently according to the marital status of their parents.

Courts exercising family law jurisdiction in Western Australia

In considering whether to make changes to family law within Western Australia, one also has to keep in mind which courts are exercising the relevant powers. The FLA created a federal family court – the Family Court of Australia. Section 43 of the FLA entitles the states and territories to set up their own family courts. Western Australia is the only jurisdiction that has elected to do this, and through the FCA created the Family Court of Western Australia ('the FCWA').

The FCWA exercises dual jurisdiction under both the FLA (in respect of matters involving parties who are or have been married to each other) and the FCA (in respect of parties who have never been married to each other). As a result of the FCWA's extended jurisdiction, the Federal Magistrates' Service in Western Australia was not given jurisdiction to hear family law matters (as it does in other states and territories).

Magistrates' courts in Western Australia also have jurisdiction to hear simple family law matters. Inside the Perth metropolitan area, only the Court of Petty Sessions situated at 150 Terrace Road (which is the same location as the FCWA) can exercise this jurisdiction. The magistrates of that court hold dual commissions as Registrars of the Family Court of Western Australia. Thus, those officers perform all lower level decision-making in family law matters in the Perth metropolitan area.

Outside of the metropolitan area general magistrates' courts have some family law jurisdiction. However, the magistrates attached to the FCWA conduct three circuits each year to Albany, Kalgoorlie, Geraldton and the North West (Karratha, Port Hedland and Broome) and 10 circuits each year to Bunbury. Each circuit is about a week in duration. The country magistrates generally only exercise their family law jurisdiction in relation to interim or procedural matters and then order the transfer of the matter to the appropriate FCWA circuit. The magistrates on circuit from the FCWA therefore hear the remaining interim hearings, summary applications and conduct conciliations and pre-trial conferences.⁷⁹ Thus, despite the complex jurisdictional web created by the co-existence of state and Commonwealth laws in this area, nearly all matters are heard by registrars or judges of the FCWA.

2. Core areas covered by existing family law legislation⁸⁰

The narrow content of the term family law has been referred to above. Family law legislation in Australia, and therefore Western Australia, deals predominantly with the following matters:

- marriage, nullity⁸¹ and divorce;
- parenting disputes;
- division of property; and
- spousal maintenance and child support.

Given that the Western Australian Parliament possesses legislative power in each of these areas, this section of the Background Paper will consider in relation to each of these areas, the extent to which Aboriginal customary family law is, or might be, accommodated.

78. *Child Support (Adoption of Laws) Act 1990* (WA) s.7.

79. Acting Principal Registrar David Monaghan, Family Court of Western Australia, email to Lisa Young, 24 February 2004.

80. In addition to the legislation mentioned above, the key piece of legislation in this area is the *Marriage Act 1961* (Cth).

81. Nullity proceedings are the process by which a void marriage is declared to be void (eg, for lack of consent, fraud or because a party is underage): see *Marriage Act 1961* (Cth) s 23B.

Marriage

It has been explained above that marriage, nullity and divorce are matters within the Commonwealth legislative domain and are matters about which the federal government has already legislated. It appears that this federal legislative power does not include deciding what amounts to marriage. In other words, it is not clear that even the Commonwealth Parliament could legislate to create a new kind of marriage – such as marriage of same-sex couples or permitted polygamy. Anthony Dickey QC has noted that the latter issue is hardly academic, especially in light of the ALRC's inquiry into the matter.⁸²

However, the question remains as to the proper treatment of customary Aboriginal marriage under state laws for unmarried couples. There are two reasons why this issue is significant. Firstly, there is the question of the appropriateness of the recognition of customary marriage in this way, regardless of the consequences that flow from that recognition. In other words, there is an issue as to whether this aspect of Aboriginal culture should be legally recognised as at least equivalent to a *de facto* marriage, so that the status of customary marriage is formally acknowledged or whether to do so would in fact downgrade the status of customary marriage. Secondly, there is the question of ensuring that customary marriage is covered in these laws to guarantee access to legal remedies when a customary marriage breaks down.

By way of background, the ALRC did not recommend that Aboriginal customary marriage be recognised as equivalent to marriage under the *Marriage Act 1961* (Cth). However, it did recommend that there be selective functional recognition—that is, recognition where appropriate in particular legislative contexts—and it set out the areas where it thought this should apply. The ALRC went on to make recommendations as to the treatment of certain aspects of Aboriginal customary marriage where there was to be recognition of those marriages.

The ALRC recommended that one of the areas of functional recognition should be the Family Court's jurisdiction with respect to principal and ancillary relief.⁸³ The terms 'principal and ancillary relief' cover the core areas of family law jurisdiction outlined above. However, in the ALRC's report the only specific contexts in which recognition of Aboriginal customary marriage was recommended were legitimacy of children and custody. The ALRC did not recommend that the areas of spousal maintenance and property settlement be amended to recognise customary marriage, instead leaving the matter to the common law or state or territory legislation.⁸⁴ Spousal maintenance and property settlement are considered below in the Western Australian context.

As selective functional recognition of marriage by the Western Australian Parliament is possible, the two areas singled out by the ALRC will be considered next.

Legitimacy

Unlike all other states and territories,⁸⁵ Western Australia has not enacted specific legislation dealing with the status of children. The equality of status legislation in other Australian jurisdictions has substantially removed legal disadvantages for illegitimate children. Western Australia instead made specific legislative amendments to eliminate any such disadvantage.⁸⁶

Two areas relating to legitimacy identified by the ALRC as problematic, despite these legislative reforms, were adoption and the registration of names. At the time of the ALRC's report, Western Australian adoption law did not require the consent of a father who had never been married to the child's mother, unless he happened to be a guardian of the child. Under state law at that time⁸⁷ fathers were not automatically guardians of their illegitimate children. Changes to both the adoption legislation⁸⁸ and the FCA⁸⁹ have ensured that the requirement for consent of a biological father to an adoption is now the same for both legitimate and illegitimate children. Thus, the specific concern of the ALRC in this regard has now been addressed.

82. A Dickey, *Family Law*, (Law Book Company: Sydney, 4th ed., 2002) 39–40.

83. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, [257].

84. *Ibid* [290].

85. It should be noted that the ALRC's statement (*ibid* [271]) that the Australian Capital Territory has not enacted such legislation is no longer correct: see *Birth (Equality of Status) Act 1988* (ACT).

86. Dickey, above n 82, 296.

87. *Family Court Act 1975* (WA) s 35.

88. *Adoption Act 1994* (WA) s 17.

89. *Family Court Act 1997* (WA) s 69.

A further concerning aspect of Western Australian adoption law highlighted by the ALRC was the provision, then in force, prohibiting adoption in favour of parents not legally married to each other.⁹⁰ Obviously this would exclude as potential adoptive parents an Aboriginal couple married under their customary law. Section 39 of the *Adoption Act 1994* (WA) now stipulates that where a couple applies to become adoptive parents they must either have been married to, or have been in a de facto relationship with, each other for at least three years. As the term 'de facto relationship' is not defined in that Act, s 13A of the *Interpretation Act 1984* (WA) would apply and the broad application of that provision has been discussed above. It would seem likely that most customary marriages of three years' duration would meet the test laid out in that section, given the common presence of cohabitation and other factors indicative of a de facto marriage. However, it is technically possible that a marriage recognised by Aboriginal custom may not be classified as a de facto marriage for these purposes. Thus, s 39 of the *Adoption Act 1994* (WA) could be amended to include Aboriginal customary marriages to ensure that the question was beyond doubt.

The ALRC report does not indicate how illegitimacy affords any disadvantage in terms of the registration of names. On this point, the *Births, Deaths and Marriages Registration Act 1998* (WA) provides that:

- both *parents* are jointly responsible for having a child's birth registered;⁹¹
- the birth registration statement must state the child's name;⁹² and
- both a child's parents must apply to change that name.⁹³

There is nothing presently in the provisions concerning the change of children's names that discriminates based on the marital status of the child's parents and therefore it does not appear that these provisions would discriminate against parents who are married according to Aboriginal custom.

Custody

The second family law area mentioned by the ALRC as possibly requiring functional recognition of marriage was custody. The ALRC said:

To the extent that State and Territory legislation imposes similar qualifications for child custody or fostering, based on marriage under the general law, or differentiates a traditional husband and father's rights from those of a *Marriage Act* father, the same recommendations apply.

Marriage is not identified as a relevant legislative factor in determining custody (now known as residence) under either the Commonwealth legislation (which applies to children of a marriage in Western Australia) or state legislation (which applies to ex-nuptial children). Both statutes refer instead to factors generally relevant to a child's best interests, including the relationship between the child in question and the adults seeking a parenting role and the effect of any separation of a child from another person.⁹⁴ However, a family court can consider *any* matter it thinks relevant when making a parenting decision.⁹⁵ There is nothing in these provisions that limits the consideration of customary marriage as a relevant circumstance and to the extent that a customary marriage was relevant to a parenting dispute it would presumably be considered. Although, in practice, the mere fact of marriage (whether customary or otherwise) is usually not a very significant circumstance in such decisions.

In summary, despite the ALRC's express concern, there does not appear to be any different treatment of parents in respect to custody depending on their marital status. The issue as to the significance of Aboriginality in the making of parenting orders is considered separately below.

De facto spousal maintenance and property settlement

The ALRC did not recommend functional recognition of customary marriage in the areas of de facto spousal maintenance and property settlement because, at the time of its report, these were solely matters of state and territory jurisdiction. That is no longer strictly the case; however, it remains to be seen how the Commonwealth will utilise its referred legislative powers in these areas.

90. *Adoption of Children Act 1896* (WA) s 4.

91. *Births, Deaths and Marriages Registration Act 1998* (WA) s 15(1).

92. *Births, Deaths and Marriages Registration Act 1998* (WA) s 22(1).

93. *Births, Deaths and Marriages Registration Act 1998* (WA) s 31.

94. See *Family Law Act 1975* (Cth) ss 68F(2)(b) and (c); *Family Court Act 1997* (WA) ss 166(2)(b) and (c).

95. See *Family Law Act 1975* (Cth) s 68F(2)(l); *Family Court Act 1997* (WA) s 166(2)(l).

The only specific form of relief that is available in Western Australia to separated unmarried couples is that found in the FCA – broadly, spousal maintenance and alteration of property interests. The FCA does not make any reference to customary marriage; therefore, technically, it does not recognise such marriages. The FCA could be amended to extend its relief to the parties to a customary Aboriginal marriage. However, it is doubtful that this would, in reality, substantially extend the FCWA's jurisdiction. This is because of the very broad definition of de facto relationship. The factors set out in s 13A of the *Interpretation Act 1984* (WA), though not particularly directed at customary marriage, would appear to cover the typical features of many such marriages. However, this section could be amended to explicitly include customary Aboriginal marriages. For example, it could specify in the context of Aboriginal and Torres Strait Islander people that recognition of marriage within one's community would be indicative of a de facto marriage.

More problematic is the requirement that, for any order to be made under Part 5A of the FCA, the de facto spouses need to have lived together for at least two years, have had a child or have made 'substantial contributions'. It seems likely that a childless couple, who had been in a customary marriage for less than two years prior to separation, may not be eligible to apply for relief under the FCA. However, if there have been no 'substantial contributions' (which would activate the FCA provisions) then there is likely to be little property to divide. Also, if there are no children, then the making of a spousal maintenance order is unlikely in any event as typically it is the care of a young child that qualifies a parent for spousal maintenance. Moreover, the introduction of the child support scheme has meant that those parents paying child support are unlikely to have any residual capacity to pay spousal maintenance.

Despite the small opportunity for extension of jurisdiction by including express reference to customary marriages in the context of de facto spouses, it could be argued that such an amendment is warranted because those few couples who have gone through a customary marriage and cannot access these provisions are being treated unfairly. Nonetheless, on a fundamental level the ALRC considered it undesirable to use de facto relationship legislation as a way of recognising customary marriage. This was because equating customary marriage to a form of non-legal marriage would be to deny its legal reality in customary law.⁹⁶ In any event, a key practical problem with extending the definition of de facto marriage to cover Aboriginal customary marriage is one of definition. This was a concern highlighted by the ALRC.⁹⁷

Moral considerations with the functional recognition of customary Aboriginal marriage

A further issue that is generally addressed when considering the recognition of customary marriage in any context is the extent to which this will sanction features of marriage that might be seen as somehow morally unacceptable. In particular, the issues of polygamy, the marriage of minors and consent to marriage have proved contentious in other jurisdictions.⁹⁸ Certainly, in Australia under the *Marriage Act 1961* (Cth) a marriage is void if:

- there is a lack of consent; or
- one of the parties is underage (18);⁹⁹ or
- either of the parties is already legally married.

Promised or betrothal marriages in particular raise complex and difficult issues when one is examining a recognition of such marriages by the 'mainstream' legal system. It is arguable that to recognise such marriages would run contrary to Australia's obligations under international human rights law and also the law of contract. For example, a combination of human rights treaties that Australia has ratified, such as the *International Covenant on Economic, Social and Cultural Rights 1966*,¹⁰⁰ the *International Covenant on Civil and Political Rights 1966*,¹⁰¹ the *International Covenant on the Elimination of all Forms of Discrimination 1966*¹⁰² and the *United Nations Convention on the Elimination*

96. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, [245].

97. *Ibid* [243].

98. See for example the discussion in Chapters 4–6 (inclusive) of the South African Law Commission's *Customary Marriages*, Discussion Paper 74 (1998) prepared for the Commission's Project No 90, *The Harmonisation of the Common Law and the Indigenous Law*.

99. Unless court approval has been sought, and then it can only apply to one party and they must be over the age of 16: see *Marriage Act 1961* (Cth) s 12.

100. Article 10: 'The State Parties to the present Covenant recognise that: 1. ...Marriage must be entered into with the free consent of the intending spouses.'

101. Article 23: '2. The right of men and women of marriageable age to marry and to found a family shall be recognised. 3. No marriage shall be entered into without the free and full consent of the intending spouses.' Article 24: '1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.'

102. Article 5: '... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without discrimination as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (d) Other civil rights, in particular: ... (iv) The right to marriage and choice of spouse.'

of all Forms of Discrimination Against Women 1980¹⁰³ proscribe non-consensual marriages and discriminating practices against females.¹⁰⁴ Of course, these obligations have to be weighed against the desire to value and respect the 'social and cultural integrity of Aboriginal communities'.¹⁰⁵

It is not only Australia's obligations under international human rights law that present some difficulty in recognising promised or betrothal marriages. Such recognition would also require the reconsideration of other domestic laws. For example, under Australian law, promises to marry and marriage itself for a girl below the marriageable age as prescribed in the *Marriage Act 1961* (Cth) are non-enforceable. Under contract law, apart from contracts for necessities¹⁰⁶ and beneficial contracts of an infant (such as apprenticeships),¹⁰⁷ contracts with minors are unenforceable.¹⁰⁸ Thus contracts to marry involving an infant are unenforceable.¹⁰⁹ Further, due to the doctrine of privity,¹¹⁰ a contract of promise to marry made by adults in relation to an infant will not be enforceable against the infant. The only way a promise to marry involving an infant is enforceable is if the infant upon reaching majority enters into a new promise. Ratification of the old promise to marry will not suffice.¹¹¹ So, recognition of Aboriginal customary marriage would require a reconsideration of fundamental principles in other legal areas as well as family law.

The question of polygamous marriages is equally difficult. There are two legal possibilities: to recognise only the first marriage or to recognise equally all subsequent marriages. The former approach would clearly discriminate against the second and subsequent spouses. Dr James Crawford, the Commissioner in Charge of the ALRC inquiry into the recognition of Aboriginal customary law, states:

It is suggested that selectivity, in the context of functional recognition of [Aboriginal customary] marriage, is both arbitrary and unnecessary. What is being recognised here are the consequences of marriage, in particular in areas of compensation for death and injury, devolution of property, etc. To the extent that these consequences involve drawing upon the husband's property or rights, it is arbitrary and unfair to exclude a second wife.¹¹²

However, concerns of this nature (that is, moral concerns about the recognition of such marriages) hold little force in the context of an amendment to Part 5A of the FCA. The provisions of Part 5A do not exclude the possibility of multiple de facto marriages, the parties to each being eligible for relief under those provisions. Nor is the application of those provisions affected by the age at which cohabitation commenced or indeed the reason for the commencement of cohabitation. Theoretically this makes sense, as these provisions are quite clearly not designed to give any formal recognition to de facto relationships as marriages – rather, they are aimed at providing relief to couples cohabiting in a *marriage-like* relationship, which by definition is not a legal marriage. Indeed, even under the FLA, 'spousal' maintenance is available to parties to a void marriage.¹¹³ The ACT and NSW have gone one step further by providing this type of relief to persons in 'domestic relationships', which category is much broader than a de facto marriage.¹¹⁴

Summary

The Commission could, therefore, consider an amendment to the FCA and/or the *Interpretation Act* which had the effect of expressly including Aboriginal customary marriages as de facto relationships. The question would be whether the potentially small practical advantages of such an amendment outweigh the possibly negative implications of essentially downgrading customary marriage to the equivalent of a de facto marriage.

103. Article 5: 'States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either or the sexes or on stereotyped roles for men and women. Article 16: '1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) the same right to enter into marriages; (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent; 2. The betrothal and the marriage of a child shall have no legal effect, and necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official register compulsory.'

104. It should also be noted that many provisions of the *Convention on the Rights of Children 1989*, would prohibit non-consensual marriages where at least one of the parties is a child. The whole convention is geared to the protection of the welfare of children.

105. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Promised Marriage in Aboriginal Society*, above n 4, 1.

106. Seddon NC & Ellinghaus MP, *Cheshire and Fifoot's Law of Contract*, (Sydney: LexisNexis Butterworths, 8th ed., 2002) 798–805.

107. *Hamilton v Lethbridge* (1912) 14 CLR 236.

108. A contract whereby an infant enjoys a permanent interest in property is valid unless the infant repudiates the contract while an infant or within a reasonable time after reaching majority (at 18 years of age).

109. *Coxhead v Mullis* (1878) 3 CPD 439.

110. *Dunlop Pneumatic Tyre Co Ltd v Selfridge Co Ltd* [1915] AC 847; *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460.

111. *Watson v Campbell* (No 2) [1920] VLR 347; also refer to Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Promised Marriage in Aboriginal Society*, above n 4, 9.

112. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – The Recognition of Aboriginal Customary or Tribal Marriage*, above n 21, 15.

113. See *Family Law Act 1975* (Cth) s 71. A void marriage is one which offends the provisions of s 23B of the *Marriage Act 1961* (Cth): eg, in circumstances of a party to the marriage being underage, fraud, lack of consent, or a prohibited relationship.

114. See *Domestic Relationships Act 1994* (ACT) and *Property (Relationships) Act 1984* (NSW).

Nullity and divorce

The areas of nullity and divorce are arguably irrelevant where there is no formal legal recognition of customary marriage. Nullity concerns the conditions under which a legal marriage is not valid from the outset (that is, void). Divorce concerns the circumstances under which a legal marriage can be ended. If a customary marriage is not legally recognised then of course its validity or dissolution can be dealt with under Aboriginal customary law.

Thus, unless the Commission were to consider a reform that involved some formal legal recognition of customary marriages (as opposed to functional recognition), then it would not need to address nullity and divorce. Given that it appears that the Western Australian Parliament presently has no power to give formal legal recognition to customary Aboriginal marriages, the question of the validity and ending of such marriages is not one that needs to be addressed.

Parenting disputes

The term 'parenting dispute' is adopted in this Paper as referring to disputes over 'parental responsibility' in respect of a child. Parental responsibility is defined in the FLA and FCA as all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.¹¹⁵ When a dispute is brought before the FCWA, which can hear parenting disputes in relation to nuptial and ex-nuptial children, it has the power to make *whatever* order¹¹⁶ it considers is in the best interests of the child concerned.¹¹⁷

Whilst the FCWA is commonly asked to decide with whom a child should live, or who may have contact with a child, its powers are much broader and it can make nearly any order relating to the welfare of the child. The main exception is that matters arising under the child welfare legislation are not within its jurisdiction. As well, it is generally thought to be the case that the passage of the FLA and FCA has extinguished the Supreme Court's *parens patriae* jurisdiction in respect of minors.¹¹⁸

In the making of any order, the FCWA must have as its paramount consideration the best interests of the child concerned. In determining what is in a child's best interests, the Court must have regard to the various matters set out in what is commonly referred to as the 'best interests' checklist.¹¹⁹ That list includes, amongst other things:

- s 68F(2)(b) – the nature of the relationship of the child with each of the child's parents and with other persons;
- s 68F(2)(c) – the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
- s 68F(2)(e) – the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- s 68F(f) – the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the Court thinks are relevant.

There would seem to be three key questions for the Commission in relation to customary law and the making of parenting orders:

1. Should Aboriginal Western Australians be given the opportunity to resolve parenting disputes in an alternative forum that applies their customary law?
2. If Aboriginal Western Australians are to continue having to use the FCWA as the arbiter of last resort, are the principles being applied by that decision-making body appropriate given Aboriginal customary law and are Court processes sensitive to the particular needs of Aboriginal clients?
3. What alternative resources might be provided by the government to assist Aboriginal Western Australians resolve parenting disagreements?

115. *Family Law Act 1975* (Cth) s 61B and *Family Court Act 1997* (WA) s 68.

116. *Family Law Act 1975* (Cth) s 65D and *Family Court Act 1997* (WA) s 89.

117. *Family Law Act 1975* (Cth) s 65E and *Family Court Act 1997* (WA) s 90.

118. See Dickey, above n 82, 395.

119. *Family Law Act 1975* (Cth) s 68F(2) and *Family Court Act 1997* (WA) s 166(2).

Problems with non-access to present family law remedies

Before examining each of these issues in turn, it is important to note that the FCWA has not kept statistics on the extent to which Aboriginal people access the family court system. There is certainly a perception—which may or may not be accurate—that Aboriginal families do not access this system to the same degree as non-Aboriginal members of the community. If that perception is correct, then the question arises as to whether Aboriginal families suffer any disadvantage as a result. This is of particular concern if the reason for not accessing the system is the belief that it does not cater to the needs of Aboriginal families.

Many non-Aboriginal people resolve parenting matters without resort to the family law system. It is likely that in most such cases it would be the child's parents who would share, in one way or another, parental responsibility for the child. As the FLA and FCA already enshrine that principle,¹²⁰ the way in which parental responsibility is divided between parents would not normally create any practical difficulties for those parents. If the parents wished to formalise their particular arrangement with court orders, they could do that by consent.

Aboriginal families, on the other hand, may well resolve on someone other than one of the biological parents to be the primary carer of a child from time-to-time. If, for some reason, the parties concerned wanted to have this formalised by obtaining court orders, they would not as easily be able to do this by consent. This is because the FLA s 65G and the FCA s 92 provide that the court cannot make such an order unless:

- the parties to the proceedings have attended a conference with a family and child counsellor or a welfare officer to discuss the matter to be determined by the proposed order; and
- the court has considered a report prepared by the counsellor or officer about that matter; or
- the court is satisfied that there are circumstances that make it appropriate to make the proposed order even though the conditions in paragraph (a) are not satisfied.

The obvious intent of this section is to avoid de facto 'adoptions' using consent parenting orders. This raises a fundamental terminological issue. By adoption, one normally means giving to a non-parent the status of legal parent of a particular child. In Western Australia this is done through the Department of Community Development's Adoption Department, applying the *Adoption Act 1994* (WA). There are considerable constraints on the adoption process, aimed primarily at maximising the welfare of the child concerned.

In the case of Aboriginal families, there is no concept equivalent to adoption. Although it is common for family members other than a child's biological parent to perform the role of primary carer from time-to-time, as has been indicated in Part I, this is not equivalent to an adoption. Therefore, the current legislative division of parental responsibility between biological parents does not readily accommodate Aboriginal family life and these sections create unnecessary hurdles for Aboriginal families wishing to formalise arrangements typical to Aboriginal family life. That is not to say, of course, that a consent order would not be made once the necessary steps were taken. Rather, the question is whether it is appropriate to require Aboriginal families to jump through these technical hoops, when they are not appropriate to Aboriginal family life. Also, it may be that the legislative division of parental responsibility between biological parents creates practical difficulties for Aboriginal carers of children who are not their biological parents, when they need to engage with some formal process but are not legally authorised to do so.

It seems these are not just hypothetical problems. In the Thematic Summary for the Commission's consultations in Kalgoorlie, reference was made to the case of a grandmother caring for her grandchildren. Though the particular circumstances of the case are not clear from the Summary, it was noted that the grandmother '...was not supported by the law and was, in fact, punished by it. This produced family breakdown and delinquency'.¹²¹ In the Thematic Summary of the Commission's consultations in Laverton, mention was made of the need for the system to automatically recognise the care of a child by an extended family member, as happened in Aboriginal custom.¹²²

A similar problem might arise on the death of the parents. In the Thematic Summary for the Commission's consultations in Kalgoorlie, the Aboriginal custom of a maternal uncle taking over the care of nieces or nephews on the death of their

120. *Family Law Act 1975* (Cth) s 61C and *Family Court Act 1997* (WA) s 69.

121. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 4.

122. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 6. Further supporting comments are found in the Commission's consultations in the Pilbara region, see: Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 5 & 22.

parents was noted.¹²³ This relative would have no standing nor legal rights as a carer in mainstream family law in the absence of a parenting or adoption order. That is, his customary guardianship would not be recognised unless he sought orders to formalise it.

An alternative forum

If, as appears to be the case, Aboriginal people are not accessing the remedies available in the current family court system, the question arises as to whether an alternative forum for Aboriginal family disputes should be instituted. As the Canadian Report of the Royal Commission on Aboriginal Peoples has noted,¹²⁴ if government were to devolve to the Aboriginal community limited rights to self-determination, then family law would be a perfect candidate.¹²⁵ Accordingly, if the Commission were to consider a separate court system in Western Australia for Aboriginal customary law, then family law would seem to be an appropriate subject matter to be dealt with by such a court.

All the usual considerations would then apply as to the relationship between that court and the law it administered and other court systems applying family law legislation. A particular issue would arise where the disputants were not both of Aboriginal descent. However, the key stumbling block to a separate court system for family law would be the complex jurisdictional web this would create due to the division of powers in this area between the state and the Commonwealth. Indeed, the authors suggest that such a step would create undue complexity in the area of family law. A more appropriate solution might be to consider culturally sensitive mechanisms of primary dispute resolution. Where parties resolve matters out of the official court system then questions of jurisdiction fall away.

Culturally sensitive substance and process in the family law system

If parenting disputes for Aboriginal families continue to be decided by the family court system, one must consider whether decisions made in that system are culturally appropriate for Aboriginal families and whether the processes of that court system are adapted to meet their particular needs.

In relation to decision-making in the area of parental disputes, the main historical areas of concern have been:

- the extent to which the Family Court discriminates against Aboriginal parents due to a lack of understanding of Aboriginal society; and
- the failure by the Family Court to appreciate the importance of maintaining an Aboriginal child's ties to its cultural heritage.

As has been said, the child's best interests are the paramount consideration in the making of any parenting order. In determining what is in a child's best interests, family courts are now required to take account of the need to 'maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders'.¹²⁶ In addition to this specific legislative injunction, recent decision-making by the Family Court shows increasing sensitivity to cultural issues facing Aboriginal families and in particular the importance of placing Aboriginal children in the care of Aboriginal families. These developments are set out in more detail in Part III of the Commission's earlier Background Paper, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*.¹²⁷

Despite improvements in Family Court decision-making in these areas, the notes of the Manguri consultation meeting point to a perception that 'the court is "not listening" and does not seem to understand the dynamics of Aboriginal families'.¹²⁸ This comment was recorded in relation to parenting disputes and mediation services and therefore could apply to both decision-making and service provision. Service provision is discussed further below.

The federal government's Family Law Pathways Advisory Group was established to advise the government on how to achieve an integrated family law system. The Group's report, *Out of the Maze – Pathways to the Future for Families Experiencing Separation* ('*Out of the Maze*'), was launched in August 2001. In that report it was observed that:

123. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 3.

124. *Report of the Royal Commission on Aboriginal Peoples* (Canada, 1996) vol 3, ch 2, [4].

125. This option has also been considered by the New Zealand Law Commission. The work in this area in both jurisdictions is considered below, although, it is important to note that neither jurisdiction has yet legislated in this area.

126. FLA s 68F(2)(f) and FCA s 166(2)(f).

127. Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', Background Paper No 1, above pp 176.

128. Law Reform Commission of Western Australia, *Thematic Summaries of Consultation – Manguri*, 4 November 2002, 3. The notes of the Commission's Consultation Meetings are available online at <<http://www.lrc.justice.wa.gov.au>>.

At present the *Family Law Act* does not explicitly recognise child-rearing obligations or parenting responsibilities of family members other than parents. Meaningful consideration needs to be given to amending the *Family Law Act* to incorporate indigenous child-rearing practices. The *Family Law Act* needs to offer guidance as to the importance placed on a child's cultural identity. This is imperative when determining the best interests of indigenous children.¹²⁹

Thus, it was recommended that the FLA be amended so that:

- a section 61 should acknowledge unique kinship obligations and child-rearing practices of indigenous culture;
- b section 60B(2) (which relates to principles underlying a child's right to adequate and proper parenting) should include a new paragraph stating that children of indigenous origins have a right, in community with other members of their group, to enjoy their own culture, profess and practice their own religion, and use their own language; and
- c in section 68F(2)(f) the phrase 'any need' should be replaced by 'the need of every indigenous child'.¹³⁰

Similar amendments could be made to the equivalent provisions of the FCA, however, that would result in different provisions for nuptial and ex-nuptial children unless and until the FLA was amended.

The first of these recommendations is particularly interesting in light of a related matter raised in the Commission's consultations. Many of the notes of the consultation meetings referred to the way non-Aboriginal law views children's rights and, in that context, disciplinary practices within Aboriginal families.¹³¹ Where a parenting dispute is between two Aboriginal parents then it is hard to imagine that either party could effectively use a claim of excessive child discipline against the other party, so long as the disciplinary practices in question were acceptable in Aboriginal society. The issue might be more contentious where the dispute is between an Aboriginal parent and a non-Aboriginal parent. There is little in the reported case law to assist on this issue, save for general statements to the effect that cultural or religious practices should not disadvantage any parent, provided that those practices are not inimical to the welfare of the child.¹³²

Of course, many non-Aboriginal parents also physically discipline their children and this is not generally considered to be a disqualifying factor in terms of either residence or contact. Obviously, if there are other issues of violence it is more likely that it will feature as a relevant consideration. However, the best interests principle is sufficiently undemanding that a decision-maker *might* place inappropriate negative weight on family practices that are culturally appropriate within Aboriginal families, without that being explicit in the decision. What this issue highlights is the *potential* for discriminatory, or culturally inappropriate, decision-making in relation to Aboriginal families. There may well be other examples of this. One case that was brought to the authors' attention involved an order prohibiting a child's contact to its extended paternal relatives, because the father had killed the child's mother. The cultural implications of such an order in an Aboriginal family might be quite different from a non-Aboriginal family. In the authors' views, further research would be necessary to consider the extent to which this occurs and that would require more than empirical surveys of case outcomes.¹³³

In any event, if it is the case that a matter such as Aboriginal disciplining practices is impacting on family court decision-making, then an amendment such as that suggested in Recommendation 22 (a) of *Out of the Maze* would force a court to face the issue directly in the context of Aboriginal culture. Presumably it would make it more difficult for the decision-maker to draw an adverse inference from a culturally appropriate form of disciplining a child.

In relation to court processes, it is clear from the notes of the Commission's consultation meetings that Aboriginal families have concerns about the way the family law system operates. For example, the notes of the Mirrabooka consultation meeting express the need to accept oral, as well as written testimony.¹³⁴ This is particularly important in a family law context where most evidence is given by affidavit, and this is accentuated in interim hearings.¹³⁵ As most matters do not proceed to a final hearing, the process for interim hearings is extremely important.

The Thematic Summary for the Commission's consultation in the Pilbara region identifies another potential issue: in the Family Court, primary evidence at trial is given by affidavit, but of course there is still cross-examination. Aboriginal

129. Family Law Pathways Advisory Group, 'Out of the Maze: Pathways to the Future for Families Experiencing Separation' (August 2001) 89.

130. Ibid, Recommendation 22.

131. See, Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 3; *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 4; *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 4; *Thematic Summaries of Consultations – Albany*, 18 November 2003, 3.

132. See for example *Firth v Firth* (1988) FLC ¶91-971 [77025]. Although this case relates to religious practices, the principle clearly applies generally.

133. Empirical data alone will not give a full picture of decision-making where something as flexible as the best interests test is being applied: see generally Eastale P, Behrens J & Young L, 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' (2000) 14 *Australian Journal of Family Law* 234.

134. Law Reform Commission of Western Australia, *Thematic Summaries of Consultation – Mirrabooka*, 18 November 2002, 6.

135. See for example *Family Law Rules 2004*, r 5.09.

protocols prohibit some people from being seated in the same room, such as mother-in-law and son-in-law.¹³⁶ In a parenting dispute it would not be uncommon for people with that blood relationship to be involved in the same case. Some accommodation might be needed to ensure that this protocol is observed, but at the same time allow for the rules of natural justice. For example, the party who is not permitted under traditional law to sit in the same room as a witness might hear the evidence electronically.

The notes of the Mirrabooka consultation meeting also highlight the issue of support during court processes for Aboriginal clients. It was suggested that there be a right to request an Aboriginal elder/lawperson as 'significant other'/advocate where language or culture presents a barrier for a party.¹³⁷ Finally, attendees at the Mirrabooka consultation meeting made the point that family law issues are extremely complex for participants.¹³⁸ The new *Family Law Rules 2004* (WA) are designed to lessen this problem, but their impact is obviously likely to be limited in this regard. The complexity of family court proceedings is exacerbated for the high percentage of self-represented litigants. However, as the Commission's consultation notes highlight, there is little research on the impact of the family law system on Aboriginal families. Certainly, the dearth of family law research directed at the problems facing Aboriginal families is striking. Indeed, until recently the FCWA has not recorded data on which cases before it involved Aboriginal families.

It is fair to say that, for a variety of reasons, the FCWA has not undertaken any major initiatives to deal with the specific problems faced by Aboriginal families using the Court. The authors were advised by the FCWA's Ethnic Liaison Officer that the Court had begun a process some years ago to develop a protocol. However, it appears that the process adopted did not attract significant interest from the stakeholders and so was abandoned. The FCWA has, however, very recently taken the opportunity to employ four Aboriginal trainees in the Court, arising out of the Department of Justice's program to provide such trainees to Western Australian courts. These young people¹³⁹ will gather experience working in the different parts of the Court, with the long-term goal of improving the Court's ability to provide culturally appropriate services to its Aboriginal clients. Moreover, the authors are advised that efforts will now be made to input into the FCWA's computer records identifying data as to ethnicity voluntarily supplied by Aboriginal users of the FCWA.¹⁴⁰

Despite these steps, there are notable shortcomings. For example, the Family Court Mediation and Counselling Service does not employ any Aboriginal counsellors. Moreover, the Department of Justice's Aboriginal Alternative Dispute Resolution Services are available only for criminal justice matters. The lack of appropriate counselling services provided in this arm of the justice system has recently been brought home to the FCWA. New rules of court were introduced on 29 March 2004.¹⁴¹ Barring some exempt cases (which includes those where violence is an issue),¹⁴² these Rules require the parties to undertake 'pre-action procedures' before they can file an application.¹⁴³ This means 'participating in primary dispute resolution, such as negotiation, conciliation, mediation, arbitration and counselling'.¹⁴⁴ To the extent it cannot fulfil such a need, the Family Court Mediation and Counselling Service would normally refer matters to organisations such as Relationships Australia, Centrecare and Anglicare. However, as a result of the new Rules, the Aboriginal Alternative Dispute Resolution Services has had a relative flood of requests for the provision of primary dispute resolution services to Aboriginal people. This is not their brief, and their mediators are not trained in this area; however, there is no alternative specialised service to accommodate these clients.

It may be that federal funding will be available in this area as the Commonwealth Department of Family and Community Services espouses a strong commitment to considering more appropriate ways of delivering services to Aboriginal families.¹⁴⁵ However, the specific needs of Western Australian Aboriginal families must be considered. Certainly, this is a serious and urgent matter that needs to be addressed by the Western Australian government. The key issue here is that Aboriginal users of the family court system are now *compelled* to access primary dispute resolution mechanisms before taking court action and those mechanisms need to understand and accommodate the needs of Aboriginal families. This raises issues as to staffing, education and the general conduct of these processes (for example, who will be allowed to participate).

136. Law Reform Commission of Western Australia, *Thematic Summaries of Consultation – Pilbara*, 6–11 April 2003, 4.

137. Law Reform Commission of Western Australia, *Thematic Summaries of Consultation – Mirrabooka*, 18 November 2002, 6.

138. *Ibid.*

139. They are aged between 17 and 21.

140. Katherine Thomas, FCWA Executive Officer, discussion with Lisa Young, 17 May 2004.

141. *Family Law Rules 2004* (WA).

142. *Family Law Rules 2004* (WA) r 1.05(2).

143. *Family Law Rules 2004* (WA) r 1.05 and schedule 1.

144. *Family Law Rules 2004* (WA) schedule 1, part 1, 1.

145. See, Commonwealth Department of Family and Community Services, *Statement of Commitment to Aboriginal and Torres Strait Islander People: Indigenous Business is Everybody's Business* (2003).

The lack of appropriate primary dispute resolution services for Aboriginal families is very significant in terms of accommodating their customary law. Such processes are desirable for Aboriginal families precisely because they can take account of customary law in a way that is not possible in the current adversarial system. Providing appropriately structured and funded services that can deal with a wide range of family law matters also overcomes the complex jurisdictional problems referred to above.

The issues addressed above are not peculiar to Australia. In particular the recommendations made in March 2003 by the New Zealand Law Commission in its report on *Dispute Resolution in Family Court*,¹⁴⁶ resonate with the dilemmas faced by Aboriginal users of the family law system in that country.

A problem endemic to family law throughout Australia has been the lack of integration of services. This failing in the system was recently investigated by the federal government in *Out of the Maze*. Federal government funding is now being directed at initiatives that support the recommendations outlined in that report. Like other reports,¹⁴⁷ *Out of the Maze* specifically commented on the particular barriers facing Aboriginal users of the system. The following lengthy extract highlights the issues at stake and shows the greater attention able to be given to Aboriginal clients by the Family Court of Australia:

In the integrated family law system, service providers would be much better informed about customary lore and how family law processes can accommodate the relevant aspects, including child-rearing responsibilities in the wider indigenous family. The Advisory Group also recognises the unique position of indigenous Australians when interacting with the family law system. Historically, indigenous families have responded to the cultural inappropriateness of Australian family law by avoiding the court and dealing with family disputes informally, or under traditional lore. Customary lore, community negotiation/development and empowerment are fundamental in any interaction with indigenous Australians and the family law system.

...

There is also some concern that while the needs of indigenous people living in rural and remote communities are recognised, indigenous people living in urban communities may incorrectly be assumed to conform to the wider community's interaction with the family law system. Services which currently employ indigenous staff, such as the Indigenous Consultants in the Family Court of Australia, and services specifically for indigenous families (for example Aboriginal legal centres) are more likely to attract indigenous clients than others. As a result, the capacity of other services to help indigenous clients is limited.

The experience of the Family Court of Australia in developing appropriate services for Aboriginal and Torres Strait Islander communities through consultation provides a model for how other service providers in the system might proceed. The Family Court over the past six years has put in place a range of programs designed to ensure that the Court's services are accessible to indigenous peoples. The Court conducted an extensive consultative process with indigenous community groups, agencies and individuals, and one of the significant outcomes of the consultation process was the establishment of six indigenous workers, called 'Family Consultants', based in Darwin, Alice Springs and Cairns. As well, each registry of the Family Court has the responsibility to establish local networks with the appropriate indigenous communities and agencies in their area to ensure that their registry is providing services in a manner that is appropriate for indigenous clients. The Court has been explicit in stating that the programs in place are not designed to replace or undermine in any way resolution processes that may reside within the indigenous communities themselves to assist with family breakdown. Rather, the programs are to ensure that, if an indigenous person chooses or is required to attend the Family Court, there are no barriers to their accessing the services on the same terms as other members of the Australian community.

In the self-help pathway, support for family and community decision making would be improved by the provision of culturally appropriate information. In the supported pathway, services would be made more culturally appropriate through the employment of indigenous staff, cross-cultural education and wider availability of interpreters. Consideration of new services and interventions tailored specifically for indigenous families (for example narrative therapy and indigenous family law conferencing) needs to be ongoing. When litigation is appropriate, the community obligations of indigenous peoples would be fully considered in arriving at residency and custody decisions. As an alternative to litigation, a new pathway of indigenous family law conferencing needs to be developed, based on circle sentencing in criminal jurisdiction, the New South Wales.¹⁴⁸

The Group then made the following recommendation to government:

146. New Zealand Law Commission, *Dispute Resolution in Family Court*, Report No 82 (2003) ch 13.

147. *Services to Indigenous Peoples in the Town of Port Hedland, Mapping and Gap Analysis*, 24 December 2003, 17. This analysis was prepared by the Department of Indigenous Affairs for the Pilbara Government Managers Indigenous Forum.

148. Family Law Pathways Advisory Group, 'Out of the Maze - Pathways to the Future for Families Experiencing Separation' (August 2001) 89–91.

- 23.1 That culturally appropriate service delivery be expanded through:
- all professionals of the Family Court of Australia (including counsellors, registrars and judges) and service providers involved in indigenous parenting issues receiving ongoing bicultural education. This education should include the history and effects of forcible removal of children and indigenous cultural values, particularly those related to child-rearing. Competency standards also need to be developed;
 - development of an indigenous employment strategy in courts with family law jurisdiction. This would include retention and expansion of the Indigenous Consultant positions in the Family Court of Australia;
 - provision of interpreters particularly, but not only, in courts; and
 - sponsoring the establishment of local-level indigenous community networks, where local expertise and knowledge can be shared with non-indigenous service providers.
- 23.2 That new service types be developed and tested, in partnership with indigenous communities. Two interventions tailored specifically for indigenous families—narrative therapy and indigenous family law conferencing—need assessment for their applicability to family dispute resolution and as alternatives to litigation.
- 23.3 That a database be created to collect information about indigenous family law cases. This would require identification of indigenous cases and would facilitate research into the way customary lore is taken into account in determining the best interests of children.
- 23.4 That national standards for indigenous children be in accordance with the recommendations from the Bringing Them Home report.
- 23.5 That programs and initiatives be developed, owned and implemented by local indigenous communities, to help ensure best practice in working with indigenous people.¹⁴⁹

Initiatives of the Family Court of Australia are not automatically adopted in the FCWA and this explains the differences to be seen in the two courts in this area. Indeed, the Family Court of Australia's newly released National Cultural Diversity Plan, which defines the actions that will be implemented during 2004–05 and 2005–06, does not apply in Western Australia. Obviously, there are funding implications for implementing such initiatives in Western Australia.

In summary it can be said that initiatives to accommodate the needs of Aboriginal families in the FCWA have been limited to date. It is appropriate that the Western Australian government give consideration to those measures that have been effective in the Family Court of Australia and to the recommendations made for improving services in that court. In particular, the provision of appropriate primary dispute resolution mechanisms should be addressed as a matter of priority. Further, one of the barriers to improving family law delivery for Aboriginal families is a lack of relevant research; therefore, the Western Australian government should consider targeting funding to improve research resources in this area.

Child support

The shared nature of child-rearing in Aboriginal communities calls into question the utility to such communities of a child support system that is premised on the model of a non-Aboriginal nuclear family.¹⁵⁰ There are a number of ways that Aboriginal culture and customary law could potentially clash with the substance and delivery of the child support scheme. This Background Paper will consider the following matters:

- The child support formula and its application.
- The relationship between the payment of child support and the receipt of income tested government benefits.
- Service delivery.

The child support formula and its application

A consequence of shared child-rearing in Aboriginal communities is that financial responsibility for a child can move between family members. Accordingly, in Aboriginal families, it is *not* the case that biological parents are solely responsible for the financial support of their children. This is in direct conflict with state and federal family law, which provide that biological parents are primarily responsible for the financial support of their children.¹⁵¹ Thus, when an Aboriginal child is living with someone other than their biological parent, that carer is technically entitled to seek child support from one or both parents. However, in that situation, the non-parent carer is not obliged to seek child support.

149. Ibid Recommendation 23.

150. Family and Children Branch, Department of Family and Community Services WA, *Kids' Money: Better Outcomes for Indigenous Children* (January 2002) [2].

151. See *Family Law Act 1975* (Cth) s 66C and *Family Court Act 1997* (WA) s 115.

Therefore, the existence of the child support system need not create any problem for Aboriginal families who privately arrange the financial support of children in a manner different to that contemplated by the family law legislation and child support scheme.

There has been a very recent federal government review of some family law matters, which included child support.¹⁵² As a result of that inquiry, it is expected that the government will revisit the formula in the near future. It would seem that the issue most likely to impact directly on Aboriginal users of the child support scheme would be in relation to increasing the variations of the child support percentage according to the level of shared care. Presently, a parent who has less than 110 nights per year of contact still pays the full child support percentage. In other words, reductions in child support for substantial contact only kick in when there is more than 109 nights' contact per year. This feature of the formula has been the subject of ongoing criticism, not least from men's groups. The particular significance of this issue for Aboriginal families is self-evident as the failure to recognise the true cost of shared parenting is most likely to impact on families that share care. The Aboriginal Legal Service of Western Australia ('ALSWA') highlighted this in their submission to the federal government inquiry.¹⁵³

ALSWA raised another interesting issue in that submission. An unreported decision of a magistrate in Paraburdoo was cited which apparently had the effect of reducing a parent's liability to pay child support to his biological child because the magistrate found that the parent had a legal duty to support step-children in his care. Such a decision would be uncommon; although, it has long been the case that the family law legislation has permitted a legal duty to be created for the support of step-children.¹⁵⁴ The question of the extent to which the law should balance child support against the paying parent's obligations (whether moral or legal) to support a second family is a vexed one, and different approaches have been adopted in different jurisdictions. This is not, of course, an issue peculiar to Aboriginal families. Moreover, it must be remembered that when a parent paying child support partners someone with children, that new partner will lose the government benefits they have been entitled to as a single parent. Despite this, the new children are not, in the absence of a court order, the legal dependant of that payer parent. Therefore, the payer's liability to pay child support for their biological children will not diminish. Thus, in most cases, the reality is that the children of the second family are more likely to suffer financially under the law as it stands. As we have said, this is an issue that might face many Australian families.

One can envisage, however, particular examples of how this hierarchy of financial responsibility might not accommodate Aboriginal family life. Imagine a child comes into the family of an uncle for a period, where the uncle is paying child support for other children. The child support due to those other children would not recognise any legal responsibility on the part of the uncle for this child.

Given that the formula is likely to be reviewed by the federal government, it would seem prudent to ensure there is appropriate input as to the impact of any proposed changes on Aboriginal families. If Western Australia wished to act independently and change the formula in this regard, it would only be able to amend the provisions that applied to unmarried couples, again resulting in a dichotomy within the state depending on marital status.

Child support and government benefits

There are issues, other than the formula itself, of concern to the Aboriginal community. In particular, service delivery and integration of child support payments with Centrelink payments have been matters that have attracted some attention.

The Child Support Scheme has a deliberate interaction with the receipt by parents of income tested government benefits. One motive for introducing child support legislation was to reduce welfare payments. This legislation encourages the payment of maintenance for children, where that is appropriate, in preference to the parent with primary care relying on government benefits. One way of achieving this end, was to force parents receiving income tested parenting benefits to claim any entitlement to child support they might have from the other biological parent. The parenting benefits being received by the carer parent are then reduced according to the amount of child support received.

152. House of Representatives, Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (December, 2003).

153. Aboriginal Legal Service of Western Australia (Inc) Submissions in Relation to Inquiry into Child Custody Arrangements in the Event of Family Separation (20 February 2004) 8.

154. See *Family Law Act 1975* (Cth) s 66D and *Family Court Act 1997* (WA) s 116.

Government benefits provided to people who are parenting children (now known as Family Tax Benefits) have not always been shared amongst the various people caring for the children in question. It is now possible for carers who share the care of their children to divide their benefit according to their level of care. Nonetheless, this requires notification and a set way of receiving the benefits. This has not necessarily accommodated the needs of Aboriginal families. As a result, in 2000–01 Extended Family Care Pilots were run in Queensland and New South Wales. Although run in other states, this model would have similar application in Western Australia.

To accommodate traditional shared child-raising practices, families were encouraged to form family care groups. These groups agreed to share FTB resources for the children moving between carers. Agreements operated on honour and built on family obligation so that assistance in cash or goods in lieu...could be handed between carers for the children.¹⁵⁵

This pilot was extremely successful – 91 percent of participants found the arrangements 'positive' or 'very positive'.¹⁵⁶ However, as far as the authors are aware no further action has been taken to implement this pilot on a wider scale. Indeed, the Commission's consultations with Aboriginal communities have highlighted the fact that the problem is wider than just the issue of sharing benefits amongst carer family members. Comments were made in the Thematic Summaries for Laverton¹⁵⁷ and the Pilbara region¹⁵⁸ that extended family caring solely for children were not receiving the associated government benefits. Thus, even in less complex care arrangements notification issues seem to be a problem for Aboriginal families and may well reflect a system not designed for more flexible family arrangements.

The Extended Family Care Pilots are an example of a simple way to address one of the key policy issues faced in accommodating Aboriginal child-rearing practices, that is:

...how best to enable families to exercise choice in their child raising arrangements and the role of Government in providing safeguards around those choices.¹⁵⁹

The failure to take any further action, despite the success of the Pilots, might simply reflect the stretched resources of the two government agencies, both of which are under fairly constant attack from different sectors of the community. Funding of programs like this, which are known to be successful, would seem to be an efficient way to utilise resources and a fairly simple solution to a very real problem for Aboriginal families. Moreover, these Pilots highlight the need to engage directly with Aboriginal communities to ensure that problems specific to them are identified and where possible addressed.

Service delivery

In its submission to the federal government's Inquiry into Child Custody Arrangements in the Event of Family Separation, ALSWA has noted that many Aboriginal children are not in the care of their biological parents at times, and yet the carer parents have not been receiving child support.¹⁶⁰ ALSWA pointed to the need to ensure that culturally appropriate information about entitlements was made available to all Australians, including Aboriginal Australians.

It further appears that the Child Support Agency is not presently aware of how many of their clients live in remote communities, nor whether the child support scheme is successful in benefiting Australian children and families. The authors understand that despite efforts being made to address the particular concerns of Aboriginal clients, a lack of funding has precluded the adoption of tailored initiatives.

Conclusion

Whilst the first two Parts of the Background Paper have evidenced the tensions that exist between mainstream family law and customary Aboriginal family law, this Part has shown clearly that an obvious single solution to these tensions does not readily present itself, at least not without the participation of all Australian governments. Due to the complex jurisdictional web faced in the area of family law any legislative changes must necessarily be limited. However, it seems that real and positive changes might be effected through the provision of funding to address the delivery of

155. Department of Family and Community Services (Cth), Ministerial Submission No 1079 to Minister for Family and Community Services, (17 May 2002).

156. Ibid [9.2].

157. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 6.

158. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 22.

159. Department of Family and Community Services, Family and Children Branch, *Kids' Money: Better Outcomes for Indigenous Children* (January 2002) [12.1].

160. Aboriginal Legal Service of Western Australia (Inc) 'Submissions in Relation to Inquiry into Child Custody Arrangements in the Event of Family Separation' (20 February 2004) 8.

family law services to Aboriginal families. This could be directed at a number of areas, as discussed above. In particular in relation to parenting matters, as with non-Aboriginal families, a clear and directed focus on helping families resolve their disputes without access to judicial decision making would appear to be a desirable and achievable goal. Such an approach is further supported by the recent suggestions coming from the federal government that rather than creating a new layer of decision making in family law (as was suggested by the House of Representatives' Standing Committee on Family and Community Affairs¹⁶¹) it favours directing resources to early intervention options that offer separating couples education and mediation.¹⁶²

Part III: The international context

It is important to recognise that some of the issues raised by the Commission's Terms of Reference have been considered by law reform agencies in other jurisdictions. This Part sets out the reforms and proposals for reform in New Zealand and Canada, in so far as they relate to family law.

As a federation, Canada faces similar jurisdictional complexities to those found here in Australia. Like Australia, primary legislative power rests with the Federal Parliament¹⁶³ though there is residual provincial and territorial legislative power where a matter does not relate to a marriage or divorce. Additionally, '[i]n most Canadian provinces, several levels of court share the responsibility for resolving family disputes. Overlapping and fragmented jurisdictions are rife...'.¹⁶⁴ Unlike Australia and Canada, New Zealand is a unitary state with no constitution. Thus, the same family law applies throughout New Zealand.

In both of these jurisdictions the legislative framework for family law is similar to Australia, in the sense that the content of family law is broadly the same. For example, the 'best interests' principle applies in relation to decision making concerning children in all three jurisdictions. Equally, one can see similarities amongst the customs of the Indigenous peoples of these three countries. In New Zealand, for example, the practice of whangai involves a Maori child being raised by a member other than the biological parents, but not in the sense of adoption.¹⁶⁵ Indigenous Canadians have rules as to who may marry.¹⁶⁶ By and large, however, for the purposes of this Background Paper particular differences in customary or mainstream laws do not matter, as the significance of this brief review of these jurisdictions is to consider whether there are reforms or suggestions for change that might be transferable to the Australian context. We have noted below where suggested reforms would not translate to an Australian context.

New Zealand

In recent years, the New Zealand government has released three major reports that relate to the issues addressed in this Background Paper. The first of these papers was the New Zealand Law Commission's Maori Custom and Values in *New Zealand Law*.¹⁶⁷ The purpose of the Study Paper was to:

- Consider how Maori custom and values impact on the current law; and
- Consider ideas for future law reform projects by the commission to give effect to Maori values in the laws of New Zealand.¹⁶⁸

Family law is mentioned briefly in this Study Paper, which is largely descriptive. In relation to parenting disputes, where the family court system had been accessed, the Study Paper refers to two cases where the particularity of Maori culture had been recognised and accorded value in the general application of the best interests principle. In *Makiri v Roxhburg*¹⁶⁹ the court held that:

A custody order excluding one parent altogether from the possession and care of a Maori child is seen as imposing European values on an ancient and strongly reviving culture... Though the Family Court in dealing with a guardianship case does not make special rules for any segment of the New Zealand community it must and does recognise that

161. House of Representatives, Standing Committee on Family and Community Affairs, *Every Picture Tells a Story*, above n 152, recommendation 12.

162. Arndt B, 'Early Word for Happier Split', *The Australian*, 20 July 2004, 15.

163. *Constitution Act 1867* (Canada) s 91 (26).

164. Payne JD & Payne MA, *Introduction to Canadian Family Law* (Ontario: Carswell, 1994) 10.

165. New Zealand Law Commission, *Maori Customs and Values in New Zealand Law*, Study Paper No 9 (March 2001) [234].

166. *Delgamuukw v British Columbia* [1993] 5 CNLR (BCCA) 4.

167. New Zealand Law Commission, *Maori Customs and Values in New Zealand Law*, above n 165.

168. *Ibid* [1].

169. (1988) 5 NZLR 673.

each case involving the welfare of a child must be considered according to its own individual circumstances, important traditions and cultural values affecting the child being one such obvious factor...¹⁷⁰

This is not dissimilar to statements in Australian cases.¹⁷¹

In March 2003, the New Zealand Law Commission published its report on *Dispute Resolution in the Family Court*.¹⁷² In Chapter 13 of that Report—dealing with Maori Participation in the Family Court—the following relevant recommendations were made:

- Conciliation services should, as far as possible, be contracted to qualified Maori providers so that Maori clients can choose these services.
- Training needs for Maori psychologist and report writer providers should be assessed.
- Standardised introductory procedures complying with tikanga Maori should be introduced into the Family Court. Judges and other court staff should be trained in these procedures.
- Legislation should be amended so judges can, at their discretion, permit whanau¹⁷³ to attend Family Court settlement conferences and hearings.¹⁷⁴

The following points were also made by the Commission:

- Given the importance of familial relationships to Maori society, the role of the Family Court is of central importance to Maori.
- A Maori child is not just the responsibility of its biological parents, but of the entire whanau, and the child in turn is responsible to that whanau.
- Substantive family law that prescribes a narrow range of rights and responsibilities between biological parents and children excludes key figures in traditional Maori families.
- Extending the Maori Land Court's jurisdiction to cover family law is an option that should be considered.
- It was a matter for concern that community resources, particularly those of Maori providers, were not used before or instead of Family Court procedures. It was noted that it was better to resolve disputes without having to access Family Court.
- Providers of services to Family Court clients need to be familiar with Maori values and have professional knowledge in relevant areas (ie, necessary skills).
- Any procedural changes would need to ensure the safety of women and children.
- There is a need for a Maori Family Court conciliation service. Maori providers could also be contracted to provide information sessions, and parenting and children's programmes.

Finally, in March 2004, the New Zealand Law Commission published its Report, *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*.¹⁷⁵ This report considered,¹⁷⁶ but did not recommend, that the Maori Land Court be given concurrent jurisdiction over family 'marital' property disputes. The widespread consultation apparently generated little support for this proposal, with submissions focusing more on extensions of jurisdiction more directly in the area of native title.

The New Zealand Law Commission's work in this area shows that similar issues are being faced in that jurisdiction. Notably, there has been a distinct emphasis on trying to improve court processes, and this resonates with the discussion in Part II.¹⁷⁷ In particular, it continues to point to the pressing need to provide funding that will help to improve the culturally sensitive delivery of family law services to Indigenous families.

170. New Zealand Law Commission, *Maori Customs and Values in New Zealand Law*, above n 165, [242].

171. See for instance, *In the Marriage of MCL and MCL; Minister for Health and Community Services Intervening* (1989) 15 Fam LR 7; *In the Marriage of B and R* (1995) 19 Fam LR 594.

172. New Zealand Law Commission, *Dispute Resolution in the Family Court*, Report No 82 (March 2003).

173. Whanau means extended family.

174. New Zealand Law Commission, *Dispute Resolution in the Family Court*, above n 172, 'Summary of Recommendations', 225–26.

175. New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Report No 85 (March 2004).

176. *Ibid* [330].

177. *Ibid* 42–45.

Canada

The *Constitution Act 1982* has entrenched in Canadian law Aboriginal and treaty rights. Section 35(1) of that Act grants constitutional protection for 'existing Aboriginal and treaty rights'.¹⁷⁸ There remains considerable debate in Canada as to whether this provision has also entrenched a right to Aboriginal self-governance. Whilst there have been strong arguments made to this effect, case law following the introduction of this section has not supported this view. However, there has been recognition that in matters not covered by federal or provincial laws, Aboriginal 'self-government and self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity' is appropriate.¹⁷⁹ What this means in practical terms is that the Canadian Aboriginal community is permitted to regulate itself where that does not conflict with provincial or federal laws.

The Canadian Report of the Royal Commission on Aboriginal Peoples published in October 1996 ('the Royal Commission Report') addressed in detail the question whether family law for Aboriginal persons should be made a matter for their own self-government. It was surmised by the Royal Commission that '[f]amily matters, including marriage and divorce, adoption, custody of children, and protection of children's welfare will undoubtedly be among the first areas over which self-governing Aboriginal nations will assume jurisdiction'.¹⁸⁰ Leaving aside those areas that fall outside the scope of this Background Paper, the areas of concern were identified to be:

- recognising Aboriginal custom in adoption and custody matters;
- dividing property on marriage breakdown; and
- protecting the victim's civil interests in cases of family violence.

Unlike Australia, some limited aspects of customary family law in Canada survived colonisation, in particular customary laws on marriage, adoption and custody.¹⁸¹ However, as in Australia, statutory incursions have pre-empted other aspects of customary family law. This dichotomy is compounded by the uncertainty as to the right of self-government of Aboriginal people in Canada.

The Royal Commission's findings in respect of family law and children

In relation to the application of the best interests principle in a range of contexts, the Royal Commission Report noted the need for cultural awareness and sensitivity. It also referred to developments, similar to those in Australia, where such awareness and sensitivity is increasingly being reflected. It concluded that 'guiding principles cannot be premised on the values of a single culture; hence the maxim, "a prime function of law is to prevent one person's truth...from becoming another person's tyranny"'.¹⁸²

The Royal Commission clearly favoured the view that issues relating to parenting should be the subject of Aboriginal self-government:

With the advent of self-government, Aboriginal nations will be in a position to make their own family law. Indeed, they can proceed with initiatives in this area now, since family law falls within the core of Aboriginal self-governing jurisdiction. While their customary laws in some areas have continuing validity under section 35(1) of the constitution, in other areas they have been pre-empted by federal or provincial laws. It seems likely, therefore, in view of the fundamental importance of family and family relationships, that Aboriginal people will wish to have their own laws in place as soon as possible. There would seem to be particular urgency in this regard concerning laws and policies affecting children—laws on apprehension, custody and adoption, for example—as well as other areas with an impact on children, including their quality of life and personal security, parental responsibilities with regard to support and maintenance, protection from violence, and property and inheritance. As Aboriginal people have told us, their children are their future.¹⁸³

The Royal Commission's findings in respect of property

The issues raised in the context of property by the Royal Commission Report are not ones that would apply in Western Australia. Firstly, the loss of women's rights to property on separation is discussed; however, this has arisen in the context of reserve property which has no equivalent in Western Australia. Secondly, child support issues are considered.

178. Emphasis added.

179. *Delgamuukw v British Columbia* [1993] 5 CNLR (BCCA) 250.

180. *Report of the Royal Commission into Aboriginal Peoples* (Canada, 1996) vol 3, ch 2, 91.

181. *Ibid* 92.

182. *Ibid* 95.

183. *Ibid*.

Again, these arise out of peculiarities associated with the ownership of land on reserves.

Like issues relating to children, the Royal Commission Report concluded that distribution of property on the breakdown of a relationship is a matter that ought to be within the sphere of Aboriginal self-government.

In conclusion, the Royal Commission Report said:

Aboriginal nations have an opportunity to start from first principles in creating a family law regime that reflects their cultures, and we believe that they should be encouraged to do so. The courtroom is not a therapeutic institution, nor is law a sufficiently refined tool to define family relationships in culturally appropriate ways. Indeed, law and family do not walk easily hand in hand. As law professor Harry Arthurs has written:

'Law', at least in the formal sense, implies authority, conflict, and if necessary, coercion. 'Family' implies partnership, compromise and ultimately, love. 'Law' is general, applying to all citizens within a state. 'Family' is particular, and is shaped for each of us by our own individual personalities, and by the very different and complex interplay of religion, ethnicity, class and culture. 'Law' is form: due process, precision, predictability. 'Family' is substance: traditionally home, children and loyalty, or in a more modern idiom, sharing and caring.

It will require a great deal of planning and deliberation to devise laws that reflect the non-coercive cultures that Aboriginal people are determined to preserve and at the same time protect vulnerable people in an often troubled environment. Participation in a wage economy has introduced new ways of holding property and meeting obligations of family support. Aboriginal nations will undoubtedly seek a synthesis of traditions of sharing among kin networks and ways of enforcing the legitimate obligations and protecting the entitlements of individuals. In view of the legal vacuum that now exists with respect to many of these issues, we urge an early start on addressing the aspects of family law raised in this chapter.¹⁸⁴

The Royal Commission Report recommended that:

- 3.2.10 Federal, provincial and territorial governments promptly acknowledge that the field of family law is generally a core area of Aboriginal self-governing jurisdiction, in which Aboriginal nations can undertake self-starting initiatives without prior federal, provincial or territorial agreements.
- 3.2.11 Federal, provincial and territorial governments acknowledge the validity of Aboriginal customary law in areas of family law, such as marriage, divorce, child custody and adoption, and amend their legislation accordingly.
- 3.2.12 Aboriginal nations or organizations consult with federal, provincial and territorial governments on areas of family law with a view to
 - (a) making possible legislative amendments to resolve anomalies in the application of family law to Aboriginal people and to fill current gaps;
 - (b) working out appropriate mechanisms of transition to Aboriginal control under self-government; and
 - (c) settling issues of mutual interest on the recognition and enforcement of the decisions of their respective adjudicative bodies.
- 3.2.13 With a view to self-starting initiatives in the family law area or to self-government, Aboriginal nations or communities establish committees, with women as full participants, to study issues such as
 - (a) the interests of family members in family assets;
 - (b) the division of family assets on marriage breakdown;
 - (c) factors to be considered in relation to the best interests of the child, as the principle is applicable to Aboriginal custody and adoption;
 - (d) rights of inheritance pertaining to wills, estates or intestacy; and
 - (e) obligations of spousal and child support.

Since this Report, as far as the authors can ascertain, there have been no steps taken in Canada to move toward formal recognition of a right to self-government, nor a negotiation of the areas to which self-government would apply. It must be remembered that the Royal Commission Report's exhortation to self-governance is one that is made to '[f]ederal, provincial and territorial governments'.¹⁸⁵ Whilst the arguments in favour of Aboriginal self-government in the

^{184.} Ibid 100–01 (footnote omitted).

^{185.} See Royal Commission's Recommendation 3.2.11, above p 171.



area of family law, so eloquently put in the Report, apply equally to Aboriginal families in Western Australia, the authors would suggest the Western Australian government does not have sufficiently wide jurisdiction in this area to achieve a workable solution. The complex interaction of state and federal laws in Western Australia in all areas of family law makes the suggested Canadian solution one that would need—as in Canada—to be recommended at a federal level.

Conclusion

The authors are conscious that this Background Paper has a particular focus on what cannot be achieved in the area of family law and customary law in Western Australia. We do not mean to suggest by this that an integrated national approach to the recognition of Aboriginal customary law would not be a superior solution, nor that attempts should not be made to lobby for such change. However, to date there does not seem to have been much enthusiasm for this approach at a federal level. In light of that, this Background Paper seeks to highlight the areas in which the state government might effect some positive change. Possible minor statutory amendments have been canvassed. However, the authors hope this Background Paper identifies some areas in which significant steps could be taken without statutory intervention and yet which would have the effect of recognising Aboriginal 'family law' and the particular needs of Aboriginal families. The authors are hopeful that this Background Paper will stimulate further submissions on the matters raised so that concrete steps can be taken to address the particular needs of Aboriginal families in this complex and difficult area.

background paper 5

Aboriginal customary laws reference – an overview

John Toohey*

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1. Terms of reference

The Law Reform Commission has been asked 'to enquire into and report upon Aboriginal Customary Laws in Western Australia'. I have been asked to prepare a 'background paper' for the Reference.

I take that task to involve saying something of matters that go to make up the fabric of the society in which customary laws have existed, and continue to exist, side-by-side with laws brought to this country by its white settlers and developed by legislatures and the judiciary over many years. Reporting to government whether there should be recognition of those laws within the State's legal system—and if so to what extent and in what manner—is the Commission's role. Nevertheless one cannot be divorced entirely from the other and some of my comments inevitably bear on the 'practicality' of recognition, using that term to mean the extent to and manner in which the two laws can co-exist.

2. Recognition

It is worth dwelling for a moment on what is meant by 'recognition' here. It is a term commonly used in any discussion of the place of Aboriginal law in our society. In its ordinary use it includes the perception of something formally as existing or true. It may also mean the acknowledgement of something as valid, or as entitled to consideration.¹

There can be no doubt that Aboriginal customary laws exist and that they are important to Aboriginal people. Clearly they are entitled to consideration. Indeed, they are valid for the people concerned though their acceptance within the State's legal system is the very question with which the present Reference is concerned.

It is of interest and, I think, of some importance that although the Australian Law Reform Commission (ALRC) entitled its 1986 report 'The Recognition of Aboriginal Customary Laws',² that was not the language of its reference. It required the ALRC:

To inquire into and report upon whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:

- a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;
- b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and
- c) any other related matter.

The reference speaks of applying customary law and it was the ALRC's conclusion that 'the arguments in favour of recognition establish a case for the appropriate recognition of Aboriginal customary laws by the general legal system'.³ The ALRC made its position clear when it spoke of recognising customary laws 'within the framework of the general law, rather than through the creation of separate formal systems'.⁴ The present Reference states at the outset that 'there may be a need to recognise the existence of, and take into account within [the State's] legal system, Aboriginal customary laws'. No doubt the language was carefully chosen to make it clear that the framework within which the Commission is to operate does not include recognition of customary laws as a legal system operating independently of the State's legal system but rather as dependent upon recognition within that system.

Furthermore, the Reference is couched in a way which does not of itself accord any particular status to customary laws. Indeed its terms require the Commission to give particular reference to whether these laws should be recognised. No doubt the very existence of the Reference invites some positive response.

3. Arguments for and against recognition

In its 1986 report the ALRC noted arguments in favour of and against recognition.⁵ These arguments were summarised by the Northern Territory Law Reform Committee (NTLRC) in a Background Paper to its recent report on Aboriginal Customary Law⁶ and I borrow that summary as a guide to the arguments in question.

1. *Macquarie Dictionary* (3rd ed., 1780).

2. Australian Law Reform Commission (ALRC), *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

3. *Ibid* [194].

4. *Ibid* [196].

5. *Ibid* [102]–[127].

6. Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003).

The ALRC noted a number of arguments in favour of greater recognition of Aboriginal customary law:

- recognition would advance the process of reconciliation between Aboriginal and non-Aboriginal Territory residents
- non-recognition can lead to injustice in specific situations where traditional law governs a person's conduct
- the present legal system has failed to deal effectively with many Aboriginal disputes and there are disproportionately high levels of Aboriginal contact with the justice system
- traditional authority may be more efficient in maintaining order with Aboriginal communities, and thus be more cost-effective
- courts are recognising Aboriginal customary law within their discretionary powers, and more formal recognition would clarify the law
- non-recognition is consistent with principles of 'assimilation' and 'integration', whereas principles of 'self-management' or 'self-determination' are more appropriate
- Australia's international standing and reputation would benefit from its giving recognition to the laws and traditions of its indigenous peoples.

The ALRC Report identified a number of arguments against recognition:

- customary law may incorporate rules and punishments that are unacceptable to the wider Australian society
- some aspects of customary law are secret, and disclosure on a confidential basis is inconsistent with the judicial function within our legal system
- Aboriginal people may lose control over customary law if it were incorporated within the general legal system
- customary law may not adequately protect Aboriginal women
- recognition of customary law might create 'two laws' within our society
- Aboriginal customary law may no longer be relevant to some Aboriginal people, and some may prefer the present legal system
- recognition should be restricted to those Aborigines living in a strictly traditional manner.⁷

These arguments have been proffered, in one form or another, pretty much since white settlement. In more recent years there has been a willingness by governments to recognise the reality of customary laws for many Aboriginal people, whether actively practised or seen as an integral part of their culture. In turn this has led governments to consider the strength of the arguments in favour of recognition and the practicalities of recognition within a country in which the indigenous people are now a minority. The issue has been heightened by the strength of the land rights movement and the recognition of native title and by a greater willingness to appreciate what Justice Blackburn described as a 'subtle and elaborate system highly adapted to the country in which the people led their lives' and which led him to conclude: 'If ever a system could be called 'a government of laws, and not of men,' it is that shown in the evidence before me'.⁸ In *Milirrpum* Blackburn J said that 'the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship'.⁹ The emphasis on spiritual connection and on the role of the mythical ancestors in the 'Dreamtime' as the source of law may overshadow what the NTLRC described as 'an extremely broad and complex set of rules and unwritten legislation governing social relationships, economic rights, land ownership, wildlife conservation, land management and intellectual property rights'.¹⁰ It may also cause the role of customary laws in the resolution of disputes within a community to be overlooked.

The notion of a treaty or an agreement between indigenous and non-indigenous Australians or, as it is sometimes put, between the two peoples of this country, is not part of the Commission's remit. That does not mean that the Commission should simply close its eyes to these wider considerations. If, from the ongoing debate they produce, it is possible to gain a better understanding of customary laws and what Aboriginal people expect from their recognition, it may help the Commission in its approach to the question posed by the Reference, namely, 'whether those laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis'.

Professor Enid Campbell pointed out in a paper written for the ALRC reference mentioned earlier:

Suffice it to say that when Australia was settled it was by no means a forgone conclusion that the imperial law should be universally applied to the exclusion of native custom and that the decision to apply that law to Aborigines

7. NTLRC, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 6. (Footnotes omitted.)

8. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267.

9. *Ibid* 167.

10. NTLRC, above n 6, 42.

not only in their dealings with Europeans, but in their dealings inter se, seems to have been taken quite deliberately as a matter of policy.¹¹

In *Walker v New South Wales*,¹² Mason CJ held that sovereignty carried with it the legislative competence of Australian parliaments to regulate or affect the rights of Aboriginal people and that customary laws could not stand against that competence. Clearly that is the legal basis on which the Commission must proceed. It is another question whether the common law may recognise custom where to do so would not run counter to existing laws within the State's legal system. The recognition of native title in *Mabo [No 2]*¹³ and *Wik*¹⁴ bears on that question but an examination of the wider question of the common law is outside the scope of this paper.

4. Background facts

It is worth setting out a few basic facts which bear on the background against which the Commission will report. I do so in brief form.

1. Western Australia is Australia's largest State with an area of 2,527,621 square kilometres.
2. On Census night 7 August 2001 there were counted 1,851,252 in the State.
3. Of these 58,496 persons identified as being of indigenous origin.
4. This number represents 3.2 per cent of the total population. By way of contrast the indigenous population of the Northern Territory is somewhat less but constitutes more than 28 per cent of its total population.
5. The greatest number of Aboriginal people in Western Australia live in the Perth metropolitan area – just over 20,000. The Kimberley has the highest proportion of Aborigines of any of the State's regions. Outside the major towns they make up the overwhelming majority of the population. The Pilbara presents a similar picture. In other regions there is a greater concentration in the major population centres but Aboriginal people make up significant proportions of the populations of rural and regional areas.
6. All residents of Western Australia are subject to the laws of Parliament and the decisions of the courts.
7. Western Australia is part of a federation; its laws are State and Federal.
8. Australia has international obligations which touch the lives of all its citizens, not least in the field of human rights.

These propositions serve to demonstrate the complexity of the Commission's task – a relatively small population, spread over the whole of the State, some living lives pretty much untouched by customary laws, others in whose lives those laws play a significant part.

5. Implications of contact

As the ALRC pointed out: 'For practical purposes there are no Aboriginal people who have not had at least some contact with Australian society'.¹⁵

That report was published nearly 20 years ago; the degree of contact inevitably has grown since then. While many communities complain of the breakdown of traditional law and practices, there are overarching considerations which have resulted in a greater awareness of Aboriginal identity, both on the part of Aborigines themselves and of those who are not Aboriginal. The acceptance of traditional ownership of land, the protection of sacred sites and the enhanced interest in Aboriginal dance, music and painting are among those considerations. More directly in point, the courts have shown an increased willingness to look at aspects of traditional life that may throw light on the circumstances in which an offence was committed and on appropriate forms of sentence.

The paradox of course is that where customary laws have lost influence it is because of the impact of the non-indigenous population over the years. At the same time any effective recognition of those laws lies very much in the hands of that non-indigenous population.

In any event I do not read the Reference as limited to a purely utilitarian answer or some response dependent upon the size of the indigenous population. Whether customary laws should be recognised may give a moral aspect to

11. Campbell E, "Accommodating Aboriginal Law" (25 September 1977) 2.
12. (1994) 182 CLR 45.
13. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1.
14. *Wik Peoples v Queensland* (1997) 141 ALR 129.
15. ALRC, above n 2, [34].

recognition, but such a claim has to be placed in the scales along with the existence of the State's legal system, the practical value of recognition and indeed the wishes of the indigenous population. Those wishes may vary according to the remoteness of the population, their ages and gender and a variety of other factors.

6. Manner of recognition

Where these considerations assume great importance is in the manner in which customary laws 'should be recognised and given support to' – one of the matters to which the Commission is required to give particular reference. This is an aspect of the inquiry which, in a sense, comes at the end of the Commission's work. It arises at the point at which the Commission is satisfied that there should be some recognition of customary laws and must then consider whether recognition should have a geographical aspect or be limited to those leading a more traditional life style or turn on other criteria.

The recommendations in the report of the NTLRC 'concentrate on matters affecting Aboriginal communities'.¹⁶ They do so because of the distribution of the Aboriginal population in the Territory, a minority living inside urban areas and the majority outside. Indeed, 'Two-thirds of all Aboriginal people in the Northern Territory live outside urban areas in small communities on Aboriginal land or special purpose leases or on pastoral leases'.¹⁷ That is not so true of Western Australia where there is a greater concentration in cities and towns. Nevertheless, as appears earlier in this paper, a substantial number of Aboriginal people live in communities in which they constitute the majority.

The NTLRC saw the answer to recognition in allowing each community to develop its own plan to incorporate traditional law into the community 'in any way that the community thinks appropriate'.¹⁸ This approach envisages models dealing with a wide range of matters, civil and criminal, which in part can be left to the community and otherwise are put to government for its response. There is an expected caveat: 'No model can permit the infringement of human rights'.¹⁹ This distinction might be expressed as the difference between legislative and administrative recognition, oversimplified though that might be.

In speaking of the manner of recognition I have strayed beyond the sort of background I had in mind. Furthermore to look at manner of recognition before reaching some conclusions about the range of matters where recognition is thought appropriate may seem like putting the cart before the horse, so to speak. However, the communities are in so many respects the key to the strength of customary laws in this State, to the matters to which they pertain and the manner in which recognition can be accorded, without adversely affecting the legitimate rights and expectations of those who live in the communities.

7. Ascertaining customary laws

Theory

Recognition of customary laws provokes the question: what are those customary laws? And in turn, what are the implications of their recognition?

The Reference wisely does not seek to define customary laws. Those laws cannot be reduced to writing as if they were a statute or code. Even the *Customs Recognition Act 1963* of Papua New Guinea, an Act specifically relating to the determination and recognition of custom, balks at a definition. Rather it sets out the situations in which custom may be taken into account. The ALRC, in its Draft Aboriginal Customary Laws (Recognition) Bill 1986, took much the same approach in some cases but in others gave more direct force to customary laws.

However it goes about its task the Commission must gain some understanding of Aboriginal customary laws, if only to appreciate their source and the basis upon which they are accepted by indigenous people as binding upon them. It is important not to see customary laws only through the prism of western ideas. It is artificial to seek to isolate Aboriginal law from religion and culture. As I suggested in my 1999 paper 'Understanding Aboriginal Law',²⁰ it is

16. NTLRC, above n 6, 14.

17. NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 6.

18. NTLRC, above n 6, 6.

19. NTLRC, above n 7, 48.

20. The paper 'Understanding Aboriginal Law' is attached as an appendix to this Background Paper, see below pp 186–212.

enough 'to see law in Aboriginal society as a body of rules, accepted by the society and enforced by recognisable constraints'.²¹ This approach is developed in the paper; I shall not repeat what appears there.

However, there is a comment by Professor Max Charlesworth which bears on these matters. Speaking of the modifications which have taken place in rituals and songs, he observed:

But one must distinguish here between the public rhetoric of Aborigines, which gives the impression that Aboriginal religion is essentially devoted to the faithful replication of the primordial design laid down by the Ancestor Spirits, and the reality of actual life and practice where there is a continual process of development and creative invention.²²

I say something about the immutability of Aboriginal law later in the paper. All I am concerned to do here is to warn against expecting to find parallels between customary and non-customary laws and to keep in mind that Aboriginal people who have to deal with this word 'law' may be using it in a wider sense than a lawyer would use it.

Inevitably popular discussion of recognition tends to focus on aspects of criminal law: that is, conduct that within the State's legal system attracts the operation of the criminal law. The importance of dealing with such conduct in the recognition of customary laws is obvious but it does tend to put the notion of punishment, with particular reference to payback, at the forefront of any discussion. Nothing I say is intended to diminish the difficulties this area presents. However, it would be quite wrong to allow these difficulties to overshadow other areas of law.

The Reference puts the matter in context by requiring the Commission to have regard to a range of matters including those corresponding to criminal law (including domestic violence), civil law, local government law, the law of domestic relations, inheritance law, law relating to spiritual matters and the laws of evidence and procedure.

Practice

The Commission has conducted a series of field trips aimed at hearing at first hand the views of indigenous communities. The summaries state that these consultations have been guided by four key questions which ask in effect:

- How is Aboriginal law still practised?
- In what ways is it practised?
- In what situations is it practised?
- What issues confront Aboriginal people when practising their law today?

In the time available to the Commission, this is no doubt the most useful way of ascertaining the views of the people in question. It is also a useful basis on which to consider a number of issues that arise in thinking about customary laws.

However, questions limited to existing practice may result in an unduly narrow approach. As a generalisation, the practice of customary laws reflects the distance of a community from the influence of cities and towns. But even in locations where overt practice is not apparent people may see their laws as a valuable means of maintaining an ordered society. Such a view is likely to come from older persons but a younger generation may well have an important contribution to make in this regard. That generation may have a more realistic approach to how the two sets of laws may work, one with the other, at least in relation to juveniles.

As to ascertaining the views of the indigenous people, it is apparent from the thematic summaries and from what the Commission itself has said that its members are alive to the difficulties of ensuring that the views of individuals reflect the views of the community. The difficulties are more acute the less time the Commission is able to spend in particular locations. I hasten to say that this is not peculiar to the task the Commission has embarked on. It exists whenever the views of any community are sought.

Aboriginal communities, like other communities, are not free from factions and from family divisions. As with any community, it is not always easy to tell whether someone purporting to be a spokesperson is indeed in that position. The difficulty is compounded where some matters cannot be talked about in front of women; and the reverse applies. But those sorts of assessments have to be made and made in the light of advice from those who are part of, or familiar with, the community, be they Aboriginal or non-Aboriginal.

21. Ibid, see below p 188.

22. Charlesworth M, *Religious inventions: four essays* (Cambridge: Cambridge University Press, 1997) 65–66.

There is an upside to this. Although there is often diversity among those with whom the Commission makes contact, a pattern does tend to emerge. Furthermore, although there are often long distances between locations, many Aboriginal communities in Western Australia are linked by dreaming tracks, sharing ceremonies and traditions. And there are strong common themes associated with the 'dreamtime' so that although stories about the mythical ancestors may vary, there is evident a common basis in the origins and activities of those ancestors and their responsibility for the law. It does not follow that there should be one overall approach to the implementation of customary laws within the State's legal system. That is a different question.

The approach to be taken to any system of recognition is one of the most formidable tasks facing the Commission. I return to this aspect later in the paper. At this point I simply wish to note the obvious connection between customary laws and the communities in which they were and are practised. Indeed the NTLRC's general view is that 'each Aboriginal community will define its own problems and solutions'.²³ While that approach might be thought to beg the question, the NTLRC was speaking in the context of specific communities proposing specific plans to government. Those plans—referred to as models—may relate to a range of matters, civil and criminal. An obvious illustration is dispute resolution processes. Whether that approach is the most appropriate for this State lies at the heart of the Reference.

8. Immutability

There is an aspect of Aboriginal customary laws that is relevant to the work of the Commission. It arises in this way.

Aboriginal people sometimes point to what they see as a distinction between their law and, adopting the language of the Reference, the State's legal system. The latter, they say, is ever changing; the former is immutable. How they ask, not always rhetorically, can one respect a law which Parliament may change at will?

In my paper 'Understanding Aboriginal Law', I offer a quotation from a Bunitj man from Kakadu:

Law never changes...
Always stay same
Maybe it hard
But proper one for all people.

Not like white European law...
Always changing
If you don't like it
You can change.

Aboriginal law never change
Old people tell us
'you got to keep it'
It always stays.²⁴

One response to the charge is that Aboriginal law is not always as immutable as it might seem. For instance, it is common practice now for young people to marry against the kinship system and for their marriage to be accepted within the community. The rejoinder will be that the dictates of the law are clear and should be obeyed and that acceptance is reluctant. Like any society, there is a difference between the law and obedience to the law. For the Commission the relevance of all this lies in the need to explore, not the jurisprudential significance of the distinction, but the practicalities of recognition and giving effect to the law.

We are in a difficult area here. In part the difficulties are semantic – what is 'change'? Legislatures are constrained by constitutional and other obligations. And while the common law has developed through judicial decisions, the courts are not open to adopt rules 'if their adoption would fracture the skeleton of principle which gives this body of our law its shape and internal consistency'.²⁵ Customary laws, it may be thought, present a somewhat analogous picture.

But the difficulties go deeper than that. People who have an oral tradition may see history through a different lens to those who have a written tradition. The former may be less prepared to acknowledge that contemporary culture differs from the past. This subject has been critically examined by Dr Peter Sutton in 'The politics of suffering: Indigenous

23. NTLRC, above n 6, 21.

24. Toohey, above n 20, see below p 186. Extract taken from Neidjie B, Davis S & Fox A, *Kakadu Man ... Bill Neidjie* (NSW: Mybrood Pty Ltd, 1985) 39.

25. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 29 (per Brennan J).

policy in Australia since the 1970s'.²⁶ A result of all this for the Commission is likely to be a problem in identifying whether some course of conduct is truly customary law and therefore presents a case for recognition. The answer must lie in the voice of the Aboriginal people themselves.

The NTLRC concluded that 'The examination of Aboriginal law as primarily a dispute resolution mechanism has revealed, not surprisingly, that *non-fundamental* legal norms may ultimately be negotiable'.²⁷ The Committee did not seek to define the line between the non-changeable and the changeable, except to speak of adapting punishment to meet modern circumstances.

It is not possible to define this line. To take one illustration, the system of promised marriage in which an infant girl is promised to an adult male is more complex than appears in some commentaries. And such an arrangement may be adaptable in the sense that an elderly man may surrender his position to a younger suitor, acceptable to the young woman, in return for goods and services rendered by the younger man.

There is scope for a better understanding of the concept of promise and what it implies. Nevertheless, within the State's legal system the protection and welfare of children is paramount and any recognition of customary laws must proceed on that basis.

9. Law and culture

Another distinction made is between law and culture. The all-embracing nature of Aboriginal law seems at odds with this distinction and I doubt that many Aborigines would find it acceptable except in the sense that people often use the term 'culture' to speak of everything they hold dear in their Aboriginality, including their law.

Dr Sutton has written in the article previously mentioned:

Indigenous people in this country themselves propose various kinds of cultural change as integral to improved wellbeing. There are those who promote engagement in the 'real economy' instead of reliance on welfare, greater engagement in Western education on a combined 'two ways' education, conscious intervention in dietary and other health and related practices, the promotion of non-violent ways of resolving adult conflict at the expense of fighting, the re-introduction of greater degrees of coercion as a means of controlling crime, emigration from Indigenous settlements to cities, alcohol, prohibition, and so on.²⁸

Dr Sutton has expressed concern that the argument against cultural change focuses unduly on a limited set of aesthetic practices and gives insufficient weight to the freedom to choose a more 'modern' way of life. The argument, he says, 'implies a negative comparison between ancient ways and modern ways'.²⁹

Whether or not one agrees with Dr Sutton's views on the meaning to be attached to culture in this context, it is apparent that there are complex issues involved here. I do not suggest that they are issues the Commission need explore in depth but an awareness of them may be useful in its approach to what it is that recognition may imply.

10. Customary law and violence

There is one aspect of customary laws that calls for particular attention. At times an Aborigine charged with an offence within the State's legal system will raise by way of defence or mitigation the alleged acceptance of his conduct by the law or culture of the community to which he belongs. This is usually in relation to violence against another, a man or more likely a woman. The courts face this situation frequently and certainly where the violence is against a woman may not be persuaded that there is such acceptance. The lesson here is caution in assessing what acceptance there is of particular conduct involving violence. And there is the further question of whether any such acceptance is at odds with legislative or other protection of human rights.

Wherever recognition of customary laws is under consideration in this country the position of Aboriginal women comes to the fore. It does so in the present context because of the difficulties in reconciling some aspects of customary laws having a particular relevance to women with their position under the legal systems of the States or Commonwealth.

26. Sutton P, 'The politics of suffering: Indigenous policy in Australia since the 1970s' (2001) 11 *Anthropological Forum* 125.

27. NTLRC, *The Recognition of Aboriginal Customary Law as Law*, Background Paper No 2 (2003) 12.

28. Sutton, above n 26.

29. Ibid.

I do not propose to deal with these difficulties in detail; they warrant a paper in their own right. However, it is helpful to focus on them to an extent, not only because the subject matter is so important but also because they illustrate the nature of the task presented by this Reference.

The extent of violence suffered by Aboriginal women at the hands of Aboriginal men has been documented quite extensively in recent years. Much of the material is noted by Joan Kimm in *A Fatal Conjunction*³⁰ which is a valuable treatment of what appears as a sub-title to the book, namely two laws, two cultures. It is the existence and identification of any customary law aspect with which the Commission is concerned.

Violence against Aboriginal women by Aboriginal men occurs in various circumstances. There may or may not be a sexual content. The violence may on its face be a straight-forward case of rape. Some sexual violence may be allegedly consensual or allegedly traditional, said to be by way of punishment for an offence against a customary law. In that last regard it has been argued that there was a sort of consent to sexual intercourse, required as a way of expiation for such an offence. Of course the age of the female may preclude any question of consent or the situation may be one in which she has not truly consented to intercourse with the man in question.

The difficulties inherent in identifying the category into which an act of violence falls may take on an extra dimension in the particular circumstances. What conclusions may properly be drawn from the evidence where a charge is brought under the State's legal system? Do the circumstances suggest that there may be a traditional element present? Was the person charged influenced in any way by that element?

These are considerations going to the position of the accused. They are questions for the court or the body responsible for dealing with the 'case'. Whether there should be recognition of the role customary law has played in the violence and if so in what way are questions the Commission is called upon to answer. But it cannot provide answers oblivious to the consequences of recommending that recognition be accorded or not accorded.

I have spent time on the issue of violence to women, not only because of its obvious importance, but because it points up, perhaps more than any other situation, the task facing the Commission. If customary laws in this area are to be recognised, is it by empowering the courts to have regard to those laws? If so, is it to provide an answer to a charge of assault or to point to appropriate forms of punishment? The Reference requires the Commission to have regard to 'relevant Commonwealth legislation and international obligations' so any recommendation must operate within those strictures.

Aboriginal women want such protection as the State's legal system allows them; indeed they want more in the administration of the law. The protection once offered by customary laws has been weakened over time but that does not mean that a recommendation should not aim to strengthen the procedures Aboriginal women would put in place as a way of dealing with violence, without surrendering the protection offered by the State's legal system.

As to violence against children, clearly their welfare is paramount and they must be afforded all the protection the State's legal system and its authorities can give. Is there a role for customary laws in this situation? If there is it is likely to lie in the application of those laws on an administrative basis, aimed at ensuring that violent situations do not occur.

11. Frozen in time?

There is another aspect of Aboriginal customary laws that is somewhat allied to immutability. While I do not see it as a requirement of the Reference that the Commission identify with any precision the scope of customary laws, it may need to ask itself from time to time: are we being told about practices that have existed without change or, in some cases, are they practices that have been adapted to meet the changing conditions in which Aboriginal people live? I have focused on practices so as to differentiate the issue of immutability of the law itself.

Within this area of discourse lies a further refinement. It goes to the content of customary laws and to that extent does not, I think, call for any detailed consideration by the Commission. Any such consideration is more likely to arise within any recognition that may be accorded to those laws. It does however present an issue to which the Commission may think it advisable to advert, if only to show it has not escaped notice.

30. Kimm J, *A fatal conjunction: two laws two cultures* (Annandale, NSW: The Federation Press, 2004).

The issue is whether customary laws are frozen in time, to borrow a phrase that is often used. In other words, is the scope of a particular customary law ascertained by reference to the time of European contact only or are traditional customs and practices inherited in adapted form fairly to be regarded as part of that law?

The issue has arisen in the context of native title claims with the argument that there is an evidential burden to establish rights and interests under pre-sovereignty traditional laws and customs and to show a continuance of those laws and customs in order to make good a connection with the land claimed. There are several decisions of the High Court and of the Federal Court in which this issue has been canvassed and in more recent decisions the evidential burden has been prominent.

The Reference speaks in general terms of Aboriginal customary laws. There is nothing that ties recognition only to customary laws that have remained unaltered since white settlement. The point is that laws and customs 'have their origins in the culture and social organisation of the relevant group as it existed prior to the advent of non-Aboriginal interference with the culture and social organisation'.³¹ Or, as put by Lee J in *Ward v Western Australia*: 'Law in Aboriginal terms is an aggregation of traditional values, rules, beliefs and practices derived from Aboriginal past'.³²

Changes to Aboriginal traditions have been recognised in the writings of anthropologists and courts, sometimes but not always in the context of native title. Examples are noted by Graeme Neate in his valuable paper 'Turning back the tide? Issues in the legal recognition of continuity and change in traditional laws and customs'.³³ Illustrations are changes to hunting and fishing practices, to leadership and lifestyle and in the performance of ceremonies.

Whatever the legal position with regard to the extinguishment of native title, there is no reason in this Reference to give Aboriginal customary laws a narrow connotation. For the Commission the importance of customary laws, whether untouched or adapted over the years, goes to the case for recognition and, importantly, the extent and the manner in which they should be recognised.

The Reference begins with this pronouncement:

Recognising that all persons in Western Australia are subject to and protected by the State's legal system; and there may be a need to recognise the existence of, and take into account within this legal system, Aboriginal customary laws.

What the ALRC said early in its report is applicable here:

In a sense the giving of the Reference was itself a recognition of the existence of Aboriginal customary laws and of the continuing adherence by Aborigines to their customary laws and traditions. On the other hand the Terms of Reference do not imply that the formal recognition of Aboriginal customary laws is the best response to the problems identified.³⁴

The approach implicit in this paragraph is reflected in the draft bill proposed by the ALRC. It fastens on to particular situations and deals with them accordingly.

The term 'recognition' is no doubt a handy one so long as it is not thought to foreclose any of the matters upon which the Commission must report which is 'to inquire into and report upon Aboriginal customary laws in Western Australia'. What is it that Aborigines want from this Reference? Some may see a political solution as the answer, in effect a treaty or an agreement but as mentioned earlier this is outside the Commission's remit.

Others may visualise a situation in which customary laws are taken into account in the sense that they form part of the fabric of the legal system rather in the way that the Papua New Guinea legislation empowers a court to take custom into account for certain purposes depending on the nature of the case. That offers a possible approach though it would not satisfy those who argue for the blanket operation of customary laws. The distribution of indigenous people throughout Western Australia militates against an overall approach, except perhaps where relationships such as marriage and parenthood are involved.

31. *Yarmirr v Northern Territory* (1998) 82 FCR 533, 568.

32. (1998) 159 ALR 483, 504.

33. Neate G, 'Turning Back the Tide? Issues in the Legal Recognition of Continuity and Change in Traditional Laws and Customs', paper delivered to the Native Title Conference 2002 (Geraldton, September 2002).

34. ALRC, above n 2, [5].

12. Marriage

Although I have been speaking of situations in which, except in the case of promised marriages, there may be no particular relationship between the persons involved, there is the wider question of recognising traditional marriages.

In so far as de facto relationships now carry rights and obligations comparable with marriages according to the civil law, it may be thought that recognition has no great part to play in this area. On the face of it there may seem no reason why marriage according to customary law should not be recognised.

However, the view of the ALRC was that 'direct underwriting of Aboriginal marriage rules would change the location of authority over domestic relations from the Aboriginal community or group to courts or other agencies'.³⁵ The approach taken by the ALRC was that traditional marriages should be recognised for the purpose of particular laws, in other words, that there should be a functional recognition.

The whole question of marriage, children and family property is explored in the ALRC Report as the Commission is well aware.

13. Payback

Discussions about recognition and media coverage of the subject inevitably fasten on to payback. Those who oppose any form of recognition ask how Parliament can condone, let alone authorise, physical violence as a form of punishment. Some Aborigines, particularly older men in remote communities, argue that if such a traditional form of punishment can no longer be available, it is false to speak of recognition.

Payback colours unduly the idea of recognition. To some it implies a gap between the State's legal system and customary laws which cannot be bridged. I have said something about payback in my paper 'Understanding Aboriginal Law' and I shall not repeat what is said there, except to draw attention to its symbolic nature in some cases and its role in the process of reconciliation of the families offended by the conduct which led to payback.

This is not to say that the physical impact of payback is not present in some cases; it is and always has underlain the process. My own experience suggests that the symbolic nature of payback, accompanied by some form of compensation to the relatives of the victim, has become more and more common. Just how common I do not know but it would be helpful to get some overall picture. Again, the views of Aboriginal people in this regard are likely to depend on age, gender and the remoteness of the community.

This is one of those situations in which consultation with the communities and a better understanding of the current approach to payback is needed to see whether there can be accommodation between the State's legal system and customary laws.

14. Communities

Legislation in Western Australia and the Northern Territory (perhaps elsewhere) empowers communities to control and enforce civic obligations. This is a long way from recognition of customary laws or even taking them into account. Is it an edifice on which to build so as to vest control of certain conduct in the hands of the community?

The members of the Commission are well aware of the different responses Aboriginal people make to the idea of recognition. The older people see their authority crumbling. They mourn the conduct of younger men and women which offends the community and demeans the young themselves. In the more isolated communities the role of customary laws is more evident though many of those communities are beset by social problems. In any event people move into towns and back into communities so that control is difficult.

The views of the older people must be respected but what do the young think about customary laws and their application to them? In many communities the initiation of young men still takes place, though often with reluctance on the part of those to be initiated. And in the absence of some ongoing teaching process, the impact of initiation may soon be lost. Women are unwilling to surrender the protection the State's legal system offers in the case of domestic

35. ALRC, above n 2, [246].

violence, particularly where the protection offered by customary laws no longer operates or at any rate operates with diminished efficacy.

These are, to a degree, random thoughts but they do point out the difficulties of a blanket approach. On the other hand an approach that permits customary laws to operate only in situations of minimal importance is unlikely to satisfy anyone for whom those laws are important.

However, the State's legal system and customary laws need not be mutually exclusive. In many respects the two can operate in conjunction. It would be unduly limiting to see taking customary laws into account as placing those laws in juxtaposition to the statute law of Western Australia. The State's legal system embraces a range of administrative procedures where greater flexibility is possible. However, when these are situations in which customary laws are envisaged as operating, Aboriginal people would expect some formal recognition of those situations.

In all of this discussion we are inevitably drawn back to the role of law in a society. It does not mean that its members have this constantly in mind; within it is a general awareness of the importance of obedience to the law and indeed the integral place it holds in a people's culture. Even where traditional law seems to carry little weight in some Aboriginal communities there is an appreciation of how that law has served people in the past and for many a hope that it will continue to do so, even though their lives are affected by two laws and two cultures. The task of reconciling the two through recognition lies at the heart of the Reference.

15. Customary laws – where no equivalent

Recognition is usually seen as something which, in one form or another, allows the State's legal system and customary laws to operate together. It is then a matter of seeing whether some positive law, statutory or otherwise, can accommodate customary laws and practices. But there is the other side of the coin, namely, conduct which is offensive to customary laws, in particular misuse of sacred objects and the use of language forbidden to women and children and to men except as part of a ceremony.

This sort of conduct is unlikely to attract the attention of the legal system. Can it be left to the communities to deal with, without at the same time exposing the community to prosecution?

16. Complaints about the legal system

This brings me to another matter which is important for the way in which the Commission approaches its task, in particular the way in which it approaches its report

No Aboriginal person in Western Australia is untouched by the State's legal system. More than that, most have some familiarity with an aspect or aspects of that system. Of course for some it may be as defendant or accused in a criminal proceeding, but I have in mind a much wider range of situations – community organisations, employment, contact with government. The range of situations is no different from those that face non-indigenous persons. Likewise the extent of familiarity will depend upon location.

The complaints indigenous people have about the State's legal system do not go generally to the substance of the law. They go to the way in which the law is administered, often in a way that seems oblivious to Aboriginal culture. Here I am using 'culture' loosely but as a term of wide import.

Very often what indigenous people are seeking is not the exclusion of 'our law', rather the administration of that law in a way that is sensitive to their wishes. A few months ago there was a report on the ABC of a group of women in Broome who say they are dissatisfied with the way in which violence to partners and children is being handled by the authorities. The report was brief but I took their spokesperson to be saying, not that they wish the existing laws to be changed as that they should have the opportunity to see how this most important problem can be lessened through their own ideas and practices.

In many cases where Aborigines criticise the legal system, they are criticising the administration of the system and the lack of their own input. Whether they see the answer in some cases as a separate court or tribunal is another matter. Again, my own experience is that most (though perhaps not all) communities would rather leave it to the State to deal with the most serious criminal offences.

The Commission is asked to consider the need to take into account Aboriginal customary laws and that means the substance of those laws, not merely the administration of the legal system. Nevertheless, it is important to know whether complaints about that system are complaints about the law or its administration.

17. Conclusion

The matters raised by this paper reflect a number of issues facing the Commission. The most basic is an understanding of what Aboriginal people expect from the Reference. There is no single response to that expectation.

There are those who would give customary laws a broad operation, at least within their own community. Such an operation could only be available within the limits met by the Reference itself, essentially the extent and manner in which customary laws should be taken into account within the State's legal system.

There are those who seek recognition of the value of certain aspects of traditional law, especially in the maintenance of order within their community. This concern tends to focus on alternative processes for the resolution of disputes, not necessarily to the exclusion of the State's legal system but at least carrying some formal recognition, legislative or administrative.

There are those who seek greater recognition of traditional law in the prosecution and disposition of conduct attracting the State's criminal laws and indeed conduct which offends particular communities without a clear counterpart in those laws.

There are those who seek a greater recognition of traditional law in a range of personal relationships, at the same time accepting the protection offered by the State's legal system.

And there are, I suggest, many Aboriginal people who see traditional law as part of their Aboriginal identity and culture and in that sense wish to maintain the importance of that law even though it may have no practical application in their everyday lives. The recognition they seek may be largely formal, but nevertheless important.

It is for these reasons that there is no single answer to the question of what recognition means to Aboriginal people and how it can be taken into account. It is on that footing the Commission approaches its task.

Appendix: Understanding Aboriginal law

John Toohey*

The Inquiry

Perhaps I should apologise for the title of this paper. It suggests that I have reached an understanding; that would be too extravagant a claim. 'An Attempt at Understanding Aboriginal Law' would be a more accurate title but unduly self-deprecatory since I have been aided by the writings of legal anthropologists, usually anthropologists rather than lawyers, too few of whom have ventured into this field. Most of all, I have learned from the Aboriginal people themselves with whom I have spoken in Western Australia and in the Northern Territory.

I began with the working title 'The Jurisprudential Basis of Aboriginal Customary Law'. While it has a rather pretentious ring, in a very real sense it conveys what I set out to do. In past years, anthropologists and others have written about law in 'primitive' or, more happily, 'small-scale' societies. Generally, though not always, the treatment of the subject involved looking at the way in which law operates in such a society, often as part of a wider description of the society itself. To say this is not to minimise the work of those writers. Rather, it is to point out that such a treatment may leave unanswered the fundamental question of the meaning of 'law' in such a context, also whether there is anything in the society that answers that term, indeed whether the question can usefully be asked without first making clear what the commentator means by law. The answer to that last question determines the ambit of the inquiry; to some extent it determines the outcome. All this is not surprising. After all, writers in western countries have debated these issues for centuries and the debate has lost none of its fervour:

Few questions containing human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?'¹

The Australian Law Reform Commission's monumental work on *The Recognition of Aboriginal Customary Laws* was able to identify various aspects of Aboriginal law and, in some respects, to recommend its incorporation in the wider system of law prevailing in this country.² It was able to do so without probing too deeply into matters of jurisprudence. The Commission's terms of reference spoke of 'Aboriginal customary law' without in any way foreclosing how the Commission might treat that phrase.

There is in the hearts and minds of Aboriginal people a real concern that the legal system to which they, and the rest of us, are subject has failed abjectly to appreciate the strength of their law, to understand its origin and to acknowledge the sanctions that give it force. The effectiveness of their own law is denied to them in many ways but its substitute does not always command the respect which is necessary for a law abiding society, particularly among the young. Aborigines say: 'Our law is strong, it does not change. Your law is weak, it changes every time parliament sits'. Just how far the contrast can be sustained may be a matter of debate. At this point, it is the existence of the concern that needs to be noted.

Comparisons and contrasts between Aboriginal law and Australian law assume that there is some common understanding of what is meant by 'law'. The correctness of that assumption is at the forefront of this paper. It is not just a matter of semantics, it goes much deeper than that. But even at the level of semantics many Aboriginal words do not translate readily into English, at least not without failing to convey the full flavour of the Aboriginal language.³ In particular, concepts which may be encapsulated in a word or phrase rarely admit of such conciseness in translation. If the touchstones for the existence of law include a political system with an identifiable legislature, executive and judiciary and with a recognisable system of enforcement, it is tempting to conclude that a particular society has no

* Much of this work was made possible by an invitation to spend some time at the Law School of the University of Western Australia as a Visiting Professor [in 1999]. For this I am very grateful to the University and especially to Professor Ian Campbell, the Dean of the Law School.

1. Hart HLA, *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994) 1.

2. Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* Report 31 (Canberra: AGPS, 1986). To avoid undue repetition, I shall use 'Aboriginal law' to describe the customary law of the Australian Aborigines and 'Australian law' to describe the statute and common law prevailing in this country.

3. 'The Aboriginal language' is no more than a convenient shorthand expression for the many languages spoken. Alan Rumsey has written: 'there are, even now, at least 100 quite distinct Aboriginal languages, and 200 years ago there were many more.'; 'Language and Territoriality in Aboriginal Australia' in M Walsh & C Yallop (eds) *Language and Culture in Aboriginal Australia* (Canberra: Aboriginal Studies Press, 1993, 191).

system of law. That is not to say that it is lawless in the ordinary acceptance of the term, rather that it has no law worth studying. It is in this way that a particular definition may virtually determine the outcome of the inquiry. On the other hand, the existence of institutions having some parallel in our own law may not readily reveal itself. There may be a problem of language or simply a failure to recognise the parallel.

A warning was sounded by Simon Roberts when he wrote:

It has come to be recognized as a central problem of the social services that in any inquiry the observer is prone to fit the material under investigation, consciously or unconsciously, into a conceptual and institutional framework of his own, distorting the material as he does so. The hazard is obvious where the subject matter he is trying to understand and describe is located in an alien culture; and the risks are perhaps greatest where the arrangements under observation bear a superficial resemblance to those in our society about which we may have established clear and dogmatic ideas.⁴

The more acceptable approach is to avoid colouring 'law' with western concepts, rather to proceed to examine the society in question against the widest understanding of the term. Perhaps one could ignore the term altogether and simply look at all possibly relevant features of a society. That however becomes a somewhat undisciplined inquiry, one without any parameters. The fact is that, so far as the present context is concerned, the term law has been used so often in relation to Aboriginal society that it is more profitable to give it some meaning, one that is not dictated by non Aboriginal understanding of the term. Along the way, features of Aboriginal society emerge that seem to have some counterpart in Australian law. Sometimes the comparison is quite striking, though one should be on guard against a too ready conclusion that there are counterparts, particularly of an institutional character. That should not change the course of the inquiry which is essentially one into the Aboriginal understanding of their law.

Aborigines have become accustomed to the English word 'law' representing something imposed on them and as something the transgression of which carries particular consequences. At the same time, they draw a sharp distinction between that law and their own law, especially the changing nature of the former and the immutability of the latter. They point to the activities of parliament and the ever changing laws emanating from it. How, they say, can this be a law which deserves to be obeyed? They express concern that parliament makes laws in public including in the presence of women and children. Again, they ask, how can a law made in such circumstances be respected? One can point by way of response to the fact that in every Aboriginal community young people are marrying in ways that offend the kinship system. Their marriages are not 'straight'. One can say that the system by which young girls were promised in marriage has broken down. These departures from the law will be acknowledged, in many cases with regret, but with the response that the dictates of the law are clear and should be obeyed. A more positive answer to the charge against Australian law is that the changes made by parliament do not overturn basic principles but rather the rules with which those principles are clothed. And while the common law has always involved a process of development and indeed judges make law from time to time, the courts are not free to adopt rules 'if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency'.⁵ In any event, the inquiry is into Aboriginal law, not a comparison with Australian law.

Despite the emphasis Aboriginal people place on the timelessness of their law, the law is part of their culture. And in a number of respects that culture has adapted to changes in their society. I am speaking in general terms at this stage, by no means oblivious to the differences that exist in Aboriginal communities throughout the country.

Rituals and songs have been modified, sometimes by those who have acquired a right to those rituals and songs by exchange or trade, sometimes as a result of creative activity. Professor Max Charlesworth has discussed these questions with reference to Aboriginal religion and concluded:

But one must distinguish here between the public rhetoric of Aborigines, which gives the impression that Aboriginal religion is essentially devoted to the faithful replication of the primordial design laid down by the Ancestor Spirits, and the reality of actual life and practice where there is a continual process of development and creative invention.⁶

It would be artificial to isolate Aboriginal law from Aboriginal religion and culture. Perhaps it is the apparent suddenness with which parliament makes changes that leads Aborigines to conclude that Australian law lacks stability. The

4. Roberts S, *Order and Dispute* (Victoria, A'ia: Penguin Books, 1979) 17.

5. *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 29.

6. M Charlesworth *Religious Inventions* (Cambridge: Cambridge University Press, 1997) 65-66.

creative process of the common law is closer to the way in which Aboriginal law responds to change. However, I would not wish to push this analogy too far.

The more one focuses on what are thought to be the indicia of law based on western ideas, the sharper the distinction between the two laws appears. To a considerable extent, however, the sharpness is artificially created by an unduly narrow approach to law by western society. For instance, undue emphasis on the use of force to support legal rules overlooks the wider constraints, some overt, some not, which control behaviour within a particular society.

A European jurist places great emphasis on a Code as the source of law, emanating in a direct and comprehensive way from a legislative body. Against that background, a conclusion might readily be drawn that there is no truly comparable law in a particular society. Someone trained in the common law brings to bear a different approach. Given the critical role of custom and judicial decisions in the development of that law, the less institutionalised features of Aboriginal society do not present a great obstacle to recognising the existence of law in that society.

Some lines of inquiry need to be marked out so that when "law" is used in reference to Aboriginal society there is some understanding of where the inquiry is going. One could eschew the term altogether, but that would make communication difficult. So what sort of a working definition will serve for the purpose of this paper? It is enough, I think, to see law in Aboriginal society as a body of rules, accepted as binding by the society and enforced by recognisable constraints. The flavour of what I am trying to convey by these few words is enhanced by the writings of some anthropologists.

Professor Diane Bell, writing with Pam Ditton, a lawyer:

In Aboriginal English the word 'law' is frequently used to encompass both the body of rules which are backed by religious sanctions and to explain the daily behaviour of peace abiding persons. It is all the law.⁷

Dr MJ Meggitt, speaking of the Walbiri:

There are explicit social rules, which, by and large, everybody obeys; and the people freely characterize each other's behaviour insofar as it conforms to the rules or deviates from them. The totality of the rules expresses the law, *djugaruru*, a term that may be translated also as 'the line' or 'the straight or true way'.⁸

Professor Robert Tonkinson, speaking of the Mardu and the word *juluburdi* (*yulubirdi*), glossed as 'law' by those who speak English, says that the term:

connotes a body of jural rules and moral evaluations of customary and socially sanctioned behaviour patterns that are believed by the Aborigines to have originated in the creative period, the Dreamtime...a concept so central and so pervasive as to be virtually synonymous with 'traditional culture'.⁹

Professor Nancy Williams, speaking of the Yolgnu:

'Law' refers to the existence of an overarching concept of order in human affairs backed by belief in its moral base, and certainty in the application of rules legitimated by the moral order.¹⁰

Legal anthropology

The term legal anthropology is one with which anthropologists are more familiar than lawyers. Professor Sally Moore concludes her anthropological approach to law as process with these words:

[T]he classical task of legal anthropology has been to understand the relationship between law and society. The general goal in the past has been to identify the kinds of societies in which certain legal institutions appear, and to examine the kinds of legal procedures, norms, principles, rules and concepts that are found under given social conditions. These interests continue. But a shift that is now under way in some quarters is partly a shift in method, partly a shift in problem. There is a new emphasis on sequences of events – on legal transactions, disputes and rules seen in the dimension of time.¹¹

7. Bell D & Ditton P, *Law: The Old and New* (Canberra: Aboriginal History, 1980) 22.

8. Meggitt MJ, *Desert People* (Sydney: Angus & Robertson, 1962) 251.

9. Tonkinson R, *Aboriginal Victors of the Desert Crusade* (Sydney: Cummings, 1974) 7, 70.

10. Williams N, *Law, Laws and 'The Law'* (Canberra: Australian Institute of Criminology, 1 November 1997) 1 (unpublished paper).

11. Moore SF, *Law as Process* (Sydney: Routledge & Kegan Paul, 1983) 255-256.

The field of legal anthropology has been tilled by anthropologists more than lawyers though one of its pioneers was a lawyer by training – Sir Henry Maine, with his *Ancient Law* published in 1861. There followed a period when much of the work on law in pre-literate societies was written by colonial administrators and by missionaries, each group having a particular end in view. The anthropologists whose writings on law are best known – Malinowski, Schapera, Hoebel, Gluckman, Bohannan and Gulliver – wrote just before World War II and since, though in Malinowski's case a little earlier.¹² KN Llewellyn and EA Hoebel's *The Cheyenne Way* (1941) is the best known example of joint research by a law professor and an anthropologist. The omission of Australian names is deliberate; they are mentioned in what follows.

To gain some understanding of the nature of Aboriginal law it is necessary to go to the writings of anthropologists rather than lawyers. A little more than twenty years ago Anthony Dickey wrote:

It seems scarcely credible that despite the immense amount of research that has so far been undertaken into Aboriginal culture studies of traditional Aboriginal law are almost non-existent. Yet from the point of view of academic lawyers and legal scientists generally such is the case.¹³

In 1934 Malinowski had complained that the anthropology of law had been neglected 'to an extent which the layman would find unbelievable and which the specialist realises with a shock'.¹⁴ As it happens, Elizabeth Eggleston's study of Aborigines and the criminal law was published in 1976, about the same time as Dickey was writing. There is a chapter on tribal law which, however, is largely concerned with the conflict between the two laws.¹⁵ While the Australian Law Reform Commission has published its report since then, as I have already noted the task of the Commission involved identifying aspects of customary law rather than looking too closely at the source of that law.

When anthropologists have written about customary law in Australia, it has sometimes been as part of a wider survey of Aboriginal society, as for instance in the writings of RM and CH Berndt, sometimes in the course of depicting a particular society as in the work of MJ Meggitt and T Strehlow. Some anthropologists, Kenneth Maddock, Nancy Williams and Diane Bell come to mind, have put a particular emphasis on Aboriginal law in their writings. But anthropologists and lawyers may have different ends in view when they write about Aboriginal law and their background of studies is different.¹⁶ Writing in 1953 and seeking to distinguish the concerns of anthropologists from administrators in African societies, AN Allott said:

The anthropologists seek to show the social purpose of customary rules, and how they fit into the structure of behaviour. The aim of legal research is narrow, to record those rules of custom or usage which are either enforced in the courts, or are of a kind which the courts would enforce. Appreciation of the part which these rules play in the social structure is therefore irrelevant or, at most, only needed as background knowledge, or for the better elucidation of the meaning of these rules.¹⁷

Whatever might be the reaction of anthropologists to this conspectus, it hardly does justice to the scope of legal research by jurists such as Henry Maine, Julius Stone, Roscoe Pound and Karl Llewellyn, to mention but a few.

The elusiveness of the subject which language presents is highlighted in the comment by Dr Dickey that 'what anthropologists mean by "law" is usually quite different from what lawyers or legal scientists mean when they use the same word'.¹⁸ It is worthwhile spending a little time on this alleged difference because in the search for the jurisprudence of Aboriginal law it is necessary to settle on some understanding of the law in question. If we are using the term in a non-Aboriginal context, there inevitably will be a constraint on the search because it will tend to focus on those aspects which have their counterpart in Aboriginal society, with the consequence that some aspect which fails to reflect the non-Aboriginal understanding of law may be left out of account.

The distinction drawn by Dickey is questionable. For lawyers, he suggests, law signifies 'those rules which are supported by, or which concern, the legitimate use of force by a socially authorised agent'. For anthropologists, he

12. The writers on legal anthropology are placed in their historical context by Professor Moore (above n 11, ch 7) and by Professor Laura Nader 'The Anthropological Study of Law' in *The Ethnography of Law* (1975) an American Anthropologist Special Publication, 3.

13. Dickey A, 'The Mythical Introduction of "Law" to the Worora Aborigines – Part One' (1975-1976) 12 *UWAL Rev* 350.

14. Malinowski B, 'Introduction' in *HI Hogbin Law and Order in Polynesia* (London: Christophus, 1934) 1xi.

15. Eggleston E, *Fear, Favour or Affection* (Canberra: ANU Press, 1976) ch 9.

16. Williams NM, 'Studies in Australian Aboriginal law 1961-1986' in Berndt RM & Tonkinson R (eds) *Social Anthropology and Australian Aboriginal Studies* (Canberra: Aboriginal Studies Press, 1988) 191 contains a valuable treatment of anthropological writing on Aboriginal law.

17. Allott AN, 'Methods of Legal Research into Customary Law' (1953) 5(4) *Journal of African Administration* 172.

18. Dickey above n 13, 350.

continues, law comprehends 'all the main rules which control the behaviour of a particular society regardless of any sanction, or the type of sanction, attached'.¹⁹ The distinction is, I think, exaggerated because it implies a difference which in fact may not be so great. Force and social control are contrasted yet social control may comprise overt and subtle constraints. If, as Dickey suggests, anthropologists consider the lawyers' concept of law to be code-based, (and I do not think this is the assessment of contemporary Australian anthropologists), they are under a misapprehension. The common law stands in marked distinction to the idea of a code. It has been developed over many years by judicial decisions. And to take but one example, the common law has recognised and given effect to custom. Again, the concept of public policy developed by the common law picks up the mores of the community, its attitude to what is right and what is wrong, and applies those mores to cases of contract, tort and crime.²⁰

What some call primitive law and modern law have been placed in stark contrast, not so much because they are fundamentally different but because, lacking a written law, primitive law is examined from the view point of European or, in the present case, English law. In one of the few works on legal anthropology, KN Llewellyn and EA Hoebel approach their inquiry with this preliminary reservation:

When Law comes to take on the form most familiar to us, that of authoritative rules and doctrines expressed in their own queer, technical language, gaining precision from the operations of technical specialists at work in their own peculiar context of technique, then law becomes a world of its own.²¹

The authors claim that the obstacle standing between the study of modern law and of primitive law is the acceptance of the realm of law as being of a different order, 'for if of a different order, then it sets its own premises and becomes impenetrable on any premises except its own'.²² If one moves the technical side of law out of the central position, if it be seen merely as a 'batch of tools' to get jobs done in a culture, then every item among those tools becomes familiar rather than different. On this approach, authority is a tool, so too are norms and imperatives, procedures and institutions for handling trouble and channelling behaviour. In their words: 'When seen thus, each legal concept becomes a candle to illumine the working of society'.²³

It is significant that Llewellyn and Hoebel begin their work with what they call Five Histories which illustrate the sort of rules of conduct that are envisaged by use of the word law, or as the authors put it, 'indicators of Cheyenne law-ways'. They appear to be actual histories in the sense of incidents that took place and in that sense can be contrasted with the stories Aborigines tell of how their law came into existence. I deliberately avoid the use of the words Dreaming or Dreamtime at this point because they are labels that have been too readily applied without sufficient consideration of what the terms convey. In the Cheyenne stories are found juristic concepts which set the authors on the inquiry which is the sub-title of their book: Conflict and Case Law in Primitive Jurisprudence.

An approach along these lines clears out of the way much dead wood in thinking about Aboriginal law. It still leaves a number of questions, in particular, when we fasten on to some aspect of Aboriginal society are we looking at anything more than good manners or private morality? In any event, is that a useful distinction to make in this context? In the English language, unconscionability might once have been thought as relating to aspects of private conduct but it has now assumed an important part of the law – in equitable doctrines and in statutes empowering the courts to strike down harsh and unconscionable contracts. Indeed equity itself developed as a means of tempering the common law with ethical concepts.

The report of the Royal Commission Into Aboriginal Deaths In Custody contains a report by the Aboriginal Issues Unit of the Northern Territory. One section speaks of 'the body of norms, rules and beliefs which our people call "law" or "Tjukurrpa" or "Tjurruka"'. The Unit describes law in these terms:

[A] system of rights and obligations adhered to by members of the group, partly because of the threat of penalties and punishment, but also to avoid the more common, everyday pressures of social life which induce people to behave socially and properly: the gossip, ostracism, banishment, withdrawal of services and cessation of exchanges.

The Unit expresses the Aboriginal understanding of law as:

19. Ibid.

20. For a recent illustration, see *Ridgeway v The Queen* (1995) 184 CLR 19.

21. Llewellyn KN & Hoebel EA, *The Cheyenne Way: Conflict and caselaw in primitive jurisprudence* (Norman: Uni of Oklahoma Press, 1941) 41.

22. Ibid.

23. Ibid, 42.

[A] cosmology, a worldview which is a religious, philosophic, poetic and normative explanation of how the natural, human and supernatural domains work. Aboriginal Law ties each individual to kin, to 'country' – particular estates of land – and to Dreamings. One is born with the responsibilities and obligations which these inheritances carry.²⁴

The eminent anthropologist, WEH Stanner, essayed that Aboriginal customary law conflicted in almost every respect with the root assumptions of Australian law. In his view, the two were irreconcilable in notions of tort and crime, and procedures of arrest and trial, in concepts of admissible evidence as well as in other respects.²⁵ Much has happened since Stanner wrote, in particular the land rights movement and the detailed pictures this has presented of Aboriginal society. In any event, I take him to be saying not that this apparent irreconcilability meant that there was no such thing as Aboriginal law but rather that the approach taken by legal writers led inevitably to such a conclusion.

Just what is meant by Aboriginal law depends on a more detailed consideration of certain aspects of Aboriginal society. That is something I shall pursue later in this paper. Of the existence of that law there can be no doubt. One of the most powerful affirmations by someone not Aboriginal was made by Blackburn J in *Milirrpum v Nabalco Pty Ltd.*, when he said of the Yolgnu of north-eastern Arnhem Land:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influences. If ever a system could be called 'a government of laws and not of men', it is that shown in the evidence before me.²⁶

The source of Aboriginal law: the Dreaming

Anyone who inquires into the existence or content of Aboriginal law inevitably, and fairly quickly, encounters the Dreaming or the Dreamtime. (Or it may be the Tjukurrpa though I am not to be taken as suggesting that the one is necessarily synonymous with the others.) I am not sure that Aboriginal people have been well served by these expressions, notwithstanding their attractiveness. They tend to colour our understanding of Aboriginal law as having not only a mythical quality but, more importantly, as being unlikely to have a serious practical operation.

In *The World of the First Australians*, the Berndts speak of the formative or creative period 'when the foundations of human life were established once and for all'.²⁷ They instance various terms used in different areas throughout the continent and conclude: 'All these have been variously translated as "creative period", "ancestral times", "Dreaming", "Dreamtime", "Eternal Dreamtime", and so on'.²⁸ As the Berndts point out, Dreaming is a rather unfortunate choice because it fails to carry the idea that the foundations have continued as integral to Aboriginal society. Dreaming, they say, is a direct translation of one of the relevant native words, hence its use. That is not to say that Aboriginal people fail to distinguish between ordinary dreams and the time perspective which Dreaming conveys.

Professor Nancy Williams has discussed the significance of 'Dreaming', in particular two possible explanations for the use of the term. One explanation is that because Aborigines spoke of times 'so distant that no human link could be shown', English speakers used the term in order to highlight the lack of any connection with reality 'except as distorted and dismembered reflection, sometimes even embarrassing and more to be suppressed than explicitly related to a reality with moral order'. Anthropologists kept the term but meliorated its meaning. The other explanation lies in the translation of Aboriginal languages, particularly Elkin's view:

The concept 'dreamtime' arose out of Spencer and Gillen's use of the Aranda word Alcheringa (*Altjiranga*) in their classic *The Native Tribes of Central Australia* (1899) to denote the mythic times of the ancestors of the totemic groups.²⁹

Professor Williams explores the 'language explanation' at some length. It is unnecessary for me to do so.³⁰

In discussing the Mardu people of the Western Desert, Professor Tonkinson has said:

The profoundly spiritual worldview of the Aborigines rests on a complex set of beliefs and behaviours commonly referred to as the Dreaming, or Dreamtime, which is typically described as the period of creation... At one level of

24. Australian Government *Royal Commission into Aboriginal Deaths in Custody National Report* (Canberra, 1991) Vol 5, Appendix D(i) ¶ 2.3.1.

25. Stanner WEH, *White Man Got No Dreaming: Essays 1938-1973* (Canberra: ANU Press, 1979) 93.

26. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267.

27. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal Traditional Life: Past & Present* (Canberra: Aboriginal Studies Press, 1996) 229.

28. *Ibid.*

29. Elkin AP, *The Australian Aborigines: How to understand them* 4th edn (Sydney: Angus & Robertson, 1964) 210.

30. Williams NM, *The Yolngu and Their Land* (Canberra: Australian Institute of Aboriginal Studies, 1986) Appendix 1, 234–37.

meaning this is an indistinct era in the distant past, a time long, long ago ... when the continent was transformed from an empty and featureless plain by the activities of a great number of ancestral beings.³¹

The Dreaming beings were human-like but could assume animal form at will. As they moved through the country they created distinctive forms such as a creek bed, brought into existence by the movement of an ancestral snake, or a gap between hills opened by a blow from the stone axe of a fighting lizard man. Ultimately, these beings 'disappeared or metamorphosed into stones or other natural features or into celestial bodies'. But their spiritual essence remains. The Mardu see their entire culture as the legacy of the Dreaming epoch, a legacy which

is now connoted in the use of the English word 'law', the coining of which suggests that they see parallels in terms of obedience to a set of powerful dictates and of punishment for non 'conformity since, in both systems, human agents are involved in the punishment process.³²

The denial by the Mardu of human creativity in favour of the world – creative acts of spiritual powers means that the kinship system, marriage rules and social categories are treated as part of the master plan bequeathed by the creative beings of the Dreaming and also as imperatives, because the law demands conformity to them. The imperatives embodied in the Dreaming are the Law which locates the origin and ultimate control of power outside human society, that is from the spiritual realm. The creative beings demand conformity to the Law in a proper performance of ritual, in return for which they will ensure the reproduction of earthly society through a continuing release of life-giving power into the physical and human world.³³

The Ngarinyin people form the largest of the three Wandjina tribes of the North West Kimberley Region. Their country lies north and west of the Gibb River Road. Hannah Rachel Bell, who worked closely with the lawman David Mowaljarlai (now deceased) over many years, has written:

Ngarinyin Law is not man-made. Rather, it is constantly evident in the dual essence of the natural world. Ngarinyin Law is the Law of the sacred revealed in the daily life of ancestral beings who are present in the landscape, in nature, and in art forms. These beings cannot be ignored, their stories cannot be forgotten, and the Law that they generate cannot be changed. To do so would be to profane the sacred.³⁴

Father Kevin McKelson was at La Grange (Bidyadanga) for 30 years or more. He has written:

When asked by me for the Aboriginal word for law, my Aboriginal friends would invariably translate it as *pukarrikarra*, *jukurrpa*, *jumangkarni*, *mangarrikarra* or *manguny-ja* according to the language each one spoke.³⁵

Pukarri, he says, means dream and, with *karra* added to it, means dreams or a state in which there are many dreams. The composite is the word for Dreamtime in *Yawuru*, referring to a very long period of time,

during which events happened which shaped the history of the people locking them into a certain view of the world and to a definite pattern of behaviour.

Manguny means always and, with the suffix *ja*, formed *mangunja* meaning 'always from', implying a tradition which is unchanging.³⁶

The picture presented then is one of ancestral beings who shaped the physical world in a way that brought into existence the laws of nature and the laws that regulated social behaviour. No sharp distinction was made between the two.

It is the work of men, especially in the great ceremonies, to 'follow up' the Dreaming; that is, to maintain the universe by means of 'rites of passage' for the living and the dead to provide for the fecundity of natural species, etc. Any infraction of the law is believed to invite danger and will be punished by human or supernatural agency or both.³⁷

Although an understanding of Aboriginal law inevitably leads into particular areas of conduct and the consequences that follow, that is part of the creative acts of the ancestral beings. Father Worms, speaking of one such being, writes:

31. Tonkinson R, *The Mardu Aborigines*, 2nd edn (Sydney: Holt Rinehart & Winston, 1991) 20–22.

32. Ibid.

33. Ibid, 106.

34. Bell HR, *Men's Business, Women's Business: The spiritual role of gender in the world's oldest culture* (Rochester: Vermont: Inner Traditions, 1998) 135.

35. McKelson K, *Japulu Kankarra: The Father in Heaven* (Sydney: Nelen Yubu, 1995–1996) 22.

36. Ibid.

37. Maddock S, 'Can There Be a Sovereignty of Law?' in Wright B, Fry G & Petchovsky L (eds) *Contemporary Issues in Aboriginal Studies: Nepean College of Advanced Education Proceedings of the First Conference on Aboriginal Studies* (Sydney: Firebird Press, 1986) 110.

Ancient cave paintings in Western Australia represent *Bundjil* accompanied by a dingo named *Wirangen*. When he was living on earth *Bundjil* fashioned its surface in a way that gave it its present appearance: the earth itself is eternal. Moreover he institutionalised the 'Law', that is to say the order of the world which is eternally operative.³⁸

Because the law is not of human origin, the people cannot change it. And if it is not obeyed there will be a return to the state of lawlessness that existed before the work of the mythical ancestors.

It should not be assumed that the activities of the mythical ancestors presented a model for human behaviour:

The *Djanggal* Brother and Sisters commit incest. *Jurawadbad* kills his own wife and mother-in-law. *Bomaboma* the trickster rapes a young girl, killing her in the process. Ancestral men steal, from women, the first sacred objects. *Njirana* spends most of his time following the Seven Sisters, the *Gunggaranggara* women. The two wives of *Balangudjalngudjalng* the white cockatoo are unfaithful; pretending to go out hunting, they spend all their time playing with other men until finally he tricks them into entering into an inaccessible cave, high in the rocks, then pulls away the tree-ladder and leaves them to die. And so on.³⁹

The co-existence of a cosmic creative force, personified in some way and with very human failings, is of course well known. Ancient Greece is as good an example as any.⁴⁰ But as L. R. Hiatt has observed:

behind the articulated trivialities and obscenities of [Aboriginal] myths lies a mute striving, most clearly evident in their sacred rites, to express the idea of an exalted and transcendent Power, a Father, Mother and Maker.⁴¹

Whatever the frailties of the mythical ancestors, their power to lay down precepts of behaviour for those who come after them cannot be questioned.

Anyone seeking to understand Aboriginal law is conscious of the many communities throughout Australia and of differences between them. This might be thought to be a barrier to making generalisations. Certainly it imposes a level of caution. Nevertheless, more than one commentator has remarked in one form or another on 'the remarkable homogeneity of social and religious life throughout the continent'.⁴²

Sheila Maddock suggests that normally we would associate systematic coherence on such a scale with an efficient political organisation but that is not the case with Aboriginal society. Some would say that 'primitive' people have a simple culture and that what is simple is much the same everywhere. However, Aboriginal religious and social life is extremely complex and elaborate. 'The kinship and social class systems of Australia are among the most complicated in the world'.⁴³ Many of the institutions of Aboriginal society actually provide for a systematic interaction of people over a wide area, principally through the kinship system. The system of moieties is so elaborate that everyone an Aborigine comes into contact with, who is another Aborigine, is likely to be related to that person.⁴⁴ This relationship determines how they will act in relation to each other.

And people are linked by the journeys of the mythical ancestors who travelled great distances. The Berndts have observed:

If the situation we find in such places as the Great Victoria and Western Desert, through the mountainous core of Central Australia and up the Canning Stock Route to the eastern Kimberleys, in the Victoria River areas and across the Northern Territory to Arnhem Land is any guide, hundreds of such tracks or roads criss-crossed one another right through the Continent, representing, at least potentially, a net-work of intercommunication.⁴⁵

The Wadi Gudjara, the Berndts have noted:

wandered across almost the whole Great Victoria and Western Desert, passing through dozens of local group territories and covering possibly twenty-five to thirty dialect or language units.⁴⁶

38. Worms EA, *Australian Aboriginal Religions* (Kensington: Nelen Yuby Missiological Unit, 1986) 108.

39. Berndt & Berndt, above n 27, 337.

40. Homer's *The Iliad* attributes to the gods and goddesses on Mount Olympus some very unattractive qualities.

41. Hiatt LR, *Arguments about Aborigines* (Cambridge: Cambridge University Press, 1996) 104.

42. Maddock S, above n 37, 109.

43. Ibid.

44. 'Moiety': a system of tribal classification into two divisions or moieties. They are generally exogamous, that is, a person must marry into the opposite moiety. The division is relevant for social and ceremonial purposes.

45. Berndt & Berndt, above n 27, 243.

46. Ibid.

A group of mythical beings, the *dingari*, moved over the whole Western Desert. The story of the Two Men, of which people speak in Broome, tells of their journey from places in the south such as Jigalong, linking people over a great area of the North West of Western Australia.

People at Borraloola speak of the Dreaming that came to them from Queensland and continued south to the Roper River and beyond. In western Arnhem Land, among the *Gunwinggu*, a major myth concerns an ancestral woman who came from over the sea in the direction of Indonesia. In some accounts, she disappeared in the direction of Yirrkala. In eastern Arnhem Land the journeys often relate to the Two Sisters who arrived from an island far to the east, the land of the dead some say. As they moved inland they changed shape, one of the transformations being into the Wagilag Sisters whose story is recounted later in this paper.

I have a bark painting by Laklak Ganambarr whose homeland is Rorruwuy in north-east Arnhem Land. The painting relates to the Dhuwa moiety and the arrival by canoe of two sisters from an island far to the east. The two women, known as *Djan'kawu*, are referred to as "the two who created the world". The artwork information continues:

After arriving at Yalanbara in Rirratjinu clan country they commenced to journey across all Dhuwa land and as they went they sang their special ceremonial song language and created the minutiae of the environment up to the shape of the land itself. As they travelled through the land they plunged their *mawalan* (sacred digging sticks) into the ground to create sacred fresh water or *milnurr*. They gave birth to the first members of each *Dhuwa* clan and gave these new people their distinctive clan dialects or languages.

These accounts of the Dreamtime ancestors have their counterparts throughout Australia and in some cases, the Two Sisters for instance, there is a striking similarity over long distances. And what the accounts bring home is that the process of creation was not only of the physical landscape but of language, law and social behaviour.

The *Wandjina* of the Kimberley region, which are associated with the *Ngarinyin* and with the *Wanumbal* and the *Worora* (also spelled *Worrora*), occupy a somewhat unusual position in the creation story. They are more localised than some of the mythical beings just mentioned. And their image is to be found still in rock shelters of the country of the three tribal groups. People speak of them as the source of law and their image is a recurring theme of the senior painters of the region. At the same time there are other mythical ancestors such as the *Wunggud*, whose waters were created by the Snake, which play their part in the creation.

Whatever the origin of the term 'Dreaming', it has gained wide currency throughout Australia, even among Aborigines. Strike up a conversation about the law and where it comes from and the answer will usually involve a reference to the term. However, the Yolgnu of north-eastern Arnhem Land tend to resist that terminology because it suggests a lack of reality in their law. Some will use it when speaking with *balanda*, that is non-Aborigines, because *balanda* themselves use it. And that is no doubt how the terminology has taken on the currency that it has.

It has been said that *madayin* is the name for the complete system of law of the Yolgnu, a term embracing the law itself, the instruments and objects that encode and symbolise the law, together with oral teaching, names, song cycles and sacred places.⁴⁷ Inevitably there are difficulties of language and translation in seeking to come to grips with conceptual matters. I note that Professor Williams gives *madayin* a more restricted meaning, implying something of greatest value, often signifying something sacred.⁴⁸ Whatever the reconciliation, if there be one or needs to be one, we should be careful of using English expressions such as Dreaming or Dreamtime as if somehow they offered a ready explanation for a complex aspect of Aboriginal society.

In particular, there is nothing unreal or dream-like about the law which the phenomena brought into existence nor is there anything transient about that law in its application to a group or to an individual.⁴⁹

Origin of the law

I have asked many Aboriginal people where their law comes from. The answer is generally in terms of their mythical ancestors. But a more direct retort came from Lucy Marshall, a Nigina lady living in Derby: 'Why do you ask where our law comes from? Where does your law come from?' An answer in terms of parliament and the courts hardly serves

47. Aboriginal Resource and Development Services Inc. *Information Paper No. 7 – The Madayin* (Darwin: ARDS Inc, 1996) 1. ARDS is an organisation based in Yirrkala, north east Arnhem Land. Its executive officer is Rev Dr Djiniyini Gondarra, OAM, a Yolgnu and a member of the Uniting Church with a deep knowledge of Yolgnu law and a concern for its recognition by Australian law.

48. Williams, above n 30, 29, 45-46, 65, 86, 243.

49. Charlesworth, above n 6, 72-73.

to explain the authority of Australian law or the historical tradition which underpins it. The responses of Aboriginal people must be seen in the same light, illuminating but not necessarily comprehensive.

There are many stories of how the law came to be made known to Aboriginal people. One is told by David Mowaljarlai:

During Wodoi and Djingun time there was a man called *Wibalma* who made sacred things. He kept them in a workshop, at a distance from where he lived. He had a wife who was old and blind.

One day, when he was out hunting, Wodoi and Djingun came to visit him. They came up and asked the old woman. "Where is Wibalma?" And she said, "Out hunting. He'll be back soon."

So the two men went over to the workplace and took a whole lot of things away with them.

Wibalma was a banman – he got a feeling out there in the bush, where he was hunting. He came straight back. [Medicine men have an extended psychic perception.] He said, "What happened here?"

His wife said, "Two men came here, Wodoi and Djingun. I heard them rattling there, but I am too blind to see what was going on. It was silent after that. They never came back to me, they went off."

He got really angry then. He took a boomerang. He got so angry he threw that boomerang and it split an ironwood tree, which we call *djinnang gang*.

He split this tree in half with his boomerang. But then he said, "Ah, never mind I'll make a new Law from this tree that was split" And he made a new Law.

Wodoi and Djingun came to the community, where they were stopping. They said, "We have a Law. We stole it from this man."

The next day Wibalma followed their track. Where they walked on stone, he could see their track; but where they walked on the plain ground, he could not see their track. He had to go to the rocky places and find their tracks there.

This is how the Law came to be. The sand ground, where he did not see their tracks, represents the space of time since Creation and the introduction of the Law.

Then he came up to where they were and the Council got them all together. They apologised to him, these two, Wodoi and Djingun: "Very sorry, but we got law now. We had to get this thing, a covenant to put agreement on, to make Wunnan a law. That is why we took it away."

Maggan, Wodoi and Djingun said. *Maggan* means 'no got'.

They didn't have anything to relate to in life. So Wibalma said, "All right, I won't be angry now. I was angry in the first place, but I split another tree with the boomerang to make a new one."⁵⁰

The story, as recounted to Dr Dickey and Hannah Rachel Bell, takes events rather further. When the three men met up, Wibalma (Ngyarri in the Dickey account) accepted the idea of sharing the law and let the others keep the sacred objects they had taken. In this way the law started.

In Part Two of his article, Dr Dickey discusses the relationship between the law and the sacred boards of the Worora. He makes the point that

the boards in question have never had any inscription, writing or, hieroglyph on them which has objectively symbolized any facts or information; the pre-contact Aboriginal tribes were pre-literate and the Worora were no exception.⁵¹

That does not mean that the markings are not distinctive and do not carry a message to the Worora. Not surprisingly, Aborigines steeped in their own law make comparisons that may help others to understand that law and the society in which it operates. To this end some informants used expressions such as 'like the Bible' and 'like the Ten Commandments' when explaining the boards. Comparisons like these and others I will mention in other contexts help to understand the significance of what is being told. They should not obscure the search for what is the true understanding of Aboriginal people.

After considering the relationship between the sacred boards and the law in the myths, Dr Dickey concludes that regardless of the precise relationship,

it is clear that the tribal law of the Worora was not deemed to be 'God given' as was the law of most Aboriginal tribes.⁵²

50. Mowaljarlai D & Malnic J, *Yorro Yorro: Spirit of the Kimberley* (Broome, WA: Magabala Books, 1993) 150–52. (The story also appears in Dickey, above n 13, 363–364; and in Bell, above n 34, 142–43.)

51. Dickey, above n 13, 480.

52. *Ib.*, 484.

The reference to 'the law of most Aboriginal Tribes', it would appear, is to the statement by Professor R. M. Berndt:

The 'law' to [Aborigines] is 'God given', including all things associated with the Dreaming era.⁵³

One might fairly ask whether in truth there is any irreconcilability here. Once again, we are in the realm of language, this time English as much as Aboriginal. It would be necessary to look more closely at what Professor Berndt meant by 'God given'. Clearly, he was using it in the broad sense of embracing all things connoted by the Dreaming. Does this not include the activities of the mythical ancestors, including those sacred objects which in some way encoded the law? Over the years boards have been damaged or destroyed but the replacements are treated as conveying the original messages. To stray into analogy, the replacements are not statutory amendments.

The narrative of the two Wagilag Sisters has been described as 'a Creation Story with wide significance for the Dhuwa moiety among the Yolngu of Central and Eastern Arnhem Land'.⁵⁴ It has also been described as a narrative

that relates the encounter between human and animal ancestors, who in the process create and make sense of their world and its creative forces. It provides the basis the key aspects of the Yolngu social life and its rituals, as expressed in ceremony and song, as well as in the laws relating to authority, kinship, territory and, significantly, marriage.⁵⁵

There is more than one version of the story but in each case its significance is much the same. The story of the Wagilag Sisters is commonly associated with Witiŋj, the Olive python. It relates how the two sisters, the older of whom has a child and the younger of whom is pregnant, leave their home in the south-east. They are followed by clansmen and reach Ngilipidji or the Stone Country of the Wagilag clan, from where they get their name. They camp at Mirarrmina. Their actions incite the python, in some accounts because one of the sisters pollutes the waterhole and the younger sister gives birth. Witiŋj, the Python, creates a flood as the first monsoon pours down its rain. The sisters dance and sing to deter Witiŋj but eventually he enters their hut and swallows them and their children. As a consequence Witiŋj develops a terrible stomach ache, the pain of which becomes so great he falls to earth and vomits the sisters, though not the children who belong to the opposite moiety, the Yirritja. There is more to the story than that but essentially it serves to explain how the women, through their irregular behaviour precipitated the laws relating to marriage and social structures and invented ceremonies in response to the threats of Witiŋj. It also explains how the power of Witiŋj summoned the first monsoon and, in the process, created the seasons. The actions of Witiŋj also serve to identify the proper relationship between the moieties. The exhibition that took place in the National Gallery of Australia in 1997 brought together a collection of paintings which depict the story of the Wagilag Sisters in its many facets.

Placing Aboriginal law within the Dreamtime disassociates it from the vagaries of man-made law but at the same time might be thought to diminish its practical operation. In this regard it is interesting to see how the law is viewed by the Yolgnu.⁵⁶ The Yolgnu reject their law as part of the Dreaming because it is inimical to the reality of their law. Their word for 'law' is *rom*, a word which Professor Williams has described as embracing a number of meanings – the religious beliefs expressed in ritual, binding custom and as designating all Yolgnu rules of conduct and customary behaviour in contrast to those of whites.⁵⁷

There is a Yolgnu term *Madayin* which includes but is wider than *rom*. The ARDS paper describes it as including:

all the peoples law (*rom*), the instruments and objects that encode and symbolise the law (*Madayin girri*), oral dictates, names and song cycles and the holy, restricted places (*dhuyu nungat wana*) that are used in the maintenance, education and development of law.⁵⁸

The *Madayin* was not brought into existence by humans; it was there from the creation of the world. The word *nurrngitj* literally means the charcoal or black ashes left over from a fire. The Yolgnu say that their *Madayin* or *rom* comes from the *nurrngitj*, that is, the ancient practice of the people and the established rule of law. There is something of a problem here in that the *Madayin* preceded humankind. Perhaps it is not so much that the *Madayin* comes from the *nurrngitj* as that the *nurrngitj* exemplifies aspects of the system of law. Whatever the correct explanation, if indeed an explanation is called for, the Yolgnu are at pains to emphasise the strength and comprehensiveness of their law.

53. Berndt RM, 'Law and Order in Aboriginal Australia' in RM & CH Berndt (eds) *Aboriginal Man in Australia* (Sydney: Angus & Robertson, 1965) 174.

54. *The Painters of the Wagilag Sisters Story 1937–1997* (Canberra: National Gallery of Australia) 9.

55. Ibid.

56. In what follows, I have relied on Aboriginal Resource and Development Services Inc *Information Paper No 7*, above n 47.

57. Williams NM, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 107–109.

58. ARDS, above n 47, 1.

Critical to our understanding of these concepts which underly Aboriginal law is the rendering into English of the relevant languages. Father McKelson has been quoted as saying, in regard to the Kimberley language groups with which he has become familiar over the years:

They have a distinct law language, just as we do in our legal system, describing behaviour in the Dreamtime, which is the pattern for behaviour today, and if this behaviour pattern is transgressed people are punished.⁵⁹

This comment was made in the context of a general discussion about the importance of language in the preservation of Aboriginal culture. I took the opportunity to ask Father McKelson, when I was speaking with him in Broome, what he meant by 'a distinct law language'. I understood him to be referring in particular to the vocabulary of terms which identify the progress of a young boy to manhood. The words themselves are largely related to ceremonies in the course of which aspects of the law are imparted.⁶⁰ Language is a vital element of any culture and the contemporary significance of Aboriginal law is very much tied to the use of Aboriginal language. A different and not directly related issue is the use of Aboriginal terms to explain to Aborigines proceedings in the courts in which they are involved.⁶¹

Aspects of Aboriginal law

This is not a treatise on Aboriginal law; it is an attempt at understanding the basis of that law. The only satisfactory way to reach that understanding is to see how Aboriginal communities meet situations in which their law, that is their rules of conduct, is transgressed. We cannot observe traditional law in a completely pristine state, that time has passed. In particular, conduct which once would have resulted in death will rarely do so today. This does not mean that the conduct has lost its seriousness. It does mean that the impact of Australian law dictates some other form of punishment. A consequence is that the victim who responds according to Aboriginal law may become an offender in Australian law. And of course the same fate may await those Aborigines whose responsibility is to enforce the law. The situations I later describe are to some extent random and they are to some extent anecdotal, except where they have been recorded in the writings of anthropologists and others. Anecdotal simply means that the situations have been instanced by Aborigines in the course of talking about their law.

The kinship system is critical to an understanding of so much of Aboriginal society, including law. The complexities of the system are discussed in the works of many anthropologists and also in the reports of Aboriginal Land Commissioners made under the *Aboriginal Land Rights (Northern Territory) Act* 1976. There is one relationship which it is important to understand in order to see how traditional law operates. In what is usually referred to as the Top End, the local descent group responsible for an area of land generally comprises *mingirringgi* and *djunggayi*. The *mingirringgi* are those whose descent is traced patronymically. The *djunggayi* for an estate in land are the children of the female members of the patronymic clan. Questions have arisen during the hearing of land claims under the *Land Rights Act* whether *djunggayi* and *mingirringgi*, or *mingirringgi* alone, should be identified as the traditional Aboriginal owners of the land being claimed. It is the *djunggayi* who control ceremonies and it is they who have the ultimate responsibility to ensure that knowledge is maintained for the benefit of the *mingirringgi*.

In desert areas, and again I am generalising, there is a similar relationship. The terms used are *kirda* and *kurdungurlu*, the first equating with *mingirringgi* and the second with *djunggayi*. The *kurdungurlu* are the sons and daughters of the female members of the patriline and they are *kurdungurlu* for the country of the patriline. In the desert they are sometimes referred to as managers; this points up their responsibility for the land and the ceremonies performed on it and the knowledge which goes with it, though they may not answer the description of traditional owners in terms of the *Land Rights Act*. In what follows I shall speak only of the *djunggayi*, intending thereby to refer to the patriline of the mother, by whatever name it is called.

At this point I should say that although the relationship of Aborigines to the land is truly part of Aboriginal law, deriving as it does from the mythical ancestors who formed the environment, I regard this as a topic in its own right. It has been the subject of a great deal of comment – in the writings of anthropologists, in the reports of Aboriginal Land Commissioners and in judicial decisions. The relationship was expressed in elegant terms by Professor Stanner when he wrote:

59. Whittaker M, 'Tongues Tied' *The Australian Magazine* 23-24 January 1999, 21.

60. The words and their significance appear in McKelson K, *Topical Vocabulary in Northern Nyangumarta* (Broome: Aboriginal Studies Dept, Nulungu Catholic College, 1989) 57-58.

61. See Wurm SA, 'Aboriginal Languages and the Law' (1963) 6 *UWAL Rev* 1.

If Aboriginal culture had an architectonic idea I would say that it was a belief that all living people, clan by clan, or lineage by lineage, were linked patrilineally with ancestral beings by inherent and imperishable bonds through territories and totems which were either the handiwork or parts of the continuing being of the ancestors themselves.⁶²

The reference to “patrilineally” should not obscure the significant role of women to which reference is made later in this paper.

Perhaps the most obvious illustration of when traditional law comes into play is when one person dies at the hands of another. It is for the family of the deceased to respond and traditionally that was by killing the offender. It was the *djunggayi* who assumed this responsibility though in some circumstances, if for instance the offender had left the area, it was possible to engage someone from outside the family for the purpose. While in conversation people spoke in terms suggesting strict liability, it is apparent that in some situations such as accidental death a response, or at any rate a commensurate response, was not required. But in those cases where a commensurate response was required, the family of the deceased stood to suffer themselves if they did not act accordingly. If the killing was at the hands of a member of the family of the deceased, the family was still called upon to make a response against the offender. Discussions I had at Borraloola, Katherine, Mataranka, Timber Creek and Yirrkala emphasised that it was for the family of the deceased, through its *djunggayi*, to make the response. The decision was not in the hands of all the ‘elders’ or of the community generally. In north east Arnhem Land the situation is complicated by the *ringitt* or alliance formed by various clans. This gives the *djunggayi* of other clans within the alliance authority as to the appropriate way of dealing with an offender.

But again, the emphasis is on the kin relationship rather than on some broader basis of authority such as a council.

It is one thing to record the importance of kinship in dispute resolution. It is quite another to spell out the complexities of that relationship, for instance the power of discipline a man may have over those whom he calls ‘sister’, a much wider relationship than is contemplated by non-Aborigines. And, as Ronald Berndt has pointed out:

The problem in law, in relation to kinship and its associated range of roles, is not so much how kin are formally supposed to react in a situation of conflict, relevant as this is, but how they actually respond when each person concerned acknowledges ties with *all* the other participants. Choice enters here, and the outcome is not so easily predicted.⁶³

I have used the term ‘family’ because that is the term used by informants. It is both narrower and wider than ‘clan’, narrower because it does not extend back through the patriline but wider because the rule of exogamy ensures that members of more than one clan are involved. Depending on the size of the families of the victim and the offender, the participants may reflect the communities at large. That will not necessarily be the case.

Despite their familiarity with the physical facts of death and bodily decay of all living things, Aboriginal people tend to look for the cause of the death of a human being beyond what is immediately apparent. They do not ignore the obvious when one man spears another. But they look for something beyond the obvious.

Except in regard to the very young or the very old, or from the viewpoint of a person deliberately responsible for the killing, the impression is that any given death is unnatural; that it should not have happened and would not have happened had it not been for some departure from the normal course of events, some active malevolence on the part of another human being.⁶⁴

The inclination is to see a death as due to sorcery. As Kenneth Maddock has pointed out:

sorcery beliefs provide a conceptual framework within which misfortune can be understood personally, not only in the sense of happening to persons but in the sense of being made to happen by persons. This is less a rejection of the evidence of the senses than an attempt to get behind appearances to the real cause of events.⁶⁵

At Borraloola men spoke of a victim being rendered unconscious, the kidney fat removed and replaced with straw and the victim being told that he would die within the next day or so. But this was an explanation, given retrospectively, of the death, not necessarily an account of a sequence of actual events.⁶⁶

62. Stanner WEH, ‘Some aspects of Aboriginal religion’ (1976) 9(1) *Colloquium* 19.

63. Berndt, above n 53, 172. Chapter 7, in which this quotation appears, contains illustrations of the place of kinship in the resolution of disputes.

64. Berndt, & Berndt above n 27, 458.

65. Maddock K, *The Australian Aborigines, A Portrait of their Society* (London: Allan Lane, Penguin Press, 1972) 162.

66. The removal of kidney fat as a form of sorcery is mentioned in RM & CH Berndt, above n 27, 326- 327. See also AP Elkin *Aboriginal Men of High Degree* (Sydney: Australasian Publishing, 1946) 60-62.

The identity of the immediate killer may of course be well known; the killing may have taken place in front of witnesses. If it is not known, there will be an 'investigation' or 'inquest' by the appropriate person or persons. There may be footprints; there may be a clue in the direction in which the head of the deceased falls while being carried to burial or in the direction in which bodily fluids leave a corpse. In north east Arnhem Land I was told that pins (wood or bone once, steel now) may be inserted into the knees of a deceased as an aid to identifying the offender.⁶⁷

Retaliation may take several forms. The offender may be killed, probably covertly, and perhaps employing sorcery to bring about the death. The victim's family may in a formal way confront the offender's family and demand satisfaction. That satisfaction may be offered and accepted through compensation or through payback, a practice which is discussed later in this paper.

The kinship system also dictates the proper relationship for marriage and clearly distinguishes between straight marriages and wrong marriages. Once, the person who entered into a wrong marriage would be punished by the family. Although Aboriginal people still uphold the idea of straight marriages, they acknowledge that many young people enter into wrong marriages. No longer, it would seem, is this a transgression which is punished. More likely, an appropriate ceremony will 'straighten things out' by placing any children within the mother's skin and thereby maintaining a proper kinship. Nevertheless accepted relationships are disturbed because, for ceremonial purposes, the children may have to follow, not their natural father but those whom their mother might have married straight.

Much the same can be said about the system of promised marriages. The young girl who is promised in marriage to a man from another clan may marry the man of her choice if he undertakes to make certain payments or perform certain services for the man to whom the girl was promised. Again, people assert that this would not have been permitted years ago but it has come to be accepted as a way of meeting changed conditions.

Diane Bell recounts a conversation with an Aboriginal woman at Warrabri (now Ali Curung) regarding the apparent breakdown in the marriage code among girls living in a town camp. 'Does this mean', she asked, 'that the Law is breaking down?' 'No', was the reply, 'people just get lazy. The Law is still there'. Bell comments: 'Of course in time the Law becomes, within limits, what people do, but there is the notion that it is there as the framework'.⁶⁸

The idea of Aboriginal law as a framework within which changes may occur is not one that all Aborigines would accept. Yet they are faced with the undoubted fact that in some respects the operation of their law has changed, albeit under the pressure of non-Aboriginal law and society. And it is not an adequate explanation simply to say that the law has not changed but in some respects is not enforced. What I think people would say, justifiably, is that they do not consciously and deliberately make changes. In that respect Aboriginal law stands in sharp contrast to Australian law even though the development of judge made law is incremental. The Report of the Parliamentary Inquiry into the Reeves Report quotes an important statement by Billy Bunter made at Kalkarindji:

Aboriginal people do not change the law. We would never ever change the law until the world ends. Every Aboriginal person in the Northern Territory, whatever tribe they are, we do not change the law. Interpretation is made by lingo. But law and order, Dreaming—the things we do—are the same in the Territory or in Australia.⁶⁹

The interpretation of the Australian Constitution and of statutes is a well recognised function of the courts. Where interpretation ends is a constant source of debate. I would not press the analogy too far, particularly as the transcript of the evidence of Billy Bunter shows that he was not asked to elaborate. But he does seem to be drawing a distinction between interpretation of the existing law on which views may change and a deliberate alteration to the law itself.

Women and the law

I have given this topic a separate heading with some reluctance. It seems to perpetuate the notion to be found in the writings of some anthropologists (male) that 'women's business' is an offshoot of Aboriginal law, rather than an integral part of it. But it is precisely for that reason, for the purpose of restoring the balance and countering the inadequate role often assigned to women in the discussion of Aboriginal law, that I have thought a separate heading worthwhile.

67. See generally Maddock, above n 63, Ch 7.

68. Bell D, *Daughters of the Dreaming* (Melbourne: McPhee Gribble, 1983) 92. See generally RM Berndt 'Tribal Marriage in a Changing Social Order' (1960-1962) 8 *UWAL Rev* 326.

69. Australian Government, *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (Canberra: AGPS, 1999) 36.

The reason for the imbalance is, I suppose, apparent. Most of the early anthropologists and others who wrote about Aboriginal society were men. Inevitably, their information came from male Aborigines. Although I have taken (and made) opportunities to speak with Aboriginal women about the law, I am conscious of the limitations there are in seeking and receiving information. Fortunately there are a number of contemporary female anthropologists who, in their writings, have given focus to the place of law in the lives of Aboriginal women.⁷⁰

The dichotomy of men's business/women's business is a basic feature of Aboriginal society. True, the circumstances in which the ritual life of each sex is closed to the other does vary. Thus Tiwi men and women are initiated at the same ceremony. But this is not the norm. In the communities with which I am familiar there are some ceremonies which both sexes may witness. But at some point the performance of ritual inevitably involves segregation and it is dangerous to ignore the secret nature of what then takes place. Nevertheless, the dichotomy should not obscure the fact that for both the law has its origin in the Dreamtime. Nor should it fail to take into account the complementary role each sex performs in relation to the law. The knowledge that the Dreamtime imparts is, in each case, to be found in the sacred boards, the songs and the paint designs. Professor Bell has observed:

Men stress their creative power, women their role as nurturers, but each is united in their common purposes – the maintenance of their society in accordance with the Dreamtime Law.⁷¹

Men and women both trace their descent from the Dreamtime, though through two distinct lines of descent. From one's father and father's father come the rights and responsibilities of *kirda* (or *mingirringgi*). Through one's mother and mother's father come those of *kurdungurlu* (or *djunggayi*). I have spoken of these relationships earlier in the paper; what is to be emphasised here is the complementarity of the two roles.

Notwithstanding the closed nature of certain rituals, Bell has suggested that women may know more of men's rituals than is commonly thought and that the converse is true. Certainly that confirms my own experience, at any rate in speaking with Aboriginal women. They learn from their husbands much of the men's ceremonial life. And some fathers impart information to their daughters as they mature, information that would not ordinarily be available to them. Also there is an interdependence of the sexes that is not always recognised. In some communities women may be present at each stage of the boys' initiation though they cover their faces when the actual circumcision is performed. A father may paint his daughter for the purpose of a woman's ceremony.

Naturally women's ceremonies focus on the stories which have particular significance for women. They provide an opportunity for instruction about sex and marriage, birthing rituals, rules to be observed in the preparation of food and its availability, or non-availability, at certain times of a woman's menstrual cycle and pregnancy. Instruction may also involve disciplining those who are learning where there is a failure to observe the precepts being taught.

For the most part the stories to which women's ceremonies relate are about ancestral women, as the men's are about ancestral men.

Dreamings travelled; they were sometimes in human form, and sometimes in animal or other form. But whatever the form, they were almost inevitably either male or female. Dreaming men and women sometimes walked separately and thus created gendered places. There are now women's places and men's places: places which are associated with one or the other because Dreaming made it that way.⁷²

Although I have spoken of the relationship of Aborigines to the land as 'a topic in its own right', I have also said that it is truly part of Aboriginal law. The role of women in that law would not be fully understood unless something was said about their rights in and responsibilities for land, its dreamings and sites. The hearings of land claims are replete with evidence to this end. In relation to the Cox River Land Claim in 1982, Professor Bell has written:

In July 1981 I was able to record and participate in a *jarada*, a closed women's ceremony held at Nutwood Downs (in the Roper River area) which women from far-flung communities attended. In song and dance, in gesture and design, the assembled women celebrated the travels of the *Munga Munga* ancestral women who pioneered the country from Tennant Creek to Arnhemland. They scattered across the Barkly Tablelands; they travelled from Macarthur River and from the junction of the Wilton and Roper Rivers to a site on Hodgson River and thence to

70. Diane Bell, Catherine Berndt, Jane Goodall, Annette Hamilton, Nancy Munn, Marie Reay, Deborah Bird Rose & Nancy Williams are the best known: the list is lexicographical and does not purport to indicate the degree of importance each has attached to the law in what she has written.

71. Bell D, *Daughters of the Dreaming* (Melbourne: McPhee Gribble, 1983) 182-183.

72. Rose DB, *Nourishing Terrains, Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996) 36.

Nutwood Downs, where their tracks divide, one following the “road” to Alice Springs, the other to a site on Brunette Downs. The *Munga Munga* assumed different forms, met with, crossed over, absorbed and transformed the essence of other ancestors; their influence infused country with the spiritual essence of women ... Within the context of this overarching responsibility for the Dreaming, women also stated their responsibility for particular tracts of land.⁷³

Enforcement of the law

The existence of law is generally regarded as dependent upon some procedures for enforcement. To search in Aboriginal society for procedures equivalent to those in Australian law is unnecessary and generally unfruitful. What is important is to identify those sanctions that do exist and the mechanisms by which disputes are resolved.

When Aboriginal society is mentioned, the term ‘elders’ is frequently used, though not so much by anthropologists. The term conjures up an image of old men who in some sort of collegiate way control a particular community and are the means by which the law is enforced. This is far too simplistic a picture and is likely to be highly misleading.

Elizabeth Eggleston has noted a disagreement among anthropologists as to the way disputes were settled in traditional Aboriginal society.⁷⁴ She mentions Berndt and Elkin as considering that there were definite legal institutions, composed of the elders, and accepted procedures by which they settled disputes. Other anthropologists such as Hiatt and Meggitt do not accept that there were elders who exercised authority over an entire group. Rather, they see the procedures as more flexible and authority as dependent largely on considerations of kinship status. They are not denying that behaviour is governed by rules in each situation. Those rules determine kinship responsibilities and expected behaviour.

Hiatt reached the same conclusions about the Gidjngali at the Blyth River in Northern Arnhem Land as Meggitt reached in regard to the Walbiri of Central Australia, conclusions which Hiatt summed up as follows:

Old men had considerable prestige, especially in matters of religion, but they did not stand out as general leaders, nor did they constitute a formal body exercising power over others. Particular men organised circumcision ceremonies and revenge expeditions, but their special roles depended on genealogical connections with the key individuals on each occasion, such as the novice or the victim, and not on age... Men of high ritual status played no special part in settling disputes; they were not even exempt from attacks by a person who felt he had a legitimate grievance.⁷⁵

Kenneth Maddock has noted the views of Strehlow who spoke of a head man of the local clan or ‘ceremonial chief’ who had the power of enforcement though ‘his actions had to have the approval, or at least the consent, of the other fully trained elders’.⁷⁶ Professor RM and Dr CH Berndt observed that formal gatherings in the nature of law courts do not exist in Aboriginal Australia but that councils of elders or men of importance or leaders seem to have been, traditionally, fairly common. But, they suggested, these councils were very informal and did not handle all types of disputes.⁷⁷ Maddock has suggested that the differences between these anthropologists are ‘more apparent than real’.⁷⁸

LR Hiatt has discussed the existence and role of the ‘headman’ whose importance was noted by early writers such as AW Howitt and Spencer and Gillen. On the other hand, Radcliffe-Brown who had carried out fieldwork in Western Australia, denied the existence of a tribal chief or any form of tribal government. A similar view was expressed by L Sharp, in respect of fieldwork in Queensland. Hiatt’s own fieldwork confirmed Meggitt’s findings, namely, that though some men were prominent by reason of their hunting or other skills:

No one emerged as a paramount leader or universal organizer for the simple reason that individual citizens performed their kinship duties religiously and guarded their kinship prerogatives jealously.⁷⁹

This area of debate is by no means academic. If the elders exercise authority over the group, it may be easier to set in place some sort of tribal court. In Western Australia between 1936 and 1954 there was legislation providing for the

73. Bell D, *Aboriginal Women and the Religious Experience – the Young Australian Scholar Lecture Series: Number 3* (South Australia: SA College of Advanced Education, 1982) 12).

74. Eggleston, above n 15, 280.

75. Hiatt LR, *Kinship and Conflict* (Canberra: ANU, 1965) 145-146.

76. Maddock K, ‘Aboriginal customary law’ in P Hanks & B Keon-Cohen (eds) *Aborigines and the Law* (Sydney: George Allen & Unwin, 1984) 212 at 227.

77. Berndt & Berndt, above n 27, 348-349.

78. Maddock, above n 76, 229.

79. Hiatt, above n 41, 91.

establishment of Courts of Native Affairs.⁸⁰ Each court was constituted by a special magistrate and a protector nominated by the Commissioner of Native Affairs. The legislation required the court 'if practicable' to 'call to its assistance a headman of the tribe to which the accused person belongs'. It empowered the court to take tribal custom into account in mitigation of punishment. It is important to stress that these courts were in fact constituted by a magistrate. The arguments for and against the constitution of such courts is not directly a concern of this paper but they point up the importance of understanding just where authority does reside in Aboriginal society. Equally, the practice in some magistrates' courts of seeking advice on penalty from an 'elder', usually chosen because of their command of English, does not always take into account the importance of kinship and the implications it may have. It may be quite inappropriate for someone to sit in court, formally or informally, where there is a particular kinship relation between that person and the defendant. An appreciation of these issues must throw a great deal of light on the character of Aboriginal law and its relevance to the matter before the court.

Important as these issues are, their resolution is not easy. Anthropologists have written a great deal on these matters, usually by reference to the particular tribal group with which they are most familiar. Without seeking to minimise the differences that exist, there is a recognised 'Aboriginal commonality' which allows some generalisations to be made.⁸¹ My own experience, based not only on what I have read but on speaking with Aboriginal people in many communities, makes it clear that the enforcement of transgressions relies very heavily on the kinship system and the relationship between the offender and victim. In some cases, there may not be a particular victim, it may be the community at large that is offended. This happens, for instance, when words that form part of a secret ceremony are uttered in public or when sacred objects are shown to someone who has no right to see them.

The disclosure of sacred objects to someone not entitled to see them or the use of words associated with ceremonies of particular importance was (and still is) regarded very seriously by Aboriginal communities. Indeed, 'hard law', as some Aboriginal people describe it, inevitably demanded the death penalty. Over 20 years ago I appeared, together with other counsel, in a murder trial in Kalgoorlie where some six Aborigines were charged with wilful murder. The killing by spears took place in a camp east of Kalgoorlie when a drunken man wandered into the camp and began to shout words of a secret nature in the presence of women and uninitiated boys. Urged not to do so, he refused and continued shouting until, in outrage, the men picked up spears and threw them at him. One spear penetrated the femoral artery as a result of which he died. As it happened, the trial judge accepted a no-case submission at the end of the Crown case and the accused were discharged. The reason was of a somewhat technical nature which has nothing to do with the subject of this paper. But the incident illustrates how seriously people still take this sort of conduct.

As mentioned earlier, remedying a wrong is very much a matter for the family of the person who has been wronged. Where the wrong occurs within the family itself, for instance when one brother kills another, it is for the family to see that the wrong is put right. This does not mean that the appropriate response lies within the discretion of the wronged family. The appropriate response or at any rate the appropriate options are well understood and must be followed. Indeed, failure to follow them can put the wronged family in the position of a wrongdoer and therefore itself subject to punishment.

In this regard one feature of Aboriginal society should not be overlooked. It is that the complexities of the kinship system will often mean that in a small community the appropriate persons to enforce the law may look very much like a council of elders. In a larger community this may not be so. As a further variation on the theme, the clan system of the Yolgnu of North Eastern Arnhem Land operates so that the appropriate course of action to be followed upon a transgression of the law may involve representatives from a number of clans.

Of course there is now a council to be found in most Aboriginal communities. But this is a consequence of government funded and the requirement of incorporation in order to receive money and to account for it.⁸² Those who comprise such councils are generally not chosen because of their deep knowledge of traditional matters. Rather they are more likely to be chosen by the community because they are younger, articulate in the English language, and have the ability to deal with the service providers and with the complexities of maintaining those services. The importance which those councils inevitably assume may at times overshadow the standing of those who would ordinarily be regarded as the 'elders'.

80. *Aborigines Act Amendment Act 1936* (WA) inserting s 59D in the *Native Administration Act 1905* (WA). The section was repealed by the *Native Welfare Act 1954* (WA). See generally Eggleston above n 15, 284-287.

81. Sansom B, 'The Aboriginal Commonality' in Berndt RM, (ed) *Aboriginal Sites, Rights and Resource Development* (Perth: Uni of WA Press, 1982) 117.

82. And more recently because of the operation of the *Native Title Act 1993* (Cth).

Payback

The practice of 'payback' is often misunderstood. From time to time in Australian law it is urged in mitigation of the sentence to be imposed on an offender, usually someone who has badly assaulted another. The courts in the Northern Territory, and the Federal Court when it was the Court of Appeal in the Territory, have wrestled with the problem, that is the extent to which traditional punishment either inflicted or to be inflicted should be taken into account when sentencing an offender. One view was expressed by a judge when sentencing in the Supreme Court in Alice Springs on 12 June, 1997. His Honour said:

The practice of payback, sometimes unwisely praised in the community, cannot be tolerated in a society which is governed by the rule of law, enforced by public peace officers, and the sooner it is stamped out the better for all concerned including the Aboriginal community.

Other judges, while in no way endorsing the practice, have accepted the reality of the situation and have given traditional punishment some weight in the sentence to be imposed.⁸³

A proper understanding of payback is helped by some reference to history. In 1839 members of the United States Exploring Expedition 1838–42 were in Sydney. The report of the expedition spoke of the situation in which a man who killed his wife or lover was obliged to defend himself with a shield while the victim's tribal relatives threw spears at him:

Such punishments are inflicted with great formality, upon an appointed day, and the whole tribe assemble to witness it. The person most injured has the first throw, and it depends upon the feelings of the tribe respecting the offence committed, whether they endeavour to do injury to the culprit or not; and thus it may be supposed that there is some judgement evinced in this mode of punishment.⁸⁴

The reference to 'endeavour to do injury' shows that an apparent strict liability could be mitigated by circumstances. Payback mostly involves physical punishment in front of witnesses and rarely involves capital punishment. The idea is to give the family of the injured person satisfaction and thereby bring the matter to an end. Because it takes place in front of witnesses, everyone knows that the trouble has been put to rest and that it will not be carried on further. What takes place is not truly a trial for the guilt of the person in question has already been determined. Trial by ordeal is, in any event, an inappropriate term since there are no combatants in the ordinary acceptance of that term. Because the event occurs only after tempers have cooled (it may be much later) and because of the ritualised nature of the action taken, payback may be readily understood as Aboriginal law in action. An instance of how payback works or rather, in this particular case, did not work, appears in the report of the Royal Commission Into Aboriginal Deaths in Custody.⁸⁵

In *R v Minor*, which was an appeal against sentence, Asche CJ put payback in its proper context when he said:

Payback is not vendetta... As I understand it, payback, in certain cases, which must be carefully delineated and clearly understood, can be a healing process; vendetta never ...In some cases the payback is purely symbolic. In one such case before me, payback consisted of merely touching the assailant on the thigh with a blunt nosed spear; the families concerned having previously come to certain financial arrangements. The formal ceremony, however, was an important and necessary part in the reconciliation of the families; because only through that ceremony could certain relatives be relieved of what, to them, was otherwise a solemn and sacred obligation to avenge the wrong inflicted on the victim.⁸⁶

Professor Nancy Williams has explained the matter in this way:

Just as Yolngu assume that conflict perdures, and may at any time be transformed into a grievance, so they assume a grievance continues to exist until it is redressed through the mediation of an act with opposite effect. *Rom ditjuwan* (the law of return or 'payback') expresses the assumption that an offence may be satisfied through the agency of a like offence. Individuals, moreover, may be liable through kin-defined obligations to be the agency of satisfaction for another's grievance. *Gur'yun* (to push, or to tempt) expresses the process of implementing that obligation.⁸⁷

83. *Jadurin v R* (1982) 44 ALR 424; *R v Minor* (1992) 2 NTLR 183.

84. Wilkes C, *Narrative of the United States Exploring Expedition 1832–1842* (Philadelphia: Lea & Blanchard, 1845) 205 (quoted in Hiatt, above n 41, 82).

85. Royal Commission, above n 24, [2.3.2]. There is a detailed account of the Tiwi formula for handling allegations of seduction by a formalised duel in CWM Hart, Pilling AR & Goodale JC, *The Tiwi of North Australia* 3rd edn (Sydney: Holt Rinehart & Winston, 1988) 85–89.

86. *R v Minor*, above n 83, at 184–85.

87. Williams, above n 57, 103.

Cursing

Another misunderstood feature of Aboriginal law is the so called 'curse'. A great deal of media attention has been given to the occasional occurrence in the Northern Territory when the occupants of a store or some other building have felt compelled to vacate because of what is said to be a curse placed on the building. The true position is explained in the following words, written in regard to the Yolngu:

'Cursing' is not an act of sorcery (*galkapuy djama*), and therefore it is *not* a curse, hex, or spell of any kind. It is the act of placing a 'restriction' over a place, food or thing (in this case the store, office etc.) by the proclamation of the name of a clan or of a personal totem. The proclamation is akin to the placing of a seal of ownership, and therefore allows only the adult owners of that name to have free access within that restriction or proclaimed area, or to that 'proclaimed thing'.⁸⁸

Each Yolngu clan (*bapurru*) possesses a group of names (*bundurr*) that can institute proceedings in law. Some of these names should be used only to instigate proceedings for an important occasion such as the *narra*. Each male is given one or several *bundurr* which they inherit from their *mari*⁸⁹ and those names are to be used only by their owners in important traditional councils. To use *bundurr* in a public situation for personal gain or as a response in anger is an abuse and traditionally involved spearing, sometimes death. The point is that when a person proclaims his *bundurr* over a building, that building assumes the character of a ceremonial place. That immediately limits the range of persons who can continue to use the building, hence the sudden departure of many. It is necessary to carry out a ceremony which restores the building to its normal function so that its access is available.

Unhappily, the concept of *bundurr* has been used as a sort of blackmail. A person may demand money and, when this is refused, threaten to proclaim *bundurr* over the local store. At the same time the conduct, which is so serious in traditional law, has no real counterpart in Australian law. So long as *bundurr* is seen as some sort of a curse, its seriousness will not be properly appreciated. And it will be so much the harder to know how this sort of conduct might best be dealt with.

A somewhat comparable situation can arise when ceremonial ground is violated, say by driving a vehicle over it. Such a situation occurred in the Northern Territory when a young man unlawfully assumed control of a vehicle and drove it to another community where, presumably under the influence of alcohol, he executed manoeuvres on ground reserved for the performance of the very important *gunabibi* ceremony. Members of the community in effect impounded the vehicle and, initially at least, refused to return it to the community from which it was taken, because of its involvement in a serious breach of traditional law. Yet another instance of the victims in Aboriginal law becoming the offenders in Australian law.

Sorcery

The use of sorcery was well understood in Aboriginal society though the extent of belief in its powers varied among tribal groups. Belief does not necessarily accord with acceptability.

Sorcery is illegal in Yolngu society and calls for punishment.⁹⁰ There are claims that *galka' djama* (sorcery) is on the increase so as to avoid *dhagir'yun* (to punish) which may involve methods offensive to *balanda* (non Aboriginal) law. This belief, it is said, is reinforced by instances when traditional punishment has been applied and the keeper of the law has been brought before the *balanda* legal system and dealt with, while the original offender who was being punished for violations of Yolngu law was seen by Australian law as a victim. Because sorcery is still regarded as unlawful, it leads to lawlessness. And it causes confusion in the minds of many Yolngu about the harmful effects of introduced things, disease and sickness, new foods, substances of abuse and sometimes even technology. The extent to which sorcery is practised among Aborigines and its consequences is not dealt with in any detail in this paper.

Professor Williams has documented grievances she became aware of among the Yolngu at Yirrkala during the 12 months beginning November 1969. These include nine grievances said to arise from allegations of sorcery.⁹¹ As she

88. Aboriginal Resource and Development Services Inc, *Information Paper No 6 – It's not a Curse, but a Proclamation* (Darwin: ARDS Inc, 1996) 1.

89. *Mari* include mother's mother, mother's mother's brother; father's father and father's father's sister.

90. Aboriginal Resource and Development Services Inc *Information Paper No 4: 'Galka Djama'* (Darwin: ARDS Inc, 1993).

91. Williams, above n 57, 68- 70.

points out, sorcery is by definition practised with malintention and is not to be confused with Yolngu, healing practises in which the assistance of spirits is involved. Reid, who analysed Yolngu uses of sorcery in relation to individual and community health, concluded that the Yolngu attribute all serious illness and death to sorcery. The ultimate causes of such misfortunes, in her view, are breaches of law and of relationships between people and the supernatural.⁹²

Quite a lot has been written about sorcery in Aboriginal society. There is a general discussion by the Berndts in *The World of the First Australians*.⁹³ It is not always easy to distinguish between the sorcerer and the native doctor, the sort of person identified by Elkin in *Aboriginal Men of High Degree*.⁹⁴ These are men who possess knowledge and power over and above ordinary members of the community; their powers are used to heal, not to harm.

Yet the distinction is not always drawn. For instance, Meggitt writes about the Walbiri medicine men or 'clever fellows', 'with assumed curative, destructive and divinatory powers, either on his own or other people's behalf'.⁹⁵ Meggitt gives the medicine man a variety of roles. He may announce the death of a dying man. If the death appears to have been caused by sorcery, he visits the deceased's shelter before it is burned down and searches for evidence of the identity of the putative killer. If the death was not caused by wounds inflicted by a known person, the men of the deceased's matriline assemble to hold an inquest and, with the aid of the medicine man, look for clues that might identify the sorcerer responsible for the death.

The relevance of this discussion to traditional law is the extent to which the use of sorcery, at least in more recent times, points up a disenchantment on the part of Aborigines with the effect of white law on their own law, in particular the way in which it precludes traditional forms of punishment. In other words, if those forms are unavailable because they offend Australian law, there is a temptation to employ sorcery because of its covert nature and also to employ it against a member of the offender's family if the offender is not accessible.

Sanctions

Earlier discussion made the point that enforcement is a necessary characteristic of law only so long as a range of constraints is accepted. It is against that background that the question of sanctions falls to be considered.

When Australian law is the subject of debate, the focus is often on the consequences of a breach of that law. When Aboriginal people are asked what happens when their law is broken, the response tends to be one of puzzlement. But, they say, we expect people to obey the law. That is not to say that they fail to recognise that the law may be broken but they operate in the expectation that it will be observed. When the law is not observed, various procedures come into play. First, something must be said about the sort of conduct that is regarded as 'unlawful' and therefore as triggering an appropriate procedure.

Professor Williams has used the term 'grievances' to refer to conflicts within the Yolgnu, whether made public or not, and 'disputes' to refer to those grievances which are made public. She has identified grievances in terms of particular breaches which arose from 'associated jural aspects (that is, about which Yolgnu could address explicit norms), and from allegations of sorcery'.⁹⁶ She has identified them in the following way, recognising the impossibility of confining discussion of a grievance to one category:

1. Breaches of contractual obligations.
2. Failure to acknowledge specific rights of control by securing requisite permission.
3. Breaches of religious restrictions.
4. Breaches of exile.
5. Grievances arising from allegations of sorcery.

This list draws no distinction between what Australian law calls civil and criminal matters. And it may be unhelpful, even misleading, to look for such a distinction. On the other hand, there is a recognisable distinction between conduct which causes physical injury to another and conduct which is simply offensive.

92. Reid JC, *Sorcerers and Healing Spirits: Continuity and change in an Aboriginal medical system* (Canberra, ANU Press, 1983).

93. Above n 27, Chapter IX.

94. Elkin, above n 66, ch 1.

95. Meggitt, above n 8, 249.

96. Williams, above n 57, 67.

Dr Meggitt has produced a table of what he describes as offences that are commonly recognised by the Walbiri. These have a more direct counterpart in the Australian criminal law, though not all answer this description. Omitting some detail, the table reads:

A. Offences of commission.

1. Unauthorised homicide.
2. Sacrilege.
3. Unauthorised sorcery.
4. Incest.
5. Cohabitation with certain kin.
6. Abduction or enticement of women.
7. Adultery with certain kind.
8. Adultery with potential spouses.
9. Unauthorised physical assault, not intended to be fatal.
10. Usurpation of ritual privileges or duties.
11. Theft and intentional destruction of another's property.
12. Insult.

B. Offences of omission.

1. Physical neglect of certain relatives.
2. Refusal to make gifts to certain relatives.
3. Refusal to educate certain relatives.⁹⁷

It is useful at this stage to note Meggitt's further table of penalties, which is linked to the previous table:

1. **Death** – a. caused by a non-human agency (A2).
b. caused by human sorcery (A1, possibly A3).
c. caused by physical attack (A1, A2, possibly A3).
2. **Insanity** – caused by a non-human agency (A2).
3. **Illness** – caused by human sorcery (A1, A2, A3, A5, A6, A7, A8, B1, B2).
4. **Wounding** – attack with a spear or knife intended to draw blood (A5, A6, A7, A8, A9, A10, A11).
5. **Battery** – attack with a club or boomerang (A6, A7, A8, A9, A10, A11, A12, B1, B2, B3).
6. **Oral abuse** – this accompanies all human punishments.
7. **Ridicule** – this is directed mainly at offences of omission.⁹⁸

Professor Williams has put the matter in terms of grievances and this, no doubt, has led her to cast her net widely. Unlike Dr Meggitt, she does not speak of offences though some of the conduct she identifies as giving rise to grievances among the Yolgnu would answer Dr Meggitt's table of offences recognised by the Walbiri.

The Berndts take a somewhat different approach. Their classification of offences within a tribal group adopts two main headings. In the first place and what they describe as of 'primary importance', are breaches of sacred law, that is regulations, tabus and codes of behaviour, thought to have a clearly supernatural basis. In the second place, there are offences against other persons or against property. Some conduct falls somewhere between these two categories, depending on the seriousness of what is involved. Thus, incest is both an offence against the person and a breach of traditional and supernaturally sanctioned laws.⁹⁹

For my purposes, it is not especially profitable to spend too much time on specific categories of conduct. In particular, to seek for a close analogy with the distinction between private and public law drawn by Australian law is not rewarding. While much of what Australian law regards as criminal offences is to be found in a comprehensive statute such as the *Criminal Code* of Western Australia, there is an increasing range of conduct which once was thought to give rise to civil remedies only but now may ground a prosecution as well. There are many examples in the areas of corporations law and trade practices law. Given the broad definition of law with which this paper began, it seems more useful to identify the sorts of conduct (including omissions) which give rise to disputes in Aboriginal society.

97. Meggitt, above n 8, 256-257.

98. Ibid, 258.

99. Berndt & Berndt, above n 27, 343-345.

One reason, and to my mind the primary reason, why the search for an analogy with the public law, private law distinction will be unprofitable is because of the critical role which the kinship system plays in the resolution of disputes. I mentioned this earlier in regard to the role of elders and of councils. The point is made very clearly by Meggitt when he says:

The legal norms not only define the offence and its consequence but also nominate who should carry out the punishment. Community membership and genealogical connection are the basic criteria in the selection; and there is rarely any doubt about the identity and the acceptability of the person who should act. Thus, an inquest following a sudden death reveals (magically) the kinship category and the community affiliation of the putative killer; the law states specifically that the close mother's brothers of the deceased must ascertain the actual identity of the murderer and then kill him. If a man wounds his wife for some trifling delinquency, the law asserts that her father, brother, or mother's brother (but nobody else) should attack him.¹⁰⁰

The central role of the kinship system should not be misunderstood. It does not mean that a dispute is resolved in some secret or arbitrary way so that it is not possible to judge whether the requirements of Aboriginal law have been observed. The community will know what has happened and whether the family has exposed itself to some form of sanction by its failure to observe those requirements. That does not mean that every minor grievance is dealt with in a formal way and under the eyes of the community but that would be the case with anything of a serious nature.

Professor Williams has explained that among the Yolgnu an individual may bring a grievance into the public arena 'by a number of patterned means'.¹⁰¹ She suggests that the means by which a grievance is made public has an important bearing on the procedures that are put in place in trying to settle it. There may be an oral declaration, a show of strength or a ritual dance.

Dispute resolution among the Yolgnu is complicated by the presence of the *Narra*. I do not pretend to have a full understanding of its role. Djiniyini Gondarra has defined *Narra* as:

[A] chamber of law and jurisdiction where the leaders are called together by the clap sticks. Secrecy provisions apply creating a type of parliamentary privilege so that the only information to leave the chamber is the publicly viewed objects that encode the law (like the sacred Dilly Bag). The citizens are outside the chamber or the ceremonial place and the law is taken to them.¹⁰²

As explained, the *Narra* is a sort of parliament but the reference to jurisdiction suggests a role in dispute resolution. On my visits to Yirrkala in April and September 1999, where I spoke with many of the clan leaders, the analogy with parliament tended to break down because, while the *Narra* is a body that meets and expounds the law, it does not make new law. One of the clan leaders spoke in these terms:

The foundation of the earth is the foundation of the law and out of this comes the power to proclaim things. We know the first *Narra* made by the two creators but we don't know before this. We have followed that pattern since.

It is tempting to think of the *Narra* as some sort of appellate body but this is to read too much into its functions. It may be that in expounding the law from time to time and with reference to particular events, the *Narra* effectively resolves some grievance that has been aired. On the present state of my inquiry, I cannot take this matter any further. Indeed there soon comes a point where information is not readily available because of the nature of some matters which the *Narra* deals with.

The Berndts have suggested:

Although self-help ... is the basis of legal procedure in Aboriginal Australia, in most areas more or less formal discussions or meetings are held at irregular intervals to settle grievances. The most convenient time for this is when members of different tribes meet for ceremonies.¹⁰³

In the context in which this statement appears, these inter-tribal meetings may deal not only with grievances between the tribes but also grievances between members of the one tribe. In the latter case, it would only be if the two tribes shared the same mythology and ritual. Disputes between the two tribes might more accurately be described as

100. Meggitt, above n 8, 259.

101. Williams, above n 57, 74.

102. Address to the National Youth Reconciliation Convention in Darwin on 17/07/1998.

103. Berndt & Berndt, above n 27, 347.

disputes between members of two tribes, as where the victim and the offender come from different tribes. While these meetings may be significant as providing one means of social control, they are stated not to be judicially based bodies. The Berndts put the matter more positively when they say:

Formal gatherings in the nature of law courts with judiciary functions do not exist in Aboriginal Australia: there is no formally constituted court of law, comprising special persons vested with authority and power to deal with cases, pass judgment, and impose punishment. The immediate demands of self-help, together with a relatively weak political organization, had militated against such a development.¹⁰⁴

The Berndts go on to give examples, taken from late 19th and early 20th century writings, suggesting the existence in parts of eastern Australia of councils with a dispute settling role. The writings of contemporary anthropologists do not suggest that such bodies now exist though the *Narra* of the Yolgnu warrants further consideration.

The term *Makarata* acquired prominence during the late 1970s and early 1980s when questions of Aboriginal sovereignty were raised and there was a move to have something in the nature of a treaty. The term was thought to avoid the legal problems associated with a treaty between white and black Australians and to have an appeal because it was spoken of as a peace making ceremony. However, the Berndts consider that the *Magarada*, as they call it, is better described as trial by ordeal or settlement by combat.¹⁰⁵ The *Magarada* is a feature of north eastern and western Arnhem Land. It takes place after an offence has been committed, but only after people's rage and resentment have had time to cool. The arrangements are made by the injured party and involve two groups who advance towards each other. There is spear throwing on the part of the injured person's group. The whole process is very ritualised though it may result in a thigh wound. In this latter respect it is comparable to the thigh wounding of the Western Desert. In another context I have spoken of payback. Whatever precise form the procedure takes, it is aimed at putting an end to the grievance which brought it into existence and at effecting a reconciliation between all concerned. It is not a form of revenge.

The environment

Much has been written and said about the relationship of Aborigines to the land, particularly in the course of land claims made under the *Aboriginal Land Rights (Northern Territory) Act 1976*. Quite a deal has been written also about the way in which Aborigines adapted to the environment, particularly in desert areas where it was necessary for survival. The firing of land as a conservation measure has been the subject of ongoing debate.¹⁰⁶

Very little has been said about the environment and its maintenance as an aspect of Aboriginal law. In a paper prepared for the Australian Law Reform Commission's Report, Mary Fisher wrote:

Traditional hunting and fishing practices were closely intertwined with the law. Rituals to maintain the land and replenish the food supply were an important part of traditional culture. Strict rules regulated the use of natural resources and governed not *only* the taking of certain species but also the consumption and distribution of food. A person's age, status and sex also had a bearing on his right to take certain species and as such the differing economic roles of men and women were clearly defined.¹⁰⁷

These matters are explored in the research paper but there is no mention of the consequences for those who transgressed the law in any relevant respect. There may be a distinction between conduct which constitutes a breach of good behaviour but does not damage the environment itself and conduct which has a damaging effect, such as an act of wanton destruction of a tree or spring.

The relationship between Aborigines and the environment is expressed by Strehlow in the following way:

In the interior of Australia, Art, Song, Myth, Dance, Rite and Drama were all linked with the totemic landscape.¹⁰⁸

However, Strehlow does not suggest what might happen if conduct damages the environment and, to my knowledge, the same may be said of other anthropologists writing about the relationship between Aborigines and the environment. So critical is the land and its resources to Aboriginal people and such importance did food assume in ceremonial life

104. *Ib.*, 348.

105. *Ib.*, 350.

106. Langton M, *Burning Questions: Emerging environmental issues for indigenous peoples in northern Australia* (Darwin: Centre for Indigenous Natural and Cultural Resource Management, NT University, 1998).

107. Australian Law Reform Commission Research, Paper No 15, above n 3, 'Summary' v.

108. Strehlow TGH, 'Culture, Social Structure and Environment in Aboriginal Central Australia' in RM & CH Berndt, above n 53, 121 at 144.

(and indeed still does), it is a little surprising that more has not been said on the subject. This may be due, at least in part, to an aspect of Aboriginal law that has been touched on from time to time in this paper, namely that if correct behaviour is not observed, it may be a matter for reparation rather than some form of penalty, though one is left to wonder at the consequences of the wanton destruction of a tree in an otherwise barren landscape.

I have touched on this matter because it goes to the behaviour of Aboriginal people and may throw some light on the scope of Aboriginal law. The association of the mythical ancestors with the creation of the world and the Aboriginal view of nature which draws no sharp distinction between the physical and spiritual must place the landscape fairly within the bounds of the law.

Professor Tonkinson has said:

If our aim is to understand Aboriginal society primarily from within, then we begin by acknowledging that the worldview of the Aborigines accords primacy to spiritual rather than ecological imperatives as guaranteeing the good life.¹⁰⁹

I do not understand Professor Tonkinson to downplay the demands of ecology but rather to stress conformity to the law because if people neglect the law the spiritual powers will reciprocate by withholding rain, causing people and the land to become infertile. There is, to borrow Tonkinson's language, a mediation between the creative era and the human realm.

The exchange of goods

In *The World of the First Australians*, a work that has been referred to more than once in this paper, Chapter 5 is entitled 'The Basis of Economic Life'. The chapter contains a number of headings, one of which is *Economic Exchange and Trade*, and another of which is *Ceremonial Gift Exchange*. The distinction drawn by these headings is between commercial transactions on the one hand and the exchange of gifts as part of ceremonial activities on the other. Each of those aspects of Aboriginal life gives rise to rights and obligations, so much so that one commentator has written about 'Aboriginal contract law'.¹¹⁰ But, as always, the search is for an understanding of those rights and obligations. From that understanding may spring some useful comparison with an aspect of Australian law. However, the search should not be coloured by such an expectation.

Whether the focus is on commercial or on non-commercial transactions, items of personal property are the medium of exchange. While the property in question is ordinarily corporeal, that is, possessing a physical quality (spears, knives, axes, shields, boomerangs, ornaments and so on), some property traded or exchanged may be incorporeal. That usually takes the form of rights to use of designs, songs and dances, perhaps access to water. Notwithstanding John Batman's purported contract to acquire land in what is now Victoria, land has always been regarded by Aborigines as inalienable. That is because land is communal property and membership of a land owning group is gained by descent or filiation.

It is convenient to look first at commercial transactions. And the first thing to be said in that regard is that the extent of such transactions in Aboriginal society is often not fully appreciated, notwithstanding the writings of some anthropologists, McCarthy and Thomson in particular.¹¹¹

McCarthy identified seven major trade routes crossing or connecting with all parts of Australia. Kim Akerman has written:

Generally trade routes lay like a fine mesh over the land, representing a network of interaction which traditionally linked many differently-oriented cultural and language groups. Goods moved initially within the range of recognised kin and then to defined partners living in adjacent territories, and then farther afield, travelling clockwise or anti-clockwise, according to convention.¹¹²

109. Tonkinson, above n 31, 25.

110. Ellinghaus MP, 'Towards an Australian Contract Law' in Ellinghaus MP, Bradbrook AJ & Duggan AJ (eds) *The Emergence of Australian Law* (Sydney: Butterworths, 1989) 54-63.

111. McCarthy FD, "'Trade' in Aboriginal Australia and 'Trade' relationships with Tones Strait, New Guinea and Malaya" *Oceania* 19(4); X(1) and (2); DF Thomson *Economic Structure and the Ceremonial Exchange Cycle in Arnhem Land* (Melbourne: McMillan, 1949).

112. Akerman K, 'Material Culture and Trade in the Kimberleys Today' in Berndt RM & Berndt CH (eds) *Aborigines of the West: Their Past and Present* (Perth: University of Western Australia Press, 1980) 243, 250.

Ackerman has had a long and close interest in the use of pearl shell by Aborigines. The main source, particularly of engraved shell, was the north-west coast of Western Australia between Port Hedland and the Buccaneer Archipelago. Cape York was another source but not so much, it seems, of decorated shell. Ackerman's map of the distribution and movement of Kimberley pearl shell shows routes as far south as Kalgoorlie and Yalata and as far east as Darwin and Alice Springs.¹¹³ In the introduction to his monograph, he writes in a rather tantalising way:

It should be noted that all the items that are discussed and illustrated are secular in nature; they do not lie within the realm of the secret-sacred. In general, pearl shell art is not held to be secret. However, the objects themselves may, from time to time, be used either centrally or incidentally in a wide range of ritual and ceremonial activities, some of which may be of a secret-sacred nature. Individual shells may also be placed in caches of sacred objects associated with a specific ceremony and remains in this context. Apart from noting that this does occur, no further comment is made on such matters.

It is unnecessary to spell out the nature and extent of commercial transactions. Ellinghaus' paper, with comprehensive footnotes, points the direction to be followed. My main concern is to understand the underlying assumptions on which commercial exchange takes place, the sanctions which attach to what might very loosely (and perhaps misleadingly) be called breach of contract and the means by which disputes arising out of such transactions are resolved.

Pacta sunt servanda (agreements are to be kept), like most Latin legal maxims, asserts rather than explains. But it is hard to envisage how there can be order in any society unless there is an expectation that undertakings will be observed. The Berndts emphasise the notion of reciprocity, generally based on kin relationships:

All gifts and services are viewed as reciprocal. This is basic to their economy – and not only to theirs, although they are more direct and explicit about it. Everything must be repaid, in kind or in equivalent, within a certain period.¹¹⁴

If reciprocity is so much an aspect of kin relationships, what is the source of the obligation to give something in return when the transaction is a strictly commercial one, devoid of any such relationship? The Law Reform Commission observed:

Aboriginal customs of gift giving, the exchange of goods and services and the role of personal property appear to fit within the normal legal rules.¹¹⁵

That observation was made in the context of according recognition to Aboriginal customary law; it does not purport to identify the basis of those customs in Aboriginal law.

It may be that the notion of reciprocity is so ingrained that it pervades situations in which no kinship is involved, allowing of course for the wide scope of that relationship. There is danger in seeking to press concepts of contract in Australian law too far. Ellinghaus recognises this when he writes of Aboriginal society:

In such a society contractual obligation cannot be regarded merely as a matter of voluntary assumption, will or intention, but is extrinsic to human relations.¹¹⁶

Indeed, one view is that even where a transaction appears to be commercial, there is a kin relationship of some sort involved. This would seem to give kinship a very wide operation indeed when goods are exchanged between people between distant places. At a meeting I attended at Baniyala near Blue Mud Bay in the south-east of Arnhem Land, I raised this matter with the older Yolgnu men who spoke of an exchange of dilly bags on their part with spear heads from a tribe some distance away. Their answer was that there is always some relationship between the country of those who exchange goods. It might be the sharing of an ancestor. There is always a 'road' between the people involved. And, it would seem, the road may involve a number of tribes, one linked to another in some way, so that the chain allows those from afar to come together. But, they said, if someone was a 'foreigner' there would be no trade.

Gift exchange may occur within the framework of the large sacred ceremonies. These ceremonies bring together tribal groups or persons from more than one moiety. The Berndts have identified six ceremonies in Western Arnhem Land which have as their focal point the exchange of special goods.¹¹⁷

113. Akerman K with Stanton J, Riji and Jakuli, *Kimberley Pearl Shell in Aboriginal Australia – Monograph Series Number 4* (Northern Territory Museum of Arts and Sciences, 1994) 14.

114. Berndt & Berndt, above n 27, 122.

115. Above n 3, 223.

116. Ellinghaus, above n 110, 61.

117. Above n 27, 131–32.

Whatever the basis of commercial transactions, the distinction between those and exchanges of a ceremonial character is well established. It is of course easier to identify the former when one of the parties is not an Aborigine, as in the case of the Macassans. Donald Thomson tells of a canoe that a Wanguru man (*Yiritja*) and his father 'bought' from a Marrakula man from Blue Mud Bay. The father had given the man some string used in a ceremony and when the father and son visited Blue Mud Bay they received from the man a canoe and other objects as well. Thomson continues:

When I suggested that this was a big 'payment' for what I suggested (tongue in cheek) was a 'small thing' I heard one of my informants, who turned aside, exclaim with a groan: "Yi! *Ballanda!*" ("Oh! White man!").

This type of ceremonial exchange, he says 'is distinguished from economic buying and is called *yarna gurrpän* [=] nothing give'.¹¹⁸

Recognition of Aboriginal land

It is not within the scope of this paper to consider the recognition of Aboriginal law by Australian law and its incorporation into that system. That was the subject of the Australian Law Reform Commission's report to which reference has been made earlier in this paper.¹¹⁹ Elizabeth Eggleston has a chapter on the recognition of tribal law which she sees as giving rise to a sort of conflict of laws situation.¹²⁰ A somewhat similar approach has been taken by Professor Williams.¹²¹ I mention this matter only to make the point that the source of Aboriginal law and its complexities should not be glossed over when any question of recognition does arise. Furthermore, there is a sharp distinction between recognition of some aspect of Aboriginal law and the empowerment of Aborigines to apply within their own community what is an aspect of Australian law.

Thus, the *Aboriginal Communities Act* 1979 of Western Australia empowers certain Aboriginal communities, through their elected councils, to prepare by-laws for the control of certain behaviour on community lands. These by-laws may relate to such matters as the prohibition or regulation of admission to the lands, control of the use of vehicles on the lands, prevention of damage to grounds and control of dumping of rubbish, new safety and preservation of buildings and other structures and fixtures, regulation of the conduct of meetings, prohibition of nuisances, offensive, indecent or improper acts, disorderly conduct or language and control of the use, possession or sale of alcohol.

Breach of a by-law is an offence and the council may call on the police to charge the offender and bring the matter before the Court of Petty Sessions. There were pilot schemes with the Bidjandanga Aboriginal Community at La Grange and with the Bardi Aborigines Association at One Arm Point. The scheme has been extended to other Kimberley communities and to communities in the central desert. It was envisaged that, when a charge was laid for breach of a by-law, the court would be convened by Aboriginal Justices of the Peace, appointed from among community members. In practice, as I understand it, the court has nearly always been convened by a magistrate who may, however, sit with one or more of the local Aboriginal Justices.

It seems that the Western Australian Act has played a part in ensuring more peaceful and constructive conduct on the lands in question and, no doubt, there are ways in which the operation of the Act can be strengthened. Its relevance to this paper is to draw attention to the ambivalent situation that arises. The scheme is based in Australian law, with its concepts of councils, by-laws and courts. The appointment of Aboriginal Justices of the Peace offers some scope for paying regard to Aboriginal law in the policing of the Act and in dealing with offenders. But in so far as the legislation is an attempt to reconcile two systems of law, and because clearly it is Australian law which in the end prevails, it may cause confusion in the minds of the Aborigines concerned. As mentioned earlier, the importance of the kinship system will sometimes mean that an Aboriginal Justice of the Peace, often selected because he or she is articulate in English and held in regard by the general community, is an inappropriate person to sit on the court.

No doubt those who played a part in legislating the by-laws scheme and in monitoring its operation were aware of these difficulties. Clearly, Mr Terence Syddall, the stipendiary magistrate at Broome who pioneered the work that led to the passing of the Act, was fully conscious of the matters I have discussed. The point of these comments is not to

118. Wiseman JP, *Thomson Time: Arnhem Land in the 1930s: a photographic essay* (Museum of Victoria, 1996) 60.

119. For a very recent argument that the Northern Territory should enact a statutory scheme for the recognition of some aspects of Aboriginal customary law, see S Gray "One Country, Many Laws: Towards Recognition of Aboriginal Customary Law in the Northern Territory of Australia" [1999] *LawAsia Journal* 65.

120. Eggleston, above n 15, Ch 9.

121. Williams, above n 10.

diminish the ideas which led to the legislation but rather to stress the need to know, with any such scheme, what is the law to be applied, whether it is Aboriginal law or Australian law or some admixture. If it is the last of these and if Aboriginal people see their law as taking a secondary role, the absence of clear lines of demarcation must inevitably produce confusion and uncertainty.¹²²

122. Wilkie M, *Aboriginal Justice Programs in Western Australia*, Research Report No 5(Perth: Crime Research Centre, 1991) 26–31; Syddall T, 'Aborigines and the Courts II' in Swanton B (ed) *Aborigines and Criminal Justice* (Canberra: Australian Institute of Criminology, 1984) 144.

background paper 6

Contemporary issues facing customary law and the general legal system: Roebourne – a case study

Kathryn Trees*

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Overview

The Law Reform Commission is currently enquiring into and reporting on Aboriginal customary laws in Western Australia. Because I have a strong relationship with many people in Roebourne I have been asked to discuss with them Aboriginal customary law and how it functions in their lives today, and report on their responses.

My report on the people's responses is included in Parts II and III of this paper. Respectively, these parts deal with customary law in Roebourne today and the role of customary law in dealing with current issues. So as to provide a background of understanding to these responses, in the first Part of this paper I have given a brief description of Roebourne and of customary law. I have also outlined four key factors relevant to a discussion of the role of customary law, as identified by the people I have spoken with. In preparing this report I have been conscious that it is not my role to critique the responses made to me. Therefore, in Parts II and III of this paper I have attempted to present the information as it was given to me. I have, however, included some of my own observations of these discussions in the conclusion.

People in Roebourne have had similar discussions with Commissioners and researchers who are also reporting to the Law Reform Commission on the role of customary law, so this paper forms only a part of their response. Further, for many reasons, including the demands on people's lives, the nature of the issues discussed, the nature of relationships between men and women and the time it takes for people to give their accounts, all the people who could speak on this issue have not had the opportunity to do so. The views expressed here therefore necessarily come from a selection of people.

Part I: Introduction

Roebourne

Roebourne, or Iremugadu, is a small town in the Pilbara region of Western Australia. It was established in 1864 and was the first colonial town in the Pilbara. It is built on the Harding River and is 12 kilometres from the coast. Now, there are the towns of Karratha and Wickham, initially constructed for workers in the mining industry, only 40 and 10 kilometres away respectively. (These towns are now also home to many Roebourne people, with people moving from Roebourne as housing becomes short, or to be near employment, or because they want to live outside of Roebourne and now have the freedom to do so.)

Roebourne has a population of approximately 1600 people, 95 per cent of whom are Aboriginal, and includes those people living in the nearby Aboriginal communities of Cheeditha and Mingullatharndo. It is the traditional 'country' of the Ngarluma¹ and Yinjibarndi² people. It is also the place where many Gurruma and Banjima people live, although the traditional 'country' of these people is more than 400 kilometres inland. These people have been progressively displaced from their 'country' over the last 150 years as part of the colonial process, through the impact of the pastoral industry and, more recently, through the impact of the mining industry.

For people in Roebourne it is only 40 years since they were living in their own tribal groups on the old reserve, the stations and in the out camps at Millstream and Letterbox (20 kilometres from Millstream).³ It is only 40 years that people have been living in the village. The village is a group of approximately 50 houses located two kilometres from the centre of town. It is on the south side of the river, and is adjacent to the old cemetery. It is approximately four kilometres from the old reserve on the northern side of the river. The village was built between 1972 and 1974 by the State Department of Housing. The old reserve was officially closed and people were obliged to move to the village. A small group of about 12 older people live in the ruins of an old stone building on the main street in the centre of town. These people do not have a roof, do not have any furniture, and do not have running water or a toilet. The time since the people have moved to the village has seen a marked difference in: the ways that groups interact; the way that customary law operates; the roles that people play in their families – most particularly men who no longer have significant hunting responsibilities; and people's health (particularly in relation to the effects of alcohol).

1. Ngarluma – pronounced, nar-la-ma.

2. Yinjibarndi – pronounced, in-ja-barn-dee.

3. Millstream is a series of permanent deep water holes in the Fortescue River and is thus an oasis. It is approximately 130 kilometres inland from Roebourne and is the traditional home of Yinjibarndi people. It is a designated National Park.

Customary law

For many of the people living in Roebourne, their customary law systems continue to regulate their lives as they had always done, even if the law is at times ignored, and for some people not well known. The concept of customary law has been dealt with in other papers produced for the Commission's reference;⁴ for the purpose of this paper, it is important to understand that Aboriginal people do not think of customary law in the sense that non-Aboriginal people think of law and the general legal system. It is also important to appreciate that it is not possible to make a simple division between customary law and life generally: Aboriginal people in Roebourne do not do this.

While doing some previous work I discussed customary law with Harriet Ketley, a lawyer for the Miriuwong and Gajerrong peoples during their native title case. Harriet made an important observation when I asked her how Miriuwong and Gajerrong peoples defined customary law. She said that elders did not define law. Rather, *'they gave examples or explanations of events with reference to their ancestors. They collapsed 'ancestors' into 'old people' ⁵ and dreaming people'* without distinction. They also made a distinction in the law when they spoke about punishment. She said, *'Younger people in the group would talk about law in our way; they were more emphatic, and said "We have to keep it" ⁶ (that is, we have to maintain customary law).*

Many Aboriginal people draw on spiritual or cultural beliefs to explain everyday events such as car accidents, illness and death. Similarly, they may explain a young person's antisocial behaviour (for example, breaking windows), as the result of his or her parents' 'wrong'⁷ marriage and therefore inability to bring the child up properly. They do not limit customary law to payback or punishment.

It is also important to remember that Aboriginal language groups or tribes are distinct groups with their own local customs and traditions, which sometimes translate into, at least subtly, different beliefs including variations in customary law. In Roebourne, as there are people from a number of Aboriginal groups living together, there is not 'a customary law'; rather, there is a mix of laws. It is not the purpose of this paper to provide details of Aboriginal customary law in Roebourne, nor, for customary law reasons, is it appropriate to do so. Consequently, while this paper provides some general information about customary law in Roebourne to facilitate understanding, it does not provide an analysis of the differences between the law of each group of peoples. I note, however, that in relation to the Ngarluma and Yinjibarndi, these groups are closely related because of the proximity of their country and traditional camping areas and intermarrying between the groups and so, as I understand, the customary law differences between the groups are not major. Further, for all groups, it is possible to say that in Roebourne customary law 'defines a person's rights and responsibilities, it defines who a person is, and it defines the person's relationship to everybody else in the world'.⁸

As Roebourne is a town, customary law cannot operate in the same way that it might in communities such as Jigalong or Cotton Creek.⁹ In these communities, elders or councillors may exclude people who break laws and disrupt other people's lives. This is not possible in a town (as a woman who spoke about the activities of a drug dealer in the town pointed out); a fact that Aboriginal people appreciate.

Customary law and general law

Customary law is much broader than the general legal system. It is an expression of tradition and a means of expressing the rules that allow communities to operate effectively. However, the issues that people have to deal with are now often outside the limits of what they traditionally used customary law to deal with. Further, the general legal system governs people's lives irrespective of customary law. At the same time, customary law operates irrespective of the general legal system. As a consequence, in many instances, people are punished according to customary law and must still face punishment in the general legal system. All the people I spoke with talked about the need for the general legal system and customary law to work together, where appropriate, if punishment and rehabilitation are to help them to 'fix' their community.

4. See for instance, Toohey J, 'Aboriginal Customary Laws Reference – An Overview', Background Paper No 5, above pp 173–185.

5. Interview with Harriet Ketley, directions lawyer for the Miriuwong and Gajerrong native title case, 2004.

6. Ibid.

7. A 'wrong' marriage refers to a marriage outside of the skin group system. This is explained further below.

8. Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 10.

9. Jigalong and Cotton Creek are two Western Desert Aboriginal communities in the Pilbara. They have their own management, have implemented community by-laws and are relatively autonomous.

Current socio-economic conditions

The socio-economic conditions in which people in Roebourne live affect all aspects of their lives. How people engage with culture—whether they are able to spend time on their country, visit sacred sites, teach children about culture, take part in law ceremonies—is greatly influenced by their general wellbeing. In my discussions about the role of customary law today and in the future people linked it to the standards of health, education, housing and living conditions as well as levels of employment.

Health

Poor diet

Health standards in Roebourne are poor. Most people have inadequate diets. They eat too many processed foods, including white bread and sugar, and not enough fresh fruit and vegetables. There are only two small shops and a service station in the town where foodstuffs (particularly fresh produce) are costly. Most people do not have cars to get to the bigger towns where there are more choices and prices are cheaper. Additionally, many people often do not have the means to go hunting and so do not eat enough kangaroo, bush turkey, fish and other traditional foods.

Among other illnesses, inadequate and inappropriate food has led to a high incidence of heart disease, diabetes, chest, nose and ear infections and the birth of underweight babies. It also leads to tiredness and lack of concentration.

Alcohol and drug abuse

As reports from the Gordon Inquiry and discussions with the Roebourne Primary School and High School Annexe, the Women's Safe House, Strong Women's Group, the Men's Group, Mawankarra Health Service and other organisations all show, alcohol and drug abuse in Roebourne is high.

People first started drinking alcohol in Roebourne in 1967. Of those who began drinking at this time, many passed away early because of alcohol related illnesses, accidents and violence. As a result, there are a markedly small number of people in the 45 to 60 year old age group. This has left an enormous gap, which has impacted on the passing down of cultural knowledge, on teaching young people to respect and look after others, on care of children, on the number of elders and the number of grandparents, and much more. We are yet to be able to measure the continuing effects of alcohol abuse on mortality rates, and, therefore, the corresponding influence on customary learning.

Excessive drinking and, for some people, drug use exacerbates other health problems. It leads to depression, psychosis, emotional and irrational behaviour, lack of inhibitions, disregard for rules of sociable behaviour and respect for others, and violence. It greatly impacts on levels of domestic violence and sexual abuse in the community. Drinking also leads to babies being born with foetal alcohol syndrome, low birth weights and other health issues. It is a direct cause of neglect of children, which in turn causes health problems for the children.

Sexual abuse

The 2002 report of Western Australia's Gordon Inquiry, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*,¹⁰ discusses the effects of neglect and sexual abuse on the development and wellbeing of Aboriginal children. The commissioners for the Gordon Inquiry spoke to people in Roebourne; the report therefore reflects their problems and concerns and is thus useful to consider in relation to the role of customary law and the general legal system.

The Report includes the findings of the Telethon Institute for Child Health Research, which lists some of the effects of child sexual abuse as:

- sexualised behaviour and age – inappropriate levels of sexual knowledge;
- anxiety and depressive symptoms;
- development of suicidal thoughts;
- school difficulties relating to academic performance, behaviour and peer relationships;

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

- behavioural problems – running away, offending;
- dissociative symptoms – amnesia, daydreaming, trances;
- increased impulsivity – hyperactivity, aggression;
- emotional distress – fear, somatic complaints, nightmares, bed-wetting;
- lowered self-esteem – 'damaged goods syndrome', sense of responsibility for the abuse, increased sense of vulnerability and futility;
- difficulties with identity formation;
- physical consequences – sexually transmitted diseases, HIV/AIDS, unwanted pregnancy and damage requiring medical attention or surgical repair; and
- precipitation of psychotic symptoms/disorders in adolescence following an experience of sexual assault.¹¹

Many people in Roebourne described these symptoms when speaking about adults and children who have been sexually abused and/or have experienced other forms of family violence. They focused on this as a vital issue that the law, both the general legal system and customary law, needs to address.

Education

Most of the older Aboriginal people in Roebourne have little or no formal (non-traditional) schooling. Today children attend primary and secondary schools and a small but increasing number go on to undertake trades courses or university degrees. However, for most people literacy and numeracy levels remain low, hindering access to the limited employment opportunities available in the nearby larger towns.

The school is an important site in relation to customary law and the general legal system. Children have to go to school and obey school rules or they risk being disciplined, which for a few children often means being suspended or excluded from the school for a period of time. The Roebourne Primary School operates a[n] Yinjibarndi language programme, taught by members of the community, and employs a number of local people as aides in some classrooms. The level of involvement of community members in the school depends on the principal and the teachers of the school. There is no formal integration of cultural systems (except for the language classes) which would allow for customary rules of how children should behave towards adults, other children and property to exist in the school. Teachers often have problems getting some children to stay at school, interact productively with other children and show respect to the teachers. They also have trouble making the curriculum relevant and interesting to the children.

Some adults said that if the children had the opportunity to learn about their own culture at school, including skin and respect systems and cultural stories of place and the seasons, they would learn better and it would help them feel that school is a part of their everyday life rather than something extra. This would be consistent with customary teaching practices. Some adults explained that their fathers, mothers and grandparents taught them all the time. They also said that parents should not still feel that the school is a place that they stay away from and that what the children learn there is not part of their everyday/home life.

All the people said that they wanted their children to go to school. Some people said that they had enjoyed going to school and that what they learnt helps them in their lives, and for some, in the jobs they do now and in teaching their children. They remembered the old people coming in to the school and telling stories and being taken outside to learn how to cook or collect bush tucker. Other people said that although they enjoyed some of it, what they learnt in school does not mean anything to them now. They said that their experience of school makes them not want to participate in the school now. They explained that they do not feel they could go there and be allowed to help. Everyone said that the school should always ask the old people and others in to tell stories, teach the kids to sing and dance and teach them their respect systems; and not just to do this on special occasions like RAIDOC week (Roebourne's version of NAIDOC). They felt that this might help the teachers because the kids would behave better.

Housing and living conditions

The village, where most of the people live, was built in the 1970s. For the most part, the houses are poor quality, three bedroom, one bathroom and toilet, asbestos houses. They have no large verandas or breeze-ways for outdoor living (Homeswest is currently replacing some of the houses with more appropriate ones, but this is a very slow process).

11. Gordon Inquiry, ibid 24.

There is very little furniture in the houses; many people do not have a fridge or enough beds for everyone. The houses at Cheeditha, the small community three kilometres from the village, although newer, are equally poor. The last census shows that 17 to 20 people often live in a house. As a consequence, there is no privacy and no space for children to be away from adults or for women to be alone. The lack of adequate housing impacts on family violence, sexual assault and breakdowns in respect systems.

Employment

The unemployment rate in Roebourne is approximately 25 per cent with a further 10 per cent of community members participating in Community Development Employment Program (CDEP) activities (work-for-the-dole). Most employment is concerned with local services such as the TAFE, schools, the hospital, the prison and shops. However, a few local people are running their own small businesses, employing themselves and other local people.

The lack of employment means that many adults have little to do with their time and therefore spend much time in or around their houses. A high proportion of people are on some form of government benefit payments. The combination of these factors means that many people, especially men 16 years and older, spend most of their time sitting with little to occupy them. Consequently, many people, particularly men, have low morale, which leads to increases in drinking and family violence.

Part II: Customary law

Defining customary law and inadequacy of language

To understand customary law it is necessary to appreciate the relationship between the inadequate concepts of 'dreamtime' and 'law'. These terms are both impositions on Aboriginal cultures. Both the use of English and needing to speak to people outside their language groups has required Aboriginal people to use such terms (or variations of them). 'Law' and 'customary law' are inadequate because they cannot be free of the western concepts and power ascribed to the word 'law' and the status of law as somehow above or separate from other aspects of our daily lives. 'Dreamtime' is a derisory and simplistic term for an ancient belief system. It is necessary to have the information in both of these concepts, and a sense of spirituality, to understand customary law, because they are indistinguishable.

Scott Cane, author of *Pila Nguru: The Spinifex People*, provides a useful discussion of the inadequacy of language when people have to discuss, for outsider's benefit, the interconnectedness of customary rules with people's wider belief system and spirituality. He writes that the Spinifex people use the term 'Tjukurrpa' to describe this and argues that they too inadequately translate it as 'law', when they are obliged to speak of their beliefs to outsiders. Cane writes:

This equation of the Tjukurrpa with 'law' conveys something more than Europeans might associate with conventional legislation. The Spinifex perception of law incorporates elements of fear, power, complexity, reason and authority but also conveys something universal and metaphysical. It is, in both practice and content, more spiritual than judicial. Spiritual beings are described as belonging to 'the Law' and country is seen as part of 'the Law'. Sacred boards are said to be 'the Law' and ceremonial acts are conducted as expressions of 'the law'. Senior holders of the Tjukurrpa are 'Law men'. When travelling through country people will often point to physical features and describe it as 'Law' or they might not speak at all, whispering, 'big Law'.¹²

Cane argues that Tjukurrpa is a combination of the components, law, spirituality and ceremony or business and it is 'nature, philosophy and psychology'.¹³ He writes that it:

provides an explanation of nature, establishes a social code, creates a basis for prestige and political status within the community, acts as a religious philosophy and forms a psychological basis (if not psychological controls) for life.¹⁴

Cane suggests that it is best described 'as the European concept of tradition'.¹⁵ This is consistent with the Northern Territory Law Reform Committee's statement that:

12. Cane S, *Pila Nguru: The Spinifex People*, (Fremantle: Fremantle Arts Centre Press, 2002) 81.

13. Ibid 82.

14. Ibid.

15. Ibid.

Aboriginal members of the committee and many others ... have emphasised Aboriginal tradition as an invisible body of rules laid down over thousands of years and governing all aspects of life, with specific sanctions if disobeyed. The expression 'customary law' is therefore correct, as containing both concepts in the one expression.¹⁶

The remainder of this Part discusses some of the key elements of customary law for the Aboriginal people of Roebourne. For a comprehensive account of traditional belief systems, other aspects of customary law, the effects of drinking rights and life in the village, I recommend that people watch *Exile and the Kingdom*, a documentary film made by Frank Rijavec, Noelene Harrison, Roger Solomon and the Ngurin Corporation. This documentary provides a rich account of many aspects of life for Yinjibarndi and Ngarluma people.

Traditional belief systems

In Roebourne, Ngarluma and Yinjibarndi people use the phrase, Nguru~Nujung~Gammu or 'when the world was soft', to describe their genesis and spiritual system, including Bidara or Law. For them, this phrase represents a time when the maarga or creation spirits 'got up from the ground' and 'lifted the sky and the world out of the sea'.¹⁷ The maarga still live in the hills and gullies and can be seen 'in the early morning mist over the water', which 'is smoke from their breakfast fires'.¹⁸ If people do not approach the maarga in the correct ways, they will get hurt. For example, when people visit Deep Reach Pool at Millstream, the traditional home of some Yinjibarndi people, you have to put a handful of water into your mouth, spit it out and call, 'nguru' to say that you are there and that you belong to the land. Elders in the group do this first and they explain to the spirit who any strangers with them are so that they too are protected.

Approaching maarga, the warlu or water-snake¹⁹ and other beings correctly is significant for understanding Ngarluma and Yinjibarndi explanations for accidents and deaths of people in the area. For Ngarluma and Yinjibarndi people there are strong links between spirituality and danger. For example, at Millstream, there is a warlu mudji, or hole in the ground, where Barrimindi, a large warlu or snake, who was travelling from the sea along the Fortescue River, which runs underground, broke the surface to look around. He was searching for the two boys, who killed the birds in what is now Deep Reach Pool. The hole now remains, and when people go to the area, they tell the story of the warlu and warn people not to stand so that your shadow crosses the hole. They are afraid that it will disturb the warlu, who may see the person and take them.

There are other manifestations of this notion of danger for Ngarluma and Yinjibarndi people, which they link clearly to caring for the land and respecting laws. In other instances where people are disrespectful or do the wrong thing the 'feather foot', a small spiritual/magic being that is often malevolent, may annoy them, cause trouble or even harm them until they put things right.

As well as the maarga, Ngarluma and Yinjibarndi people also refer to Mingkala, the sky god. Together, the maarga, the spirits of the earth, and Mingkala, god of the sky, named and shaped the land, plants and animals and finally the people themselves. For the Yinjibarndi, the people, Ngarda~ngali, came from the maarga, who are depicted in many rock engravings along the Fortescue River. Understanding that the people come out of the maarga helps us appreciate that the Nguru~Nujung~Gammu time is part of the Ngarluma and Yinjibarndi peoples' own time rather than mythical. Today when older people in Roebourne speak of events they most often do not distinguish between the creation time and an event that happened last week.

Traditional belief systems and Christianity

Since colonisation, many Aboriginal people have accepted Christianity as their religion. The similarity between Nguru~Nujung~Gammu and the role of the maarga and Mingkala and the biblical account of 'Genesis' may help explain why many Aboriginal people are able to reconcile Christianity and their traditional spiritual beliefs. During the Ngarluma and Yinjibarndi native title hearing in 2001, there was a strong example of how these belief systems interrelate for some people. In the hearing, an elder stood on the Bundut—this is a large area of rock in the floor of the Fortescue River and is the first law ground for Yinjibarndi people—and explained its past and continuing significance and sang the songs of the site. Later, under the marquee in the formal court, he was sworn in. He said that he would

16. NTLRC, above n 8, 11.

17. Rijavec F, *Know the Song, Know the Country* (Roebourne: Ieramugadu Group Incorporated, 1995) 2.

18. Ibid.

19. Ngarluma and Yinjibarndi people both have a warlu (wah-loo) a powerful creation being that created waterways and protects and punishes people. People tell the story of the Yinjibarndi warlu coming down the Harding River, meeting and fighting the Ngarluma warlu and both warlus remaining in the river to protect their respective tribes.

swear on the bible because he 'is a Christian man'. After he had sworn an oath, the court officer turned to Justice Nicholson to proceed. However, the elder intervened and said that we would now pray because he had just sworn an oath. To him an oath was not a formality. He then prayed that Mingkala would make the court understand the significance of the country for Ngurlama and Yinjibarndi people.

Ngurlama, Yinjibarndi, Gurrama and Banjima people's conversion to Christianity in Roebourne is largely the result of the Roebourne Aboriginal Church and its previous pastor, David Stevens. In the 1970s the church did a great deal of work trying to help people overcome the first years of alcohol and in the process saved many people's lives and created strong connections between them and the church. Today it plays an important part in many aspects of life. Christianity, however, has not taken over from traditional spiritual beliefs. Rather, people negotiate between Christianity and traditional beliefs; they attend church, read the bible, say there is only one God, take part in law ceremonies and take care not to anger feather foot. If someone has wronged a member of the church, in one case by taking the life of her daughter, they may say that because Jesus takes care of all their problems they do not want to exact traditional punishment. But because not all members of all families are part of the church other family members may want traditional punishment. In this situation the church member may want to support their family regardless of the church; but without choosing one set of beliefs to the exclusion of the other.

Skin systems

All the Ngurluma, Yinjibarndi and people from other groups living in Roebourne have skin systems. Skin systems are the rules of marriages and respect and come from the Bidara or the Law. Ngurluma and Yinjibarndi people call their skin system Galtharra-na.²⁰ The maarga passed the system on to the people during the learning times, or Nguru-Nujung-Gamu, and they regard it as the most important information. The Galtharra-na covers all people, plants, animals, rain, wind and country, which reinforces the relationship between people and country and explains the need to respect the country, flora and fauna. There are four skin groups in the Galtharra-na—Bananga, Burungu, Balyari and Garimarra—and all people, animals, and plants belong to one of them. People are born into their skin group, which is determined by that of their parents and must marry into the correct group, that is, their marriage must be 'straight'.

A Bananga man must marry a Burungu woman and all their children are Balyari. A Burungu man marries a Bananga woman and their children are Garimarra ... Garimarra men must marry Balyari women and their children are Burungu. Balyari men marry Garimarra women and their children become Bananga.²¹

Further, when people from one tribe marry into another tribe, they adhere to their appropriate skin group. The skin system operates between tribes, via equivalent rather than identical terminology.

One of the senior women I spoke with said that in the past girls would be married when they were 13 or 14 but she explained that they did not live with the men until they were older. They did not go to their new family until two or three years later. According to Gordon Lockyer, a Guruma elder, men were taught not to hurt their wives or give them a hard time. He said they were told to look after their wives and be good friends. Lockyer also said that men were told:

You're not to go running around anywhere else, nothing, because a lot of big fellas watching you. Spears wouldn't hurt you if you're doing the right way, easy as that.²²

This is important in relation to some Aboriginal men today claiming that physical violence towards women is cultural.²³

Many things in the community follow people's Galtharra-na relationship to one another. Take our Bidara Law for example it is run by strict rules which guide everyone in the part they have to play in the ceremony. They understand their job by knowing their Galtharra-na relationship to the boy going through the Law and his parents.²⁴

As part of the skin system, most Aboriginal groups have a system of family relationships that determines respect and obligation. It is similar to western families in that people have grandfathers, grandmothers, father, mother, uncles,

20. Rijavec F, Harrison N & the Ngurin Corporation, *Exile and the Kingdom* (Australian Film Commission, 1993). This documentary explains Ngurlama and Yinjibarndi peoples' law.

21. Rijavec, above n 17, 20.

22. Guruma Elders, *The Guruma Story*, Brehaut L & Vitenbergs A (eds) (Alice Springs: Jukurrpa Books, 2001) 22.

23. A Ngungar pastor explained that Aboriginal men's claim that violence towards women is cultural comes from the dysfunctional lives that many Aboriginal men have experienced since drinking was introduced. He said that five to seven generations of boys and men have grown up with family violence and think that this is the norm. He suggested that before people could deal with family violence they need to understand its origin and stop falling back on the 'cultural claim'.

24. Rijavec, above n 17, 20.

aunts, brothers, sisters and grandchildren. However, it is unique in that these positions are not assigned to one person only. For instance, if a woman has three sisters they are all 'mother' to her children, her partner's sisters will also be mother. People always need to have someone in all the relationship roles. This makes respect systems very complicated for outsiders. Children can talk to their uncles but cannot joke with them or mess around, but they can joke with their grandfathers. The skin system determines how men relate to their mothers-in-law; how children are looked after; how people speak to each other; and, if and when people cannot speak to each other.

Today when this skin system works well it provides protection, identity and self esteem to people. However, where it is neglected it causes people to feel alienated and at a loss in many ways. One young woman said that because of the way her life went she does not know who she is related to. She expressed disappointment in herself and said it makes her feel bad not knowing her family connections: *'Sometimes the older people come up to me now and when I don't talk to them and ask if I know who they are. You feel ashamed of yourself for not knowing. But I've just never been taught, and I do feel badly.'* She said that *'You learn who is related to you if your family talk about law and culture'*. She gave the example of a cousin brother who is always around the old people; he can talk to them all the time and so knows a lot. She said, *'But I don't have those connections, probably because I've gone away and then come back. I can't ask just anyone. Nanna was the main connection for the family.'* Other people gave similar accounts of how they have missed out knowing about cultural information and now feel inadequate because of it.

Many Aboriginal people in Roebourne speak about traditional knowledge, values and law. They fear the loss of traditional knowledge as elders pass away and younger people realise there is much they have not learnt. As well as their concern for the loss of family and knowledge many associate traditional life with safer lives in which violence and acts of disrespect were less frequent.

Law ceremonies

Law ceremonies, such as initiation, which many non-Aboriginal people focus on as representing customary law, are only part of customary law. They are times when elders and other initiated people pass information on to younger members of the community. Men and women have their own ceremonies and responsibilities during the law time. Boys must go through the law for the community to regard them as men and for them to have responsibility for carrying knowledge and passing it down to others. At this time people learn how to be responsible for others and pass on spiritual teachings about the land and animals. Although people are only initiated once, they usually take part in ceremonies throughout their lives as part of the ongoing transmission of knowledge. In Roebourne law ceremonies are still practised and young men are choosing to go through the law.

Law ceremonies in 2004

Preparations for initiation of this year's induction of young men in Roebourne have been underway for several months. On 21 October the communal aspect of law ceremony got underway at the Woodbrook law grounds near Roebourne. Initially six young men were scheduled to undergo initiation, but as the meeting unfolded, another seven young men were inducted.

This unusually large number of initiates resulted in one of the largest law gatherings in recent history. All the yartha²⁵ on the law grounds were occupied with an overflow of families camping out in the open. Besides a very strong turnout of Roebourne families, Aboriginal people from the Kimberley community of Looma, as well as people from Yandeyarra, the Banyjima lands and many other parts of the Pilbara, attended. At its peak some 400 people were in attendance.

The initiation ceremonies continued for four days through to Sunday, 24 October. Families of the initiates and many other community members will remain at the law ground for up to five weeks camping with and caring for the initiates in a cooperative holiday atmosphere that is the highlight of the community social calendar for the year. This law meeting is only the first wave of initiations for this summer. Plans made during this meeting have scheduled another round of initiations for Christmas.

Roebourne people say that there was a slump in attendance and vibrancy of law gatherings after a succession of deaths of elders over the last decade. This year's meeting represents a strong revival led by a younger generation

25. Shade structures.

who are in their thirties and who have given an enormous boost to the generation of their fathers and mothers in the organisation of the meetings. This augurs well for the future of law practice in the community, suggesting that in future years the depth of talent and energy for law will increase, bridging the gaps of leadership that were covered for by the generation of grandfathers that passed away over the last decade.

While the gathering of families and community at these law meetings from near and far afield is motivated by initiation of young men and the consequent ceremonial and social activity, the gatherings provide a forum for resolution of many other issues between individuals and families. Matters of customary law are negotiated and resolved, issues of responsibility and failure of duty are aired, and matters of improper behaviour and injury are confronted in public forums. Some of these involve both men and women; others are reserved for men or women alone.

Dispute resolution

The Galtharra-na system is integral to law and therefore to how families solve disputes with each other. It is particularly important in incidents when people die or are badly hurt and payback is involved. It is fundamental in deciding who can exact punishment and who should be punished. Law in all communities is also about dealing with or punishing wrongful acts. According to Crawford and Kirkbright, for the purpose of dispute resolution, Aboriginal customary law can take a wide variety of forms, depending on factors such as:

- the locality, the sex, status and previous history of the wrongdoer;
- the sex, status and conduct of the victim and of the person(s) required or expected to respond;
- the community's perception of the seriousness of the offence and the surrounding circumstances;
- the extent of (or concern about) external intervention.²⁶

Traditionally, punishments might have included:

- death (either directly inflicted or by 'sorcery' or incantation, spearing (of greater or less severity) or other forms of corporal punishment;
- individual 'duelling' with spear, boomerang or fighting sticks;
- collective 'duelling' (including specially structured encounters such as makarrata or minungudawada);
- shaming or public ridicule;
- more rigorous forms of initiation or training;
- burning the hair from the wrongdoer's body;
- certain arrangements for compensation (eg through adoption or promised marriage);
- exclusion from the community (eg to a particular outstation or community, or more rarely, total exclusion).²⁷

These findings are true for people in Roebourne, except perhaps for 'burning the hair' which no-one spoke of.

According to Gurrama elder Peter Stevens, traditionally, punishment for breaking a rule was harsh. He said, '*They'll spear you or anything – give you a hiding ... They get the punishment spear and spear you in the leg*'.²⁸ He said elders would punish men and women in this way for breaking up a family, fighting, or telling lies that caused trouble. Stevens says that because the punishment was harsh, people were good and therefore spearing was infrequent. Stevens also says that if a person keeps '*breaking the Law, they break your neck, or they spear through you: finish – you wouldn't cause anymore trouble ... The old people decide if he's no good, you can't do anything with him, finish him off*'.²⁹

One day I was sitting with an old man in his eighties, a juju, who was resting his leg that was often very painful. I asked him about it and he recounted the story of when he was a young man, in his thirties, and would come into the town and make trouble when he was drinking. He said that he would get into fights and worry the women and at first the elders told him to leave town and not drink, and when this did not work they yelled at him trying to shame him. He said they wanted him to be respectful to other people, not to cause harm to others physically or by causing jealousy when he went after the women. He explained that after a number of warnings, which he ignored, some of the men speared him

26. Crawford JR & Kirkbright CJ, *Reference on Aboriginal Customary Law – Aboriginal Customary Law and the Substantive Criminal Law*, Australian Law Reform Commission, Report No 31, Research Paper No 6 (1983) 35–36.

27. *Ibid.*

28. Guruma Elders, above n 22, 25.

29. *Ibid.*

in the leg. The juju said he never drank after this; he settled down, looked after his own family, and later helped others to stop drinking. When I asked him how he felt about being speared, given that he was still suffering from the damage to his leg, he said that it was the right thing for them to do because it made him change his life and stopped him hurting other people.

A group of women explained that traditionally, the families who were wronged and the offender's family negotiated punishment. They said that seniority and relationship to the person who was injured or killed would determine who took responsibility for the punishment. They described how if the offender and family of the injured person lived in separate places, the offender's family would take the offender to the injured person's family for punishment. They said that both families would take part in the punishment to ensure that people carried it out properly and fairly. There is an example from Yandeyarra later in this paper.

A senior man talked about how the community dealt with major breaches of law when they were living on the old reserve (1940s to 1975). He explained that if someone committed a serious breach, such as abusing another person or stealing someone's wife, the whole community would come together to deal with the problem. He said they would put the offender in the middle of the circle so that *'...everyone was watching and talk sense into him. Talking to people and making them feel shame for what they had done wrong was usually enough to make people behave properly and show respect to others. If someone kept offending, the elders would hit them or spear them. If they hurt a child, like the sexual abuse now, they would have been killed for that'*. One of the women added that, *'White men don't even know what happened on the reserve'*. She explained that white men would not have understood the severity of punishment.

One of the senior women talked about the old reserve. She described a tank in the middle where people would bring troublemakers. She said, *'It might be a young man who has married the wrong way. They would get the family of that person and they would flog him. The grandparents would know what was enough for him was. There was respect for the grandparents'*. She gave another example of two women fighting over a man who may have done bodily harm to each other. She said the grandmothers would get the women and sort it out. She explained that the women may not have liked what the grandmothers decided but there was respect for them and the women would do as they were told. This woman said that she blamed the welfare system for breaking down this family discipline. She said, *'They should never have moved people into the village; instead they should have built a bridge across the river'*.³⁰ She explained that in the old reserve people lived in their family groups and had to obey the marriage and respect laws, but in the village everyone was mixed up so elders were not with their children and grandchildren.

Respect

A senior Ngarluma man described traditional law as: *'Going right back before free rights, alcohol or people moving into town'*. He said that *'respect is the basis of traditional law'*. He explained that this is respect for land, visiting sites, telling the stories of sites, teaching young people about the site; respect for plants and animals, including what people can hunt and when; respect for all people in the community, elders, adults, children; and, respect for the rules of marriages and avoidance, which the skin system determines. He said, *'In the past people had to get permission to go into another group's country or family camp and now people have a house not a camp, and people can't just go into that house without being asked'*. He explained that when kids and adults do this they are disregarding traditional law and the respect for others that it requires even though they did not traditionally live in houses.

This Ngarluma man explained that it is grandparents who have always taught young people the basic rules of life, including the rules of marriage, who people are straight for (that is, who they can marry), how they must relate to their mother-in-law, sister-in-law and other family members. He said it is uncles (or dads) who 'put the reins on you' if you are a boy or young man who is misbehaving in any way and in the same way aunties (or mothers) do this for girls and young women. He and one of the women said it is important that all these people 'play their roles in raising and teaching children and young people'. They said that unfortunately this is not happening in a large number of families now and the 'kids are doing whatever they like'.

30. See Part I – Roebourne for description of the village and its location to the river.

Part III: Problems in the community today – how customary law and general law operate to deal with them

This Part deals with some of the major issues being faced by the Roebourne community today, as voiced by the people I have spoken to in the context of this paper. In summary, these issues can be attributed to the breakdown of family and community structures, largely due to the effects of drugs and alcohol, but more generally, due to the breakdown of adherence to the rules of customary law. As will be seen, many people believe that there is a role for customary law to operate in the community, even though traditionally it has not been used to deal with these types of problems. At the same time, most people also feel there is a role for the general law and would like assistance from general law structures to deal with the issues identified.

Key issues for the Roebourne community

Respect: disciplining children

A senior man commented: *'Kids' attitudes are changing now; they do not have respect for laws any more'*. He suggested that because children now go out to Woodbrook³¹ at law time and don't get much other teaching out in their country they can't learn the laws. He said they need to know about the hills, the kangaroos, birds, and the sacred sites or the law doesn't mean much. He said, *'Now they watch TV and listen to reggae music they have more American ideas, and that is culture for them now'*. He is concerned that changes in culture mean that the rules that children need to live by go. This worries him because he says children need guidelines, they need to know that there are rules and that all the adults will work together to make sure the children obey them. He gave the example of Mingulatharndo, or Five Mile, a small community seven kilometres north of Roebourne. He said all people living there have the same purpose, that is, to allow no drugs or alcohol, to look after the children, to make sure that all children go to school, and to look after the houses and the yards. He said, *'Any adults in the community can discipline the kids, and teach them, and spend time with them'*; because everyone is working towards the same thing the children learn to respect the rules and do the right thing.

I asked a woman of about 40, a mother and grandmother, what should happen when children do the wrong thing, for example, steal, break things or yell at and disobey adults. She replied, *'In the past any other adult who was there would give them a smack'*. She said it would be all right because everyone wants the children to learn: but now if another parent tells off a child or gives them a smack the parents will often fight. She said, *'They will say, "You can't touch my kid". But in our ways we all looked after the children, especially if you are a mum or an uncle (a brother or sister to either of the parents) to that child. This also now means that if adults see children who should be in school they often will not send them back, so the children run off if they want to and do other things that they should not be doing'*. One of the other women, also a mother and grandmother, said that she would want another adult to tell her grandchild off if he was doing the wrong thing. Both women said that this is an aspect of customary law that everyone in Roebourne needs to get back to.

Younger and older women said that there is a problem of whitefellas saying that it is not all right to hit a child. They said, *'The children hear this and get cheeky to people and say that they are not allowed to hit them'*. One of the old women said that when she was raising her children she would hit them or throw a stone at them if they were doing something that was wrong. She said that all her children are good people who know how to behave and to look after their children. She said that while she had had some trouble with one of her children this was only when he had been drinking and he was still responsible and looked after his family. This woman said that she would still hit her children and grandchildren if it was necessary. In her opinion, the white law was wrong for taking their system of discipline away from parents and not telling them what else they could do to discipline their families.

One of the women, who is a mother and grandmother, said that the 'parents need discipline'. She said they need to know how to look after their children and how to discipline them. She said that this is something the whitefella law should help with by teaching parents how to successfully discipline their children. The discussions we had about

31. Woodbrook is a pastoral station approximately 12 kilometres south east of Roebourne. One area of the station, also referred to as Woodbrook, is now a law ground. This site is both close enough to Roebourne for people to get to for the law ceremonies but far enough away that they cannot go back into town easily because most people do not have cars.

disciplining children are very interesting because they make it clear that the strategies for raising children to be responsible and respectful are embedded in customary practices; these are part of the everyday aspects of customary law and perhaps in some ways the most important. The women explained that when customary ways of life and practices are disrupted, for example, by changes in living conditions, coupled with the imposition of a set of beliefs about appropriate child rearing that are different to those that a group of people have used, significant problems must follow.

Dispute resolution: child sexual abuse

Abuse and housing

A young woman in her twenties who I spoke with said that the inadequate housing makes it impossible to keep people who have been drinking away from the children. Older women have confirmed this. The young woman said that everyone may be in the yards and on the streets, playing with the other kids until after dark but when they go inside they cannot isolate themselves from the drinkers and often they will not know that they need to try and do this. She said this often results in neglect, family violence and sexual abuse of women and children. As one older woman said, *'They might just crawl over people and get to a girl. They don't even know what they are doing'*.

Abuse and pornography

One young woman said that the danger of children being sexually abused is increased because of the pornography that is in so many of the homes. She said that in some houses there are pornographic movies and magazines everywhere. She explained that often when people have been drinking the men will sit and watch the movies. She recalled how when she was a teenager, she and others looked in to see what the men were doing and were shocked and embarrassed. They did not know what to think. She said, *'We're females, what can we think?'* She said that for her, this explains why so many kids are sexually active: *'It is what they see and is normal to them'*. Several other women have confirmed that pornography is an enormous problem in Roebourne and Wickham and one that they do not have any solution to. Some women said that because in the past old people would stop men hurting children they would probably have speared men for doing something like this, that incites them to abuse the children and women. These women said that the police, the elders and some of the older people should get together and see how the whitefella's law and their law can stop this happening.

Abuse and how to deal with it

I spoke with a group of four senior women about the sexual abuse that is happening. One of the women said that she did not know it was happening until fairly recently. She said that sexual abuse had not been a problem for her, her sisters or family when they were children. She went on to discuss a talk that a government agency had organised where one of the speakers presented information about the abuse of children in Roebourne. This woman said she was shocked: she asked the speaker where and when she got the information and found that she had got it from people in the community a year before but had not done anything with it until writing the paper she was now presenting. She challenged the woman for not bringing that information back to the community and said that they needed to deal with it. Since then she has heard people start to talk about some of the problems. She said it has not been happening in her family but that she would 'watch out for it'.

The women said that since the drinking rights more women have been getting hurt and domestic violence is a huge problem, but the abuse of children is much more recent. They did not have any strategies for stopping the abuse but did say that the whitefella's law and their law needed to work together. They said that there are not enough strong men to help and this needs to be a big part of the solution because in the past the men would not have let someone abuse their daughter or sister.

A woman in her eighties said that in the past a man who abused a child may have been speared with a blunt spear. However, if he committed the offence again he would have been killed. She said that the elders would have dealt with this; but now no-one does anything about what is happening to the kids. A senior man agreed that if a man in his group abused kids the elders would have speared him. Another woman said that on the old reserve and on the stations the old people had been very protective of them. She said they stayed with their grandmothers until they were older and the boys only stayed with them while they were little.

Sexual abuse by children

While it is difficult to have discussions about sexual abuse of children it is even more difficult to talk about the fact that children in Roebourne are now sexually active and in some cases sexually abusing other children. This is an issue that several people raised. One of the teachers at the Roebourne School said that there are a number of indications that the children are sexually active. She said that some of the little girls do sexually suggestive dances; the boys try to mount the girls and pull at their clothes. She said children often make sexual comments telling girls 'to suck them' and that 'they will root them'. She said that it is very clear that the children are seeing and experiencing things that they should never see and are imitating this.

One old woman said that she worries about her little grannies. She said that in her house she has seen one of the boys, aged nine, taking the little girls up to the bush. She calls them back and tells the little girls to stay away from the boys. I spoke to another woman who was also involved with this young boy and she said that she knew he was doing this and realised she would have to talk to her own children so that they could protect themselves. A young woman with little children told me that she has caught boys trying to have sex with her little girl, who is only four years old. Another young woman, who had not realised that there was such a problem with the children, said that she was walking into town and saw a seven year old boy sitting on a step masturbating. She said that she walked by and pretended not to notice. All these women said that the police and health workers must know what is going on but no one does anything about it. They said that the whitefella's law is not enough because even when someone has been caught and gone to gaol he did not stop abusing children. They said that somehow the community, the police and the health workers have to get together and find out what to do. They said the community should shame people who do the sorts of things that make children try and have sex with other children because this will let everyone know and people will know who to watch out for.

While I was at the local pool, chatting to the children, one boy and two girls, all about nine years old, told me that the boys 'break in' the girls so that it will not hurt as much when the older men do it later. I talked to one of the grandmothers about the conversation. A key problem for her was the lack of any official (she referred to the police) who she could approach to talk to about the issue.

I talked with two young women about how girls learn about themselves and their bodies, including the development of their bodies. This discussion showed that teaching traditionally provided by grandmothers and mothers is not happening, at least for some young women. They said that mostly you learn about what's happening to you at school, which provides sanitary pads and related items. They said if you are not at school and you want pads, some girls might steal them or they might try and find their mothers' and use them. They said that their mothers would have learnt about maturing and becoming women from their grandmothers and mothers, who would have taught them how to look after themselves. One of the young women said that now it is a problem for most girls each month when they want sanitary pads but they don't have any money to buy them. She said, *'Girls can't just use grass or stay away from people like they used to, but no one thinks about this'*.

Dispute resolution: alcohol abuse

Many people spoke about drinking as a regular part of life in the village. One man, in his late 40s, said that 'all his drinking friends are gone'. He said this is a big group of men in the mid-40s to mid-50s age group. He explained that when they were drinking they did not know what the effects would be because they were in the first group that grew up with drinking rights. He said, *'Now people think it will not happen to me, even when they see their friends getting sick and passing away'*. As one young woman said, *'Children grow up thinking that excessive drinking is normal because Wednesday, Thursday and Friday each week people get family payments, pensions or CDEP payments and they buy alcohol and just drink'*. She said of her little brother, *'He'll just have to look after himself because adults don't do that'*. Grandparents and great grandparents, who do not drink, are burdened by people drinking and taking drugs. They often look after large numbers of children when parents are drunk. In many cases, they provide for the children from their own small pensions.

Dispute resolution: drugs

Many people spoke about the problems of drugs in the town. Older women and men down to young people of 15 said that drugs are a real problem. They said drugs are easy to get in Roebourne and Wickham: *'Everyone knows who sells them and the police do not stop them from selling them'*. People said the drug sellers do not care who they sell to; they

don't think about the children and what it is doing to them. They said that on paydays and when families are gambling the children will get money from them and use it to buy drugs. They said lots of parents don't ask the children what they are doing with the money and sometime they are drinking themselves and don't want to be worried by the children.

However, as with all the problems in the town, there are people who are very worried about the effects of the drugs and want to find solutions. One of the women said that everyone in Roebourne knows who the local drug dealer is: *'He drives around in a new flash car but does not work'*. I asked if people in the town had thought of dealing with him themselves as happens in some of the more remote communities. One of the women said that people have talked about it and some would like to do something. She said they can't make him leave because it is a town and they don't have a say about who lives there. She also said that some of the men would punish him; they might beat him or spear him but are worried about what the police would do to them. She said, *'The whitefella's law should let the families deal with this man because he is hurting their children'*. She said the law should let people know that it is all right for them to do this because *'they should not have to worry about getting into trouble and going to gaol when they need to protect their kids and the police don't do it'*. The woman said that under customary law they could do this even though drugs was not a problem they had had to deal with in the past: *'We can still use our rules and punishments on things today'*.

Dispute resolution: respect – gambling and effect on families

A senior Yinjibarndi woman spoke about the problems of gambling and the neglect and abuse of children. She said that on gambling nights many mums (and the number is increasing) are not at home to feed the children. She said that instead the mothers, fathers and caregivers are all playing cards. She said sometimes the children have a nanna or other family that do not play cards; but too often they walk around the streets with the other children and sometimes people give them money to go to the Caltex (a service station on the great northern Highway) for food, which means they are walking away from the village. She said that some of the families lose all their money at the gambling; those who win usually share their money with close family.

Some people said that in the past 'cops used to stop the game; they used to put people in gaol for playing. Now what authority do they have over gambling? They don't do anything'. Some people suggested that the police should try and stop the gambling: 'They don't need to put people into gaol but they should be talking to people about it and telling them to look after their kids'. One woman said that 'when the police pick up the kids or tell them to go home instead of being down at the Caltex they are tough on them but it is the parents who have to take responsibility'. She suggested that the police should find the parents of those children and make them stop gambling and look after their children.

General comments on the role of customary law today and general law

Importance of customary law today – still part of their lives

As a way of explaining that customary law is still a vital part of their lives, a senior woman and a man spoke about the traditional obligation on people to let the families know if someone is very ill or has passed away. They said that not doing this correctly can cause a great deal of pain and anger that might go on for a long time and cause other problems and fights between people. The woman spoke of a time when a little boy in her father's family had passed away (about 60 years ago) and the family had not come and told people immediately. She said that the family were camping on one of the stations and they were 'having a hard sorry time'. She described how later family hit them with boomerangs and shields because they had not given all the family this sad news immediately. This punishment had logic; it was a response to grief and a disregard for other people's feelings and rights to the child.

The senior man explained that this can still happen today. He gave the example of a recent funeral in his own family, saying that if he had not told people that his mum (mother's sister) had passed away so people could come and pay respect, they could pay him and his immediate family back for that. He was using this as an example to say that 'the feeling is still there': 'White people can't understand the anger that can happen around funerals and this gets people into trouble with the police, but they have to get their feelings out and no-one should stop this'.

One of the older women spoke about the recent passing away of a man in the community. According to her, the death could not have resulted from a heart attack as the doctor claimed. She explained, 'This man was happy; he always had kindness in his heart so his heart would not have stopped'. She believed that someone who was angry at the man, and identified this person, must have caused him to die. The woman explained that she and others now felt angry at the man who caused the death. She did not say whether anyone would punish this person.

In Part III there is a detailed account of recent payback, which clearly demonstrates the ongoing effects of the punishment aspect of customary law.

The effect of a lack of Elders on the role of customary law

Many people identified a lack of elders as a reason why the rules for behaving that they get from customary law are not obeyed as they should be but are still important to how they think. One of the women said that they needed to recognise some of the younger people as elders because many of the 'old people were finished and there is no-one in the middle'. She named three women, about 50 years of age, who are active in many community services and therefore in contact with most people. She said that in the past you could not be a leader unless you went through a number of tests. She explained that these tests were part of your everyday interactions with the elders as you learnt things such as cooking or looking after a sick person or hunting. She said the elders would notice what you did and would say what things you are doing well and decide that this woman or man will make a good leader. She explained that then the person would spend more time with the elders, learning from them; not just the things that happen at law time.

One woman explained that a most important part in the process was being told off by the elders: *'To be an elder you had to be told off by the elders and show that you can take it properly'*. She described watching an elder telling off a senior man at a meeting. She said the elder *'watched to see how he took it; he was testing that man'*. The woman explained that you have to be able to *'take it properly, take it in, listen, and shake hands'*. However, some people felt that there is now a problem with some of the younger people stepping up and wanting to act as elders. They said that there are not enough elders who can keep people in line and teach people to become elders. This is a big problem for the community because the elders always had the final say if there was a problem that families or people fighting could not work out. They said that what the elders decided was usually accepted even if people didn't like it. They also said that now it is often the strongest person who wins even though they might be wrong and they are looking after themselves and their family not the community.

According to one woman, in the past old people were protective. She said that when white people came to the reserve and tried to take the children away the old people would stand up for them. She says that today many of the problems come from the alcohol and drugs and lots of the men are not strong enough to help the kids. *'They do not deal with the sexual abuse or stop the kids from abusing each other; don't know what to do, just like the women.'* She said that sometimes it is them or members of their family who are abusing women and children; when it's their uncles, their own kids or other members of their family they don't know how to do anything. She said, *'You can't just go to the police about your family and there aren't the elders to go to because there are not many left'*.

Young men's perception of customary law and the general law

I asked a group of young men, who would regularly drink too much, fight, disrespect others and sometimes mistreat women when they were drinking what law they wanted to answer to. One of these young men has been in prison often, others had been there once and others not at all. Each of them said, *'The whitefellas law'*. They said that Yinjibarndi law would be hard on them, they *'could get beaten with wadi (clubs) and it could be quite bad if they had caused a lot of trouble'*.

Young women and customary law

In a conversation with a group of young women we talked about how the customary law operates for them. They spoke about marriages and said that some families make a big deal of people marrying or being with someone who is straight for them, but it depends on how much power they think they can have. They said that, *'...some adults growled, and some of them even flog the kids; but they don't do anything much else'*. They said the young people talk about wrong way marriages more once they have babies and especially if anything goes wrong, because people will think it is because they have married the wrong way. One young woman said that even if the doctor explained what caused the problem, *'they won't take it'*. One young woman said that she had been afraid to tell people she was having a baby because it was with someone who is an uncle to her and some of the older women would be very angry and may try and hit her.

These young women said that you are lucky if your family is one who talks about law and culture because then you know things. They said that their parents only want to teach the kids culture when they are drunk: *'Then you don't want*

to listen to them because you know they are not really thinking about what they are doing and it is not meant to happen that way'. They said that they should have visits to the bush, the boys should learn to shoot and the girls should learn to make damper. They think it would be good to have projects where kids find out who they are related to. They said that even though kids watch movies and do other things most of them want to go out bush and learn about their families, its just that their parents are drinking and don't do it with them.

I asked these young women what law is. They explained that it is *'how we live; the way we do things. We need to abide by the law'*. They said that for boys the purpose of going through the law is to become men. One of the young women said that she knew almost nothing until her brother went through the law. She said no one had prepared her for what her role in the ceremony would be: *'I only knew that I was involved but didn't know how. When I went to the law ground I learnt my skin group, my nuba or straight'*. She explained that *'it is a good thing when the boys are initiated because it takes you away from Roebourne. You learn how to carry on law and you get something from it'*.

One of the young women explained that when the boys go through the law *'they don't tend to go to school after that'*. She said, *'The community treats them differently but the school does not recognise this'*. She suggested that *'the school should try to understand this and do things differently so that the boys can keep going because they need to learn and have something to do'*. She said, *'It is a problem because once they learn more about culture, they feel more empowered but what do they do with it?'*. She said that when the boys have gone through the law they hang out with their Ngoojul, a person responsible for them in the law, and they drink.

The need for customary and general law to work together – example of domestic violence

A woman who is actively involved in the school, the church, the strong women's group and takes part in customary law ceremonies said that while customary law is still operating this does not mean that the people have to be tied to the old ways. She says that the community has both laws and that they can work together well. She gave domestic violence as an example of where she thinks the whitefella law should be operating because living conditions and relationships have changed in response to poor living conditions, loss of the opportunity to live culturally and alcohol and drug use.

She said that in the past, which is within her life time, 'men would hit women, it is not a new thing' (however, she said that in her grandmother's time it was different). She said, *'These beatings would usually happen if a woman had broken the law'*, for instance *'if they chased after another man, but it was also because they were drinking, after the drinking rights had come in'*. She said today many beatings happen because people are drinking. She said that she tells her daughter not to drink too much or her husband will beat her. Her daughter likes to drink and play cards and because of this she is 'living scared' of her husband. She said when her daughter has been drinking or playing cards she comes home to her. She said, *'I want my daughter to come home to me because I'm strong and I protect her'*. She said when the daughter's husband comes she sends him away until he is sober; the next day all is well and they live as a family. She said it is a weekly cycle that corresponds to paydays.

This woman said that some men will say that hitting women is their right. She said they say that they have always done it; if the woman deserves it. She said, *'This is a problem because the women aren't strong enough to say anything against this and the men who are drinking and hitting their women won't listen anyway'*. She said, *'This is why the whitefella's law and our law have to work together. We want the women to look after their kids and not drink but we don't want the men bashing them and scaring the kids; so we need the whitefella's law too'*.

An example of difficulties in the application of the general law without consideration of circumstances – driving licences

A group of young men identified driving, licences, car registration, roadworthiness of vehicles and police chasing people in old cars as key problems of the whitefella law. I asked them whether they had licences: none of them did but they all drove. One man was drinking and lost his licence, another had just never applied for one. One man said, *'I don't know who to come to'*, while another confessed that he could not read or write. Often when people started driving they did not understand that they had to have a licence, particularly because they were only driving around their own community in unregistered cars. They said that most people do not have copies of their birth certificates, they don't have passports or other identification for applying for a licence, and many people do not read or write well enough to do the written test. They said that people use the cars to go fishing, hunting or to the shops. There are very few accidents. They think that the police should help people get their licence and should stop picking up cars that do not meet the normal standards when they are being used off-road.

One of the older women joined in the conversation about the use of cars. She spoke strongly about the need for the police to make getting a licence easier. She suggested they get people together in groups, go through the rules of driving using models and test people by asking questions and letting them answer orally. She said that at times people in the town have organised for people to learn the driving rules using mats, toy cars and listening to information, but it does not happen very often and it is something that the police should do.

Punishment – customary law and general law

To understand how the severe physical punishment that is part of customary law impacts on some people from Roebourne I spoke with a family, whose son/nephew was responsible for the death of a young man from Yandeyarra, a community 350 kilometres northeast. The death occurred nearly four years ago. The young man served two years imprisonment after which he was placed on parole for nine months. The circumstances of the death were unclear because all the boys involved had been drinking.

The police arrested the young man, 16 years old, shortly after the incident occurred. They sent him to Perth for trial in the Children's Court. He was found guilty and sentenced to three years in a juvenile detention facility. During that time, he attended school and spent time learning woodwork. After two and a half years, the Parole Board released him into the care of his aunt, who lives in Wickham, a small town 10 kilometres from Roebourne.

I spoke with the young man's aunt about his parole. She explained that he is her nephew through marriage: *'I was married to his dad's brother'*. While he was in detention he contacted her and asked if he could stay with her. Before the Parole Board would release him he had to have someone to stay with who could help him keep the parole conditions or he would be put back into detention. His aunt said, *'I'm in Wickham, away from his friends so he won't get into trouble. I told him he could stay but he had to obey my rules. I told him he could not leave the house. He was not to make any trouble'*. She said that because he knew she meant what she said and would not put up with him breaking her rules 'he was good' and the parole time went without any problems.

We talked about when her nephew finished his parole and was taken by his family up to Yandeyarra to meet the family who had lost their son and her feelings about him being punished. She said that this was hard for her, that it does not happen in Roebourne very much now. She also said that she is now going to the church and they deal with things differently. At the same time, she understood that his family felt obliged to take him to be punished. She did not like the fact that his aunts and uncles were also punished, especially those who also go to church. It is not just the offender who is punished; the mothers and fathers (aunts and uncles) are also shamed, yelled at, hit, isolated depending on the offence and the feelings of the family.

This woman has her own tragic story of loss. Her 20 year old daughter passed away three years ago after the daughter's partner, who was drinking, bashed her, covered her with a blanket and left her for the night. The woman found her the next morning. She was still alive, though her head was swollen and bruised and she was unconscious. She was flown to a hospital in Perth and put on life support. Two days later the hospital staff turned off the machine and her daughter passed away. The man was gaoled for 12 months and then released on parole. His parole period has now finished and he wants to meet her so he can apologise for what he has done. She said, *'That man who killed my daughter wants to come and see me. He sent a message to apologise but I don't want to see him. It's too soon. I can't face him'*. At this time, she does not want to punish him or have her family do this; this is, at least in part, because of her Christian beliefs. However she wants to move forward with her life and her daughter's death is not resolved yet. That someone has gone to gaol is not enough because it does not let the family who have suffered the loss deal with their feelings.

After speaking with the young man's aunt I spoke with another aunt (and mother), this time his father's sister, who is one of the young man's primary care givers and his uncle (father). His aunt is a committed member of the Roebourne Aboriginal Church, where her husband is one of the Ministers. She leads church services, organises bible studies and prayer meetings for the women and teaches Sunday school to the children. The young man's uncle is married, has children and grandchildren. He has been in gaol in the past for minor offences. He explained that he had been in the 'Regional' (the Roebourne Prison) when someone from the Law Reform Commission came to talk to them but they didn't ask him about what had happened to their boy and family and he would like to have a say.

I asked the aunt to tell me about what has happened with her nephew since the incident. She said that he had done his time in gaol and he has paid the family, which *'has made a man of him'*. She explained that, *'Roebourne doesn't have payback. The old people used it all the time but we don't now. Now the police are here'*. However, the family took

the young man up to Yandeyarra to face the family who lost their son. I asked whether the Yandeyarra family had made them take their nephew up there. The uncle said, *'No, when he got out we rang up the family and organised to take him up there'*. I also asked whether they thought it is the right thing to do after he has already been in gaol for a long time. They both agreed it was the only thing to do.

The aunt explained that, 'The whole family had to go, the mum and dad and everyone. We all went up to Yandeyarra'. She said they had to do this because until they faced the other family, 'We couldn't go up to Yandeyarra, we couldn't even go for a funeral. We couldn't roam around free'. The uncle said, 'If we keep him here they'll think he meant to do it and then they'll keep doing things to the family. We couldn't roam around free. Those feather foot would come after us and we couldn't do anything. If he didn't go and face the family we couldn't go up there again, not for funerals or anything. And we're family to that mob'.

The aunt then asked whether I know what feather foot are and said, 'They could be around here, just waiting. You don't know when they are going to come. So we had to take him up there and face the family. We all went – his dad and his mother and uncle, all the mums and dads for him (uncles and aunts). They are spirit creatures that may be all around you. They do things to hurt you, put bad ideas into people's heads and cause trouble if you have broken rules and not fixed this with whoever you hurt or took something from'.

Both his aunt and uncle explained that it was not just the young man who had to be punished, they all had to be. The young man's aunt from Wickham said that this was the hardest thing for her, that all the family had to be punished. At various times, other people said that this was the hardest part. One woman was quite upset that the aunt who is a soft caring person was punished by being hit with wadi so that she was bleeding and bruised. But the aunt explained that it was important that the whole family answers for it: 'You have to support them, show them that you are there for them'. And, the uncle said that 'the family are all OK now'.

We talked about the problems that can happen when an offender is punished by people who are drinking and therefore don't really know what they're doing. And, the continuous harassment and fighting that can occur when the offender has to face people every time they have been drinking, in many cases on a weekly basis. The uncle explained that in his nephew's case, *'there was no drinking. We went there the night before and all slept on the flats. The other family were in their places, they never made any trouble. They want us to come and face them. The whole family went with him, to support him and to show that we are all together on it. You got to give the support'*. The young man has not had to deal with people giving him trouble because of drink.

When we talked about the severity of the punishment the young man's aunt said that, 'They broke his leg, at the back near his ankle, and they hit his arms and back with sticks and broke open his head (he was unconscious). And, they hit all of us with the sticks'. One of the elders from Yandeyarra, who I asked about this particular punishment, said that when they could see that he had had enough she and another elder, a man, threw their bodies over the young man. This signals that the families are to stop. 'It is important that the punishment is done properly and that no-one just takes out their anger'. She said that families in Yandeyarra were pleased that the Roebourne family had done the right thing because now they can all go to funerals and see each other in town.

The uncle said that when the punishment was finished, 'we took him straight to Hedland hospital. He was unconscious and his head was split, his leg was broken too. But he didn't want to stay there. He was too afraid to, (because Port Hedland is not their country and his family would not be there) so we took him down to Nichol Bay (the hospital at Karratha, 30 kilometres west of Roebourne) even though he was badly hurt'. The uncle said there have not been any further punishments and there will not be. 'No, it's finished now. He can go where he wants to. He can go to Yandeyarra. We can go there for funerals and anything.'

In response to my question of whether the whiteman's law or Aboriginal customary law should deal with troubles like this with their nephew, both aunt and uncle said that both laws are important. His uncle said, *'Both laws. The police took him to the police station, then he was in remand. After he did his time in whiteman's way and when he finished his time (parole) the family took him for punishment'*. His aunt said that the time away was good for him. *'He came back with his woodwork. He learnt to do that there. He gave what he made to his family, it was really good. I've tried to tell him to keep doing it. We talked to him about going to the college. They might give him a job, teaching that woodwork. But he hasn't done it'*.

I asked whether customary law or the whiteman's law should deal with people first because all the time that someone is in gaol they have to think about what is going to happen to them when they get out and they are already worried being

in gaol. I gave the example of an incident in Kalgoorlie some months ago when a man took the life of another man and the people speared him before he went to gaol. In this case, his leg could heal while he is in gaol and he had access to medical help. I then asked whether it was better for their nephew (son) to face the family first or go through the whiteman's law first.

The uncle said: *'It's good to go to the whiteman's law first. It gives the family a chance to settle down. At first they would be angry and want to kill him. They wouldn't know when to stop, because they've just lost their son. They can't think then. But when he's been locked up they can think about it and they can think about him too. Cause they're related to him too'*. I put this same question to one of the elders from Yandeyarra who had thrown her body over the young man to signal the end of the punishment. She agreed that it is best for the whiteman's law to deal with the offender first; *'Because the family always take time to settle down after something bad has happened'*.

We spoke about how difficult it is for families in this type of situation where the one who is lost and the offender are related. I related some details of a situation in the Kimberley where a family who lost an adult son/brother took a child from the family who were responsible. I explained that when I spoke to the family who had taken the child it was clear that they loved and respected the child. They did not want to harm him or make him unhappy. Rather, he was someone for them to love and to help fill the gap left by their own loss. I asked the uncle if he knew of this sort of thing happening and what he thought about it. He said, *'I agree with that. That family will respect that baby, they'll look after it. It gives them someone. But my nephew he is family for that mob at Yandeyarra. They care about him'*. This was clear from speaking to the elder at Yandeyarra, who was involved in the punishment. She was pleased that the young man and his family are now able to visit without any problems, because they did not want to lose him too.

After the young man had been punished at Yandeyarra his family put him through the law. They did this because: *'It makes a man of him'*. His uncle said that they invited the Yandeyarra mob to take part in the ceremony, which brings them closer to him because the people who put a young man through the law have a special bond with him. The Yandeyarra mob was happy with this. The young man has said that he wanted to face the family and doing this has let him feel respect for himself. Now he knows they don't hold their anger to him and he feels right.

There are other people who the young man's family have suggested speaking to but as yet this has not been possible.

Several people, including those involved in this punishment at Yandeyarra said that today traditional punishment is complicated by the breakdown of traditional structures and alcohol (although this is not a problem at Yandeyarra). Some people suggest that today, it is often the strongest families who determine the extent of punishment, which can lead to harsher punishments being carried out than were once given. Further, where punishments were once carried out and that was the end of it, today, if people have been drinking, they may attack the offender or his or her family repeatedly.

Part IV: Conclusion

There are no simple answers to questions about the place of customary law in the general legal system. However, we do know that communities such as Roebourne are facing devastating problems of violence and abuse and that people want this to stop. To date, the general legal system has not been able to provide solutions and so it must consider other possibilities. People also have the moral right to their own beliefs and customs; although, Aboriginal people have been effectively denied this in many aspects of their lives since colonisation.

The Northern Territory Law Reform Committee's view

The Northern Territory Law Reform Committee's *Report on Aboriginal Customary Law* concluded that:

Each Aboriginal community will define its own problems and solutions. Models may deal with family law, civil law, criminal law, or the relationships between Aboriginal communities and government officers, private contractors while in Aboriginal communities, and so on.³²

It further concluded that:

³² NTLRC, above n 8, 21.

Aboriginal communities should be assisted by government to develop law and justice plans, which appropriately incorporate or recognise Aboriginal customary law as a method in dealing with issues of concern to the community or to assist or enhance the application of Australian law within the community.³³

The Committee justified this conclusion by stating that:

Traditional law can sometimes be better than Australian law at solving disputes in Aboriginal communities. The committee agrees that at least some disputes may be better dealt with under traditional law. However, sometimes, Australian law may be better suited.³⁴

The Committee is not ignorant of the problems that may occur in communities where customary law is provided official state recognition. It acknowledged that some people were concerned that 'customary law may in practice mean increased control by male elders who may themselves be perpetrators of violence, or have kinship obligations to perpetrators'.³⁵ This has significant ramifications for women in communities, who are most often subordinate to the men and in many cases are looking after their families in abusive circumstances. The Committee therefore concluded that, any interaction between the general law and customary law must:

insure that the voices of Aboriginal women, young people and less dominant groups are heard and taken into account. Their rights to equal protection under the Australian law must not be compromised.³⁶

The Roebourne people's view

The people in Roebourne are very concerned about what is happening in their community. Old and young people alike talk about the breakdown in systems of respect, which causes them to worry for the future of themselves and their children. All people that I spoke with said that they wanted strategies for dealing with problems of family violence, sexual abuse, neglect of children, stealing, breaking down of respect, and kids not going to school. They said that:

- People need proper housing so that young families can have their own living spaces;
- People need proper health care, including help with drug and alcohol problems and, knowledge of sexually transmitted diseases;
- The kids need to go to school so they can learn and will one day have jobs;
- People need work or other meaningful things to do (some people talked about station work training for young people, cultural tourism, art, sport).

People also spoke of positive strategies that are already in place, including the Mingga Patrol, which picks up people who have been drinking and feeds them; the women's safe house; the men's house; the strong women's group; the men's group; programmes for supporting families; and the church. They talked about the importance of the law ceremonies for keeping their culture strong and look forward to the next ceremonies. In the last year they lost two senior men, one in tragic circumstances and the other unexpectedly, which stopped the usual ceremonies occurring.

In the discussions that I had with people about the place of customary law and the general legal system in their everyday living, people suggested that the whitefella's law and their law need to work together. They said that their law is their lives and that respecting it will allow them to build a healthier and safer community. *'Just because it looks like people don't respect our law [it] doesn't mean its not there for us', people 'still have feelings about who they are and their country' and 'they know when they ignore their culture, their skin groups and respect then they have violence and all the other problems'. 'We can't just be like whitefellas you might think we can be in a hundred years'.*

A senior man and five senior women said that if they are to have a safe and healthy community again they need to work with the police and other services to make this happen. No one that I spoke to said that they wanted only customary law to deal with all problems or crimes in the community. Some of the young men said that customary law is too hard and they prefer the whitefella's law, even when they have to go to gaol. People said that:

- Sometimes gaol is the right thing;
- Sometimes people need to answer to the community and be talked to and maybe shamed by the elders and senior men and women;
- Strong women, men, police, health workers, the schools all need to work together especially for the kids;
- The police need to help them deal with violence, abuse and gambling;

33. Ibid 22.

34. Ibid 15.

35. Ibid.

36. Ibid 22.

- People should not go to gaol for not having a licence;
- The whitefella's law should let them deal with people who hurt the kids, like the drug trafficker and he should go to gaol.

Author's view

Towns such as Roebourne, where 90 per cent of the population are Aboriginal people from largely four interrelated tribal groups, face different issues than Aboriginal communities, which are more autonomous. People in Roebourne have a great deal of interaction with non-Aboriginal services, mining companies, tourists and other people who are not members of the Roebourne Aboriginal community. They are also highly policed, but with little input from the local people into how policing should operate in the town. The overwhelming result is that this model does not work in Roebourne.

It may well be that through the Western Australian Law Reform Commission's findings, when they are available, people in Roebourne will be able to participate in the justice system in ways that incorporate their values and law to the benefit of the community. According to the Northern Territory's findings, 'there should be no limit on the issues that Aboriginal communities can use traditional law for'.³⁷ They could therefore use it in conjunction with the general legal system.

From my discussions with people in Roebourne I suggest that there is a need and an obligation for the general legal system to work through options for involving Aboriginal people in aspects of the law. In Roebourne poverty, displacement, alcohol and drugs, and social dysfunction all contribute to violence and an increase in other crime. At this time, the general legal system has not been able to make a positive contribution to changing this trend. As many of the problems are socio-economic, it is unrealistic to expect the legal system to remedy them. However, communities want to improve their living conditions, they are seeking ways to deal with family violence, child sex abuse and other crimes, and therefore all parties need to consider all options.

Customary law needs recognition for what it can offer; for example, dispute resolution processes. The way forward clearly involves finding an appropriate mix of aspects from each legal system.

Difficulties of combining customary law and the general law system

There will be some difficulties in incorporating customary law dispute resolution processes into the general legal system. From my discussions with the people of Roebourne, the key difficulties appear to be:

- The breakdown in traditional social structure, which results in a lack of elders and senior people who can administer punishment, in its many forms.
- Stronger families determining what punishment is meted out to a person or family who offend them and who carries out the punishment.
- People and families feeling obliged to agree to customary punishment because they cannot afford to offend stronger families, even when they may not agree with the severity of punishment.
- Alcohol and other substance abuse. When people have been drinking, they may become physically or verbally abusive towards someone who has offended against them or their family. This is contrary to traditional notions of agreement about the form of punishment, which provides closure for an offence so that all involved can move on.

At the same time, not incorporating customary law into the general legal system also has some difficulties for the Aboriginal community. For Aboriginal offenders, their victim and both the families' of the victim and the offender, their need for closure is an important aspect of punishment. For them the general legal system does not deal with closure sufficiently. The general legal system regards imprisonment as the severest form of punishment and when someone has done their time, they are free to resume their life. In many cases, this does not work for Aboriginal people because they have not faced the family who they have offended and, therefore, their own family is in debt to the victim's family until they meet and settle the debt. Sometimes a victim's family will punish another member of the offender's family because they want to have closure but the offender is in prison. Additionally, as well as serving time in prison, an Aboriginal offender may also face customary punishment on release from prison.

Whether the general legal system integrates aspects of customary law or not, it is necessary to appreciate that it does operate and that Aboriginal people in Roebourne are often subject to both systems of law.

³⁷. NTLRC, above n 8, 21.

background paper 7

Aboriginal people and justice services: plans, programs and delivery

Neil Morgan* and Joanne Motteram**

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Part I: Scope and methodology

1. Introduction

This paper reviews a range of justice services provided by the Department of Justice (DOJ) in Western Australia. It is increasingly recognised that many government agencies have a role to play in services that impact on justice issues, but DOJ remains largely responsible for delivering justice services other than policing.¹ These services include the administration of courts, juvenile justice, adult prisons, community-based corrections, victim support services and agencies involved in guardianship, births, deaths and marriages, and wills and estates. It should also be emphasised that DOJ is not merely a service provider. It is the linchpin of policy development and implementation across the justice portfolio and is able to drive its own initiatives (within broad government objectives) in addition to responding to specific directives and proposals of the government of the day.

Although Aboriginal people constitute a very small proportion (around 3%) of the state's total population, they provide a—and frequently **the**—major client/customer group for DOJ.² This is most starkly illustrated by the fact that Aboriginal people currently constitute over 40 per cent of the state's prison population, over 25 per cent of people on community corrections orders, and around a third of children appearing in the Children's Court. At some pressure points they constitute an even higher proportion, accounting for around 50 per cent of the female prisoner population, and 70–80 per cent of the juvenile detention population. In addition, it is now widely acknowledged that many Aboriginal people (especially women) face complex and entrenched issues of victimisation.³

Given this background and the focus on criminal justice issues during the community consultations,⁴ it became clear that the Law Reform Commission of Western Australia (LRCWA) needed to understand more about the various initiatives and programs that have been conceived and implemented by DOJ, both 'in house' initiatives and those undertaken in partnership with other agencies and contractors. While the paper's main focus is on programs, plans and initiatives aimed specifically at Aboriginal people, it also recognises that they may well participate in 'mainstream' programs; it therefore considers a number of matters relating to those programs.

It must be emphasised that this paper is not an exercise in evaluating the success of specific programs and initiatives in terms of offender recidivism rates or other quantitative or qualitative criteria. Such an exercise would require specific, and often highly complex, research projects.⁵ Rather, it provides a review of the overall direction of programs and initiatives in the context of Aboriginal people, with reference to the concerns of the Aboriginal Customary Laws project. This includes consideration of core benchmarks such as victimisation and incarceration rates. The paper identifies positive aspects as well as suggesting some areas of concern. In essence, the challenge that DOJ faces is to translate its official policies into practice in a range of areas.

2. Terms of reference and community consultations

The LRCWA's terms of reference refer to the relationship between Aboriginal law and the general justice system. The Aboriginal community consultations brought these abstractions into sharp 'real world' focus and provide the vital contextual framework for the project. Not surprisingly, criminal justice issues were at the forefront of all these community consultations – metropolitan, regional and remote.

The criminal justice concerns that were raised during the community consultations included the following:

- The impacts of imprisonment, such as spiritual dislocation from Aboriginal law and culture, and geographical distance from family and community.⁶

1. See below p 239 for further description.

2. For further discussion of these figures and trends, see below. Basic statistics with respect to adult offenders are published every month at <<http://www.justice.wa.gov.au>> (go to Reports and Publications > Facts and Figures > Offender Management Statistics). DOJ also compiles 'weekly offender statistics.'

3. 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* (Perth: Department of Premier and Cabinet, 2002) ('Gordon Inquiry').

4. See below pp 238–39.

5. See eg Officer of the Inspector of Custodial Services, *Cognitive Skills Training in the Western Australian Prison System*, Report No 23 (August 2004); Greenberg DM, Da Silva JA & Loh N, *Evaluation of the Western Australian Sex Offender Treatment Unit (1987-1999): A Quantitative Analysis* (Perth: UWA Forensic Research Unit, 2002); Indermaur D, Morgan N & Roberts L, *Evaluation of the Perth Drug Court Pilot Project* (Perth: Department of Justice, 2004).

6. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations* (2002–2004). This view was expressed in most of the consultations – metropolitan, regional and remote. It was felt most strongly in remote locations where Aboriginal law is still the dominant force in peoples' lives.

- Criticism that some practices do not reflect—and, indeed, may disrespect—the tenets of Aboriginal law and the communities' wishes. For example, recognising the importance of Aboriginal law taking its course and respect for community protocols.⁷
- Criticism of some prison procedures, especially in relation to funeral attendance and strip searches of men who have been through the law.⁸
- Frequent complaints about actual service delivery for both victims and offenders.⁹
- Calls for Aboriginal people to have greater involvement in designing and delivering programs to address offending behaviour.¹⁰
- Calls for more Aboriginal involvement in court processes.¹¹
- An overwhelming desire for developing the capacity and authority of Aboriginal communities to deal with issues such as family violence and substance abuse.¹²

3. Structure of paper

Part I briefly outlines the role of DOJ before discussing the methodology, timeframes and information gaps of the paper. Part II discusses key policies, legislation and statistics (including trends in Aboriginal imprisonment rates) since the Royal Commission into Aboriginal Deaths in Custody in 1991.

Parts III to Part VI provide a descriptive overview of specific programs, plans and initiatives in terms of their stated objectives, their availability on the ground, the extent of Aboriginal participation, and any evaluations that have been conducted as to their effectiveness. These Parts, which are roughly divided according to the major DOJ directorates, simply summarise the information provided to the LRCWA by DOJ. Regrettably, there are some information gaps and we are unable to reproduce in full the DOJ responses to our questionnaires.¹³ Part VII provides a thematic review of the issues raised by the various initiatives described in Parts III to VI. Part VIII makes some concluding remarks.

The paper is designed to meet a number of potential needs. Some may choose to read the whole paper. However, it is possible simply to read Parts I, II, VII and VIII, and to use the detailed descriptions in Chapters 3–6 as reference points. Alternatively, some may wish to focus on the descriptive material in Parts III–VI for information purposes alone.

4. The Department of Justice

The Ministry of Justice was established in July 1993 to consolidate and rationalise justice services (other than police), which had previously been spread across a number of separate agencies. In 2001, it was renamed the Department of Justice. The core responsibility of DOJ is the provision of the framework and processes for the efficient and effective administration of justice and legal affairs in Western Australia.¹⁴ In the 2002–2003 financial year estimated actual expenditure by DOJ was \$533.9 million for the delivery of output.¹⁵

In addition to overseeing the administration of over two hundred Acts of Parliament, DOJ's core services are described in its annual reports as follows:¹⁶

- Providing court services that meet the needs of the judiciary and community, including victims of crime;
- Protecting the community and directing offenders towards the adoption of law-abiding lifestyles;
- Managing the security, integrity and preservation of birth, death and marriage records;
- Contributing to a coordinated, quality system of justice which is responsive to community needs through informing, developing and evaluating justice policy; and
- Meeting the needs of government and the community for policy, information and legislative services.

7. Ibid.

8. Ibid. See, especially, Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003.

9. Ibid.

10. Ibid.

11. Ibid.

12. Ibid. The most poignant examples were again found in more remote places that have suffered badly from problems of solvent abuse.

13. See below p 241.

14. Department of Justice, *Annual Report 2002–2003*, 15.

15. WA State Government *Budget Paper 2003–2004*.

16. Department of Justice, *Annual Report 2002–2003*, 15.

5. Methodology and timeframe

Methodology

One approach to a paper of this sort would be to rely on published DOJ documents, independent sources such as the Office of the Inspector of Custodial Services, personal knowledge and selected interviews. However, relying on such sources is unlikely to provide coverage across an organisation as complex and diverse as DOJ. It is also likely to attract criticism for being incomplete, unduly 'selective' or 'out of date'. For this reason, the LRCWA considered that it was crucial to obtain comprehensive information directly from DOJ by means of a questionnaire circulated to all relevant directorates (Corporate Services/Aboriginal Workplace Development Unit; Aboriginal Policy and Services; Court Services; Prisons Services; and Community and Juvenile Justice Services).¹⁷

For the purposes of this report, the information that was gleaned from these questionnaires (and from follow-up interviews with DOJ staff and service providers to confirm or clarify questionnaire information) has been supplemented by DOJ publications,¹⁸ other relevant literature, the reports of independent justice agencies (such as the Parole Board and the Office of the Inspector of Custodial Services) and observations drawn from the community consultations.¹⁹ For reasons that are canvassed in the next section, there are some gaps in terms of questionnaire responses, but this report reflects the information available in mid-October 2004.

Timeframe and information gaps

The LRCWA Research Directors first discussed the paper and the intention to develop a questionnaire with the Director General and other senior DOJ executives in 2003, and they offered their strong support. However, responses to the questionnaire during 2003 produced relatively little information. Therefore, in March 2004 the Commission sought to revitalise the project. Following discussions with senior DOJ executives, the questionnaire was modified to ensure that all aspects were covered and that its scope and purpose were better understood.²⁰

It was recognised that information would not necessarily be in the same format, and that different issues would arise across different divisions. For this reason, the questionnaire (a copy of which forms an Appendix to this paper) was relatively simple and open-ended in format. It asked respondents to outline initiatives, where possible, in terms of their objectives, format, content, design and target group. It also asked about the resourcing and availability of programs, together with actual participation rates and the results of evaluations. In order to accommodate differences between DOJ directorates, it was recognised that not all of these headings would be universally relevant and that some respondents might wish to raise additional matters. Space was therefore provided for other comments.

The LRCWA had anticipated that most of the information in question would be readily available, given that Aboriginal people form such a large number and proportion of DOJ clients. In April 2004, we therefore asked DOJ to provide as much information as possible by June.²¹

The task was more complex than had been anticipated and information was not readily available across all DOJ directorates. This created a number of problems in the production, coverage and presentation of this Background Paper. The deadline for questionnaire responses was initially extended from June to mid-July. Since we could identify gaps in the information received by that date,²² it was further extended to mid-October 2004, with the formal DOJ response coming under cover of a letter dated 11 October. However, gaps still remained, not least in the significant area of prison-based treatment programs. We therefore followed up again directly with the prison programs division and obtained further information on 21 October.²³ It appears that the most comprehensive and informative responses came from the Community and Juvenile Justice Directorate.

17. See below pp 240–41.

18. On the DOJ website <<http://www.justice.wa.gov.au>> (Reports & Publications link).

19. See also below Part VII on information issues.

20. In 2003, for example, we had sought advice on 'programs'. However, DOJ subsequently advised that this was not clear in scope. Using DOJ parlance, we therefore referred to programs, plans and initiatives.

21. Ms Jackie Tang (Executive Director, Community and Juvenile Justice Services) offered to coordinate and facilitate the process across all divisions of DOJ and we record our particular thanks to her. The Director General, Mr Alan Piper, also gave his personal backing.

22. For example, with respect to prisoner work camps and treatment programs.

23. Another version of the information was provided by DOJ on 24 November 2004, but this appeared virtually identical in substance to the previous versions, simply including the additional information we had sought and obtained from Prison programs.

Availability of questionnaire responses

At our suggestion, DOJ originally indicated that it would be possible for their questionnaire responses to be made available as appendices or supplements to this paper. We considered that this was appropriate and desirable, both to ensure comprehensive coverage enabling all interested parties to peruse the questionnaires for more detail, and also to cross check our summaries and comments. However, by letter dated 11 October 2004 accompanying its questionnaire responses, DOJ advised that it no longer considered it appropriate for the responses to be placed on line. The letter stated that the questionnaire 'templates are considered to be a work in progress' and that 'the responses ... were prepared during June/July 2004 and ... some of these programs, plans and reviews have developed since the information has been prepared.' The areas of particular progress were not identified or quantified.

This put us in something of a Catch 22 situation in compiling this report – not least because some public sector agencies have been known to respond to reports by saying that their comments are out of date or that they are already well-known and are being addressed.²⁴ However, since nobody can write papers on the basis of unavailable information, this Background Paper reflects the information with which we were supplied by DOJ under cover of the 11 October letter, supplemented by the other sources to which we have referred. The paper was written within a month of the information being provided.

Part II: Policy, legislation and statistics

1. Introduction

This part of the paper provides an overview of key legislation, reports, policy documents and statistics relating to Aboriginal justice issues from the Royal Commission into Aboriginal Deaths in Custody in 1991 to 2004. It begins with a sketch of legislative initiatives that were designed to reduce Aboriginal enmeshment in the justice system. It then gives an overview of major policy documents from the period 2000 to 2004 and concludes by outlining trends in victimisation and imprisonment rates.

There is a grim dissonance between the aspirations of legislation and policy documents on the one hand and 'bottom line' statistical measures on the other. Aboriginal Western Australians are amongst the most imprisoned people in the world and their position has deteriorated rapidly over the last two years. During the LRCWA's consultations, communities accepted that imprisonment is necessary for some people, but saw the current levels of mass incarceration as destructive of Aboriginal culture and law.

Western Australian Aboriginal people—three per cent of the state's population—provide over 40 per cent of the prison population and around one in 15 Aboriginal men is in prison at any given time. Three quarters of juveniles in detention and 48 per cent of women in prison are Aboriginal. On 28 October 2004, 1 264 Aboriginal people were in the state's prisons – *an increase of 44.5 per cent in just two years*. On the other hand, the number of non-Aboriginal prisoners has increased by only six per cent over this period.²⁵ Unfortunately, there is little evidence of a decline in Aboriginal victimisation rates.

2. Royal Commission into Aboriginal Deaths in Custody (1991)

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was established in October 1987 to find out why so many Aboriginal people were dying in custody. RCIADIC reported in May 1991 that death rates for Aboriginal and non-Aboriginal prisoners were actually quite similar when measured in terms of their numbers in the prison population. However, when measured by reference to their numbers in the population as a whole, Aboriginal people were dying at a far higher rate than non-Aboriginal people. This led RCIADIC to conclude that, while conditions and treatment in custody were a matter for attention, the principal problem was the disproportionate rate at which Aboriginal people were being arrested, detained and imprisoned.

The report found that the gross over-representation of Aboriginal people within the criminal justice system was the result of many wide ranging and complex factors, both historic and systemic, and documented a saga of discrimination and disadvantage in contemporary Australian society. It remains the most comprehensive investigation of Aboriginal justice issues that has been undertaken and continues to provide an important working reform document.

24. See below Part VII.

25. Since this report was written, the number of Aboriginal people in prison has increased from 1 264 to 1 380 in less than two months.

RCIADIC handed down 399 recommendations, many of which related to reducing the overall level of overrepresentation in the criminal justice system. The recommendations had special resonance for Western Australia, with its historically high Aboriginal imprisonment rate. In response, the Western Australian government undertook to refocus the way it dealt with Aboriginal people coming into contact with the justice system, particularly with a view to reducing the degree of Aboriginal enmeshment in the system.

RCIADIC recommended that independent Aboriginal-run agencies should be established to monitor the extent to which governments across the country are implementing its recommendations.²⁶ The Aboriginal Justice Council of Western Australia was established to fulfil this role and also to provide support and advice to a range of bodies, including the Coroner's Court. The Council produced regular statistical reports and reviews prior to its abolition in 2002. Since then, there has been no independent monitoring agency.²⁷

3. Legislative initiatives to reduce imprisonment

In the period since RCIADIC, successive governments have espoused a commitment to improving the position of Aboriginal people in the justice system and to reducing their rate of imprisonment while, at the same time, promoting strong law and order policies. Not surprisingly, this has resulted in policies and legislation that sometimes push in countervailing directions.

There has been a barrage of legislative activity in the criminal justice area over recent years. Legislative strategies directed at reducing the state's imprisonment rate have included the following:

1988

The *Criminal Code* was amended to include a provision that imprisonment was the option of last resort. This principle was already part of the common law and no new sentencing options were provided to judicial officers. Public drunkenness was also abolished as a criminal offence under the *Police Act 1892* (WA).

1994

The *Young Offenders Act 1994* (WA) was designed to produce a new approach to juvenile justice. It provided a statutory basis for cautioning and introduced a modern range of sentencing options for children. It also enabled the establishment of juvenile justice teams.

The *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) aimed to reduce the number of people being imprisoned for fine default by introducing alternative enforcement measures such as driver's licence suspension and seizure of goods.

1996

The *Sentencing Act 1995* (WA) and the *Sentence Administration Act 1995* (WA) came into force in November 1996, providing a new range of sentencing options, including community-based orders, intensive supervision orders and suspended sentences of imprisonment. The *Sentencing Act* abolished prison sentences of three months or less and provided for magistrates to review any sentences of imprisonment imposed by Justices of the Peace.²⁸

2003

The *Sentencing Legislation (Amendment and Repeal) Act 2003* (WA) and the *Sentence Administration Act 2003* (WA) came into force on 31 August 2003 and reflected the government's 'reducing imprisonment' strategy.²⁹ It extended the ban on short sentences to six months and, as a consequence, imprisonment is no longer a sanction for a range of offences that previously carried a six month maximum. However, the statutory maxima for a number of other offences were increased. The legislation introduced the Pre Sentence Order (another alternative to custody) and a new parole scheme for sentences less than 12 months. It also gave the courts greater discretion to refuse to make people eligible for parole on sentences of 12 months or more.³⁰

26. Commonwealth Government, *Royal Commission into Aboriginal Deaths in Custody: Final Report* (1991) recommendations 2 and 3.

27. The signing of an Aboriginal Justice Agreement in 2004 is intended to usher in a new era of monitoring but the results of this are yet to be seen (see below p 246).

28. Morgan N, 'Business as Usual or a New Utopia? Non Custodial Sentences under Western Australia's New Sentencing Laws' (1996) 26 *University of Western Australia Law Review* 364.

29. See below pp 243–44.

30. Morgan N, 'The Abolition of Six-Month Sentences, New Hybrid Orders and Truth in Sentencing: Western Australia's Latest Sentencing Laws.' (2004) 28 *Criminal Law Journal* 8.

4. 'Law and order' legislation

Over the same period, there have been a number of initiatives driven by a tough law and order agenda. The best known examples of these are the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) and the three-strikes home burglary laws of 1996, both of which had a disproportionate impact on Aboriginal people.

The *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) officially targeted metropolitan juveniles who were involved in stealing cars, followed by dangerous driving and high speed pursuits with police. It sought to 'excise the hard core of offenders from society' by mandating a minimum of 18 months in custody, followed by indefinite detention. For a number of reasons, this strategy of 'selective incapacitation' badly misfired, picking up only two young people in the target group, one of whom was Aboriginal. However, it did pick up several adult Aboriginal males from more remote parts of the state whose offences primarily involved alcohol-fuelled assaults on public officers.³¹

The three-strikes home burglary laws aimed to impose tougher sentences on home burglars in the name of deterrence and incapacitation. In essence, a 'third strike' home burglar faces a minimum sentence of 12 months detention or imprisonment. The major impact of these laws has been on children rather than adults because, under ordinary sentencing principles, adults would generally have received sentences of this length in any event. In the case of children, the main impact has been on those convicted of less serious offences because the more serious matters (especially violent home invasions) would have been likely to attract a sentence of at least 12 months in the Children's Court. Aboriginal children have been by far the most affected, constituting 80 per cent of all juvenile three-strikes cases, 90 per cent of those under 15, and 100 per cent of those under 13.³² These laws received strong criticism during the community consultations.

5. Reports, plans and policy documents (2000–2004)

The following discussion focuses on the key strategic documents that have been issued in the period from 2000 to 2004, all of which aim to address issues of over-representation and to improve the provision of justice services to Aboriginal people.

Aboriginal Justice Plan (2000)

In 1997, there was a national Ministerial Summit into Aboriginal Deaths in Custody. The Summit's main resolution was:

To address the over-representation of Indigenous peoples in the criminal justice system, Ministers agreed, in partnership with Indigenous peoples, to develop strategic plans for the coordination of Commonwealth, State and Territory funding and service delivery for Indigenous programs and services, including working towards the development of multilateral agreements between Commonwealth, State and Territory Governments and Indigenous peoples and organisations to further develop and deliver programs.³³

Following this summit, the state government's Justice Coordinating Council³⁴ and the Aboriginal Justice Council developed the Aboriginal Justice Plan (AJP), with the 'priority outcome [of] a reduction in the over-representation of Indigenous peoples at all levels of the justice system'.³⁵

Although its priority outcome focus was over-representation, the AJP adopted a whole of government approach that identified roles for all government agencies. The plan included services for victims, family, health and education, and it advocated a stronger focus on research and monitoring.³⁶

Reducing imprisonment strategy (2001–2002)

Following its election in February 2001, the Labor government announced a commitment to tackling justice issues in a comprehensive manner. This subsequently found formal expression in 2002 in the paper *Reform of Adult Justice*.³⁷

31. Harding R (ed), *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia* (Perth: Crime Research Centre, 2nd ed., 1995). The Act was repealed in 1994 but at least one offender (an Aboriginal adult from a remote community) has remained subject to its terms.

32. Morgan N, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 *Criminal Law Journal* 293.

33. Aboriginal Justice Council *Western Australian Aboriginal Justice Plan* (2000).

34. The Justice Coordinating Council, chaired by the Attorney General, comprised the ministers and chief executive officers of all state government agencies with a responsibility for justice related issues.

35. Aboriginal Justice Council, above n 33, 4.

36. For details, see *ibid*, Appendix at p 316.

37. Department of Justice, *Reform of Adult Justice in Western Australia* (2002).

The major commitments were to reduce the 'rate and cost of imprisonment and improve access to justice services for all constituents'.³⁸ Aboriginal prisoners were noted to be especially disadvantaged by short prison sentences, including fine default terms. Much emphasis was placed on the notion that instead of imposing short prison sentences, the money could be more effectively spent elsewhere – especially in strengthening community based initiatives and in developing stronger strategies to reduce reoffending.

Re-entry (2002)

In the spring of 2002, the government published a policy paper underlying its commitment to reduce reoffending by focusing on the re-entry of prisoners to the community.³⁹ The report was the result of a visit to Europe by the Attorney General, the Director General of DOJ and senior staff. The report outlined a range of initiatives that had been observed and several important recommendations were made, including:

- 'An effective re-entry program to support prisoners' re-entry to the community through: services to support prisoners' re-entry...; increased treatment options for drug offenders in the community; and providing effective and timely treatment programs from custody to community';⁴⁰
- Improving the quality and purpose of education and training in prison;
- More partnerships with other government departments in terms of health, training, employment and housing;
- More monitoring of, and assistance for, drug offenders and for people with a mental illness;
- Improving the emphasis on family relationships while prisoners are in custody, including enhanced family visits and home leave arrangements; and
- Improving statistical information and performance measures with respect to reoffending.

Prisons Division Strategic Plan for Aboriginal Services (2002–2005)

In June 2002, the DOJ Prisons Division Executive signed the Strategic Plan for Aboriginal Services 2002–2005. The intended primary outcome was 'a reduction in the over-representation of adult Aboriginal people in the prison system'. To achieve this, the plan sets out a range of objectives. These include:

- Improving reintegration strategies;
- Developing and providing an improved range of treatment programs, including culturally appropriate programs;
- Addressing the specific needs of female prisoners;
- Engaging more actively with Aboriginal communities and elders;
- Reducing the negative impacts of incarceration by 'maximising contact with families and communities' and promoting contact with key community people;
- Ensuring that Aboriginal prisoners are 'equitably represented throughout prison industry and across gratuity levels'; and
- Setting and achieving employment targets for Aboriginal people.⁴¹

Women prisoners

In Western Australia, as in the majority of the world, the number of female prisoners remains relatively small, but they are a growing proportion of the prison population. Over recent years, Aboriginal women have formed between 35 per cent and 48 per cent of the female prisoner population, and their numbers have risen rapidly over the past two years.⁴² An important focus of recent government initiatives has been to improve the conditions for women prisoners.

In 1997, the *Review of Services to Adult Women Offenders*⁴³ scoped a range of problems and suggested a number of reforms. The reform process was given renewed impetus in 2001 following a visit by the Attorney General to Canada, Minnesota and England.⁴⁴ A very significant outcome has been the establishment of Boronia Pre-Release Prison, a

38. Ibid 3.

39. McGinty J, *Reducing Reoffending – Focusing on Re-Entry to the Community* (2002).

40. Ibid 2.

41. This summary is in our words but seeks to reproduce the gist of the strategic plan.

42. See below pp 247–48.

43. Ministry of Justice, *Report on the Review of Services to Adult Women Offenders* (Perth, 1997).

44. McGinty J, *Report on a Visit to Canada, Minnesota and England* (11–20 August 2001).

new low security prison for women, which provides for women to share houses/units and also provides a number of mother and child units. The aim is to provide an environment that is as 'normal' as possible. The new facility has been operational since May 2004.

Gordon Inquiry (2002)

In July 2002, the Gordon Inquiry published its report on the response by government agencies to complaints of family violence and child abuse in Aboriginal communities.⁴⁵ The Gordon Inquiry was not a DOJ policy document but an independent inquiry, whose primary focus was on other agencies' operations. However, it merits mention here because it made a number of recommendations about justice services and has seen something of a policy adjustment across government, including DOJ.

The Inquiry concluded that 'family violence and child abuse occur in Aboriginal communities at a rate that is much higher than that of non-Aboriginal communities. The statistics point a frightening picture of what could only be termed an 'epidemic' of family violence and substance abuse in Aboriginal communities'.⁴⁶ It also commented on the complex factors that underpin this situation, including colonisation, marginalisation, loss of land and culture, the forced removal of children, extreme social disadvantage, poverty, racism, passive welfare, and drug, alcohol and substance abuse. The recommendations of relevance to this Background Paper included:

- Improvements to the range and availability of sex offender programs and an evaluation of the Cognitive Skills Program in terms of 'the specific cognitive patterns of Aboriginal offenders'.⁴⁷
- Improvements to victim support and child witness services for Aboriginal people.⁴⁸
- Improvements with respect to data.⁴⁹

Justice Drug Plan (2003)

In May 2003, DOJ released its Justice Drug Plan, a by-product of a government Drugs Roundtable in February 2003. The focus of the plan was on amphetamines, heroin and cannabis. The elements of the plan focused on reducing access to and use of drugs in prisons (through enhanced sniffer dog technology and increased drug testing); introducing a pharmacotherapy program (using alternative drugs such as Methadone and Buprenorphine or 'blockers' such as Naltrexone); improving community transition; and developing harm reduction measures to reduce the prevalence of blood-borne diseases.

Kimberley Regional Justice Project

The Kimberley Regional Justice Project commenced in 2000 with the aim of better meeting the justice needs of Aboriginal people in rural and remote communities.⁵⁰ There were community consultations by DOJ during 2002–2003 and reports of these consultations are available on the DOJ website. Three objectives are specified:

- To divert offenders from imprisonment to alternative sanctions in the community;
- To reduce the representation of Aboriginal people in the justice system; and
- To enhance safety in Kimberley communities and to ensure that all justice services are integrated and culturally sensitive to the Kimberley population.

The DOJ questionnaire responses outline four strategies to lead the Kimberley Regional Justice Project into the implementation stage:

- An action list for departmental reforms;
- A talking list to engage with Aboriginal communities;
- Processes for working towards partnership with Aboriginal communities; and
- A feedback report to Kimberley communities.⁵¹

A pilot Project Officer position commenced in December 2003.

45. Gordon Inquiry, above n 3.

46. Ibid, xxiii

47. Ibid, recommendations 79-82; see also below pp 300–05.

48. Ibid, recommendations 93-99; see also below pp 295–96 and 310–11.

49. Ibid, recommendation 103; see also below pp 310–11.

50. Department of Justice, *Kimberley Regional Justice Project: Report Back to Kimberley Communities on the Research and Consultations So Far* (2000).

51. Ibid: see <http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS_0_2_323_201_0_43/http%3Bjusticecontent.extranet.justice.wa.gov.au/content/files/Kimberley_report.pdf>.

Aboriginal Justice Agreements (2004)

The Western Australian Aboriginal Justice Agreement (AJA) was signed in March 2004 and was jointly developed by DOJ, the Department for Community Development, the Department of Indigenous Affairs, the Western Australia Police Service, the Aboriginal and Torres Strait Islander Commission (ATSIC), the Aboriginal and Torres Strait Islander Services (ATSIS) and the Aboriginal Legal Service of Western Australia for 'improving justice related outcomes for Aboriginal people.'

The AJA was developed under the aegis of the government's *Statement of Commitment to a New and Just Relationship*.⁵² It aims to provide a framework for improving justice-related outcomes for Aboriginal people, including:

- establishing safe, secure and just communities;
- increasing the capacity of government and Aboriginal people to work in partnership;
- ensuring government meets its obligations to provide equitable access to justice-related services across the state;
- reducing contact with the justice system; and
- lowering the incarceration rate of Aboriginal people.

Within this framework (and somewhat repetitiously), the AJA identifies three outcomes and five strategic areas. The three outcomes are:

- safe and sustainable communities;
- reduction in the number of victims of crime; and
- reduction of the over-representation of Aboriginal people in the criminal justice system.

The five focus areas are:

- community safety, security and wellbeing;
- individual and family wellbeing;
- criminal justice system;
- programs and service delivery; and
- public sector reform and resource flexibility.

The duration of the AJA is five years and 'it will be driven by a partnership between the Human Services Directors General Group and ATSIC'.⁵³

Described as a 'significant justice initiative for Aboriginal people in Western Australia', the AJA has some differences from the 2000 AJP.⁵⁴ Firstly, it only encompasses 'justice-related agencies' whereas the Aboriginal Justice Plan also focused on family, health and education. Secondly, whereas the AJP's nominated priority was reducing over-representation, other justice issues (such as 'safer communities' and victim issues) are given more prominence in the AJA.⁵⁵ Thirdly, the AJA does not contain any equivalent of the Appendix to the AJP, which sets out detailed suggestions and targets for government agencies.

Since the signing of the AJA, both ATSIC and ATSIS have effectively been disbanded. However, ATSIC's nine regional councils will continue to exist until June 2005 and are expected to be involved in the development of regional plans and the identification of local plans in regional areas. The disbanding of these key agencies clearly poses significant questions about the long-term implementation and viability of the AJA.

Aboriginal victimisation rates

It has long been accepted that Aboriginal people are not merely over-represented as prisoners but also as victims of crime. The Gordon Inquiry amply reaffirmed this, describing an epidemic of violence and sexual abuse. There is also clear evidence that Aboriginal people are less likely to report incidents to the police.⁵⁶

52. Government of Western Australia, *Statement of Commitment to a New and Just Relationship* (2001).

53. Government of Western Australia & Aboriginal and Torres Strait Islander Commission, *Western Australian Aboriginal Justice Agreement* (March 2004) 14.

54. See above p 243.

55. However, as noted above, the Appendix to the Aboriginal Justice Plan, above n 33 (which contained much of its real substance) referred in detail to issues of victimisation and community capacity building.

56. Gordon Inquiry, above n 3, ch 3. See also Hope A, *Inquest into the Death of Susan Ann Taylor: Coroner's Report* (2001)

It is not possible to have completely accurate figures on victimisation rates. For example, if rates of recorded incidents of violence in Aboriginal communities show an increase over the next few years, this may be due to greater levels of reporting and to an enhanced police presence in some places. Currently, there is no evidence of which we are aware to indicate any significant amelioration of the problems of victimisation to which the Gordon Inquiry referred.

6. Imprisonment rates

Comparative data at 30 June 2003

Western Australia's general rate of imprisonment is higher than the rest of Australia, apart from the Northern Territory. On 30 June 2003, the national average was 153.4 persons per 100 000 adults and Western Australia's rate was around 194 per 100 000.⁵⁷

In terms of Indigenous imprisonment rates, Western Australia has by far the highest rate per 100 000 of the adult population for both men and women:

Indigenous imprisonment rates per 100 000 of the adult population
(30 June 2003)

	All	Female	Male
NSW	2 181	431	4 068
Vic	1 183	175	2 206
Qld	1 697	232	3 290
SA	1 672	345	3 203
WA	2 744	454	5 191
Tas	527	38	1 054
NT	1 626	90	3 220
ACT	698	81	1 410
Australia	1 888	295	3 600

This means that as at 30 June 2003, one in 19 Aboriginal males was in prison at any given time. In the past 12 months, the number of Aboriginal people in Western Australian prisons has increased dramatically.

Trends in Western Australia (1996–2004)

In the period from 1996 to mid-1998, the prison population remained relatively constant, generally standing at between 2 200 and 2 300. Throughout this period, Aboriginal prisoners constituted 31–33 per cent of the prison population. However, since mid-1998, there have been dramatic fluctuations:

June 1998 to June 2001: The prison population climbed by 40 per cent, from around 2 250 in June 1998 to almost 3 200 in early 2001. However, Aboriginal prisoners continued to account for the same proportion as before, namely 31–33 per cent.

June 2001 to December 2002: In the last six months of 2001, the prison population dropped to around 2 800 (a decline of 12.5%) and stayed at that level during 2002. For most of this time, Aboriginal prisoners made up 31 per cent of the prison population and in mid-2002 their numbers were lower than for many years. This generated a good deal of optimism, epitomised in the DOJ Annual Report for 2002–2003:

The past year has seen further reforms and success in continuing to address WA's disturbing imprisonment rate ... It was therefore positive to see the prisoner population continue to decline ... With new sentencing legislation ... this trend is likely to continue downward.

However, WA continues to imprison indigenous Australians at a greater rate than any other State. This is an unacceptable situation, and throughout 2002/2003, the Department initiated innovative programs to continue to address this critical issue.⁵⁸

57. Australian Bureau of Statistics, *Prisoners in Australia* (2003).

58. Department of Justice, *Annual Report 2002–2003*, 8, 10.

January 2003 to October 2004: Such optimism proved misplaced and the unacceptable situation has deteriorated markedly. The prison population has risen consistently and is now higher than it has ever been (3 268 on 28 October 2004).

The most troubling statistic of all is that Aboriginal prisoners now constitute 38.7 per cent of the prison population.⁵⁹ The figures are truly startling. More than 80 per cent of the recent sharp increase in the state's prisoner population comprises Aboriginal inmates. In mid-2002, around 860 Aboriginal people and 1 900 non-Aboriginal people were in prison. On 28 October 2004, there were 1 264 Aboriginal inmates (an increase of 44.5%) and around 2 000 non-Aboriginal inmates (an increase of 6%). Over the following three weeks (to 18 November 2004) the number of Aboriginal prisoners increased by 36 (to 39.2% of the prison population). The number of non-Aboriginal prisoners increased by just 20. The total prison population reached over 3 300 for the first time.

Women and children

Compared with men, fewer women and children are incarcerated. However, Aboriginal women and children form an extremely high proportion of incarcerated people. Between 70 per cent and 80 per cent of children in detention are Aboriginal.

The trends with respect to women are even more marked than those just outlined. In June 2002, 187 women were in prison, of whom 67 (35%) were Aboriginal. In August 2004, there were 260 female prisoners, of whom 125 (48%) were Aboriginal. The number of Aboriginal women in prison has increased by over 80 per cent during the past two years. The number of non-Aboriginal women in prison has increased by 12.5 per cent over the same period.

Imprisonment for fine default – race and gender issues

People are ordered to pay monetary penalties when they do not deserve to go to prison. However, Aboriginal people—and especially Aboriginal women—continue to serve fine default terms at an alarming rate, and at a rate that far exceeds that for non-Aboriginal people.

Distinct persons received into prison for fine default 2002 ⁶⁰

Group	Number of receivals for fine default	Fine default receivals as a per cent of all prison receivals for the group
Male non-Indigenous	157	10.4
Female non-Indigenous	26	15.9
Male Indigenous	296	25.3
Female Indigenous	118	50.9

7. Summary

There has been a plethora of reports aimed at addressing Aboriginal justice issues over the past four years and they have all agreed, explicitly or implicitly, that imprisonment is not the answer. However, entrenched problems remain. In the longer term, it can be hoped that initiatives—especially post-Gordon Inquiry—will address issues of violence and sexual abuse.

It is impossible to be optimistic about Aboriginal incarceration rates. Put simply, Aboriginal people account for a rapidly increasing proportion of a growing adult prison population. Just three per cent of the state's population provides 40 per cent of the prison population. By way of comparison, New Zealand Maoris constitute 50 per cent of the prison population but 15 per cent of the general population.

Latest figures indicate that three-quarters of children in detention and 48 per cent of women in prison are Aboriginal. Given these figures, it is hard to avoid the conclusion that legislative and policy initiatives to reduce imprisonment have simply not reached Aboriginal people; at most, they would appear to have capped the flow of non-Aboriginal people into the prisons.

59. In the two months since this report was written, the proportion of Aboriginal prisoners has increased to 40 per cent; their numbers have increased very rapidly to around 1,400.
60. Figures taken from Fernandez JA & Loh N, *Crime and Justice Statistics for Western Australia 2002* (Perth: UWA Crime Research Centre, 2003).

Part III: Aboriginal policy and services and corporate services

This part of the paper provides a descriptive summary of the information we were given on the Aboriginal Policy and Services and Corporate Services directorates, sometimes with additional material obtained by interviews with relevant staff. The two directorates are grouped in one section because, unlike the Courts, Prisons and Community and Juvenile Justice Services directorates, they are not primarily responsible for service delivery. However, both play an important role in providing the foundation for service delivery to Aboriginal people.

Aboriginal policy and services

The DOJ website describes the Aboriginal Policy and Services directorate as 'providing strategic policy analysis and advice, as well as coordinating and facilitating consultation with the Aboriginal community for the Department.' The only two areas for which the Directorate has administrative responsibility are the Aboriginal Alternative Dispute Resolution Service and the Aboriginal Visitors' Scheme.

1. Aboriginal Alternative Dispute Resolution Service

Description

The Aboriginal Alternative Dispute Resolution Service (AADRS) provides Aboriginal people with a range of dispute resolution processes to assist them in reaching a voluntary agreement or settlement. The aim of the AADRS is to reduce the involvement of Aboriginal people in the criminal justice system by providing a culturally appropriate and negotiated form of dispute resolution. The range of dispute resolution strategies engaged includes mediation, conciliation, negotiation and advocacy. The strategies are intended as an alternative to litigation and as a preventative measure against dispute escalation, including violence. The service cannot enter into disputes or conflicts; however, referrals to other appropriate agencies can be made if necessary. The service can offer nationally accredited training in mediation and conflict resolution and the training skills can be applied to a range of settings, situations and environments.

Availability

The AADRS commenced in 1995 and is an ongoing service. The AADRS is available statewide and is contactable 24 hours a day via a 1800 number.

Participation

The AADRS has a current case load of 31 Aboriginal families and clients.

Resourcing

The AADRS employs five mediators and one administration assistant. The mediators comprise of one manager, two senior mediators and one mediator, all of whom are Aboriginal.

Comments

DOJ advised that the AADRS was formally evaluated in 2003. Management is currently considering the recommendations, most of which relate to refining and identifying strategies to improve service delivery. A review is currently being undertaken to determine what services are offered in other states, what works best and the legal issues relating to the provision of services under the current legislation.

2. Aboriginal Visitors Scheme

Description

The Aboriginal Visitors Scheme (AVS) is a confidential and independent support and counselling service provided to Aboriginal people detained in police lockups, prisons and juvenile detention centres. The service was established in 1988 as a result of the Vincent Enquiry into Aboriginal Deaths in Custody and was later endorsed by the Royal Commission into Aboriginal Deaths in Custody. The aims of the service are to ensure that:

- Means are provided for reducing the likelihood of deaths and/or self harm;
- Conditions are improved through consultation and advice to decision makers; and
- Aboriginal community groups are properly informed on conditions of custody.

The AVS deals with a range of issues for prisoners who are distressed or in need of information and reassurance. Issues usually relate to health, cultural and spiritual matters. The AVS supports Aboriginal prisoners by:

- Monitoring prisoner and detainee well being,
- Offering counselling support to prisoners and detainees, and
- Recording and reporting their concerns.

The service is available to all Aboriginal prisoners and targets those who have an identified risk profile, particularly a history of self-harm, as well as young offenders. The service cannot assist with monetary, legal or medical matters other than to make referrals to appropriate agencies. The AVS facilities are located in all prisons and detention centres across the state and in a number of police lockups. The service operates autonomously within the Prisons Division and the Police department. Aboriginal people may access the service during the rostered visits of the AVS and at other times if necessary.

Availability

The AVS was initiated in 1988 and is ongoing. Between 1988 and 2001 AVS offices have been established in the Perth metropolitan area, Kalgoorlie, Broome, Geraldton, Albany, Bunbury, Roebourne, Carnarvon and South Hedland. The service is officially available at all times to those in custody; however, access is mostly confined to rostered visit times. Metropolitan locations with a high prison muster are visited daily and the AVS engages two staff per visit. Visits to regional prisons are less frequent and access is restricted to one AVS staff per visit.

Participation

In 2002–2003 the AVS made contact with 9 368 adults and juveniles in custody.

Resourcing

A total of 48 AVS staff are employed on a part-time basis. The responsibility for the AVS funding is jointly shared with the Attorney General, the Minister for Police and Minister for Aboriginal Affairs. The service is administered by DOJ. However, the Aboriginal Policy and Services directorate advised that it is an autonomous and confidential service.

Comments

DOJ advised that:

- The 2002 evaluation recommendations are in the process of being implemented. Recommendations addressed improving the quality of the service, particularly prioritising of high-risk prisoner needs.
- Each AVS staff sees on average 195 clients per year. Each visit averages 10–20 minutes contact time per client. Increasing the number of AVS visits and AVS staff in metropolitan locations are strategies to improve client access to the AVS.

Corporate services

1. Aboriginal Employment Strategy (2004–2008)

Description

The Aboriginal Employment Strategy (AES) is a DOJ strategic initiative to increase the number of Aboriginal people employed at all levels of the DOJ organisation and to ensure that policies, programs, services and operational practices are relevant to the needs of its diverse client group. The key objectives of the AES are:

- Aboriginal employment – to increase Aboriginal employment in DOJ to 10 per cent of permanent staff over the next five years.
- Aboriginal influence – to increase the number of Aboriginal staff in decision-making, policy development and service delivery roles.
- Inclusivity – to create an inclusive work environment where respect for different cultures is promoted.

The strategies for each objective are:

- Aboriginal employment – remove artificial barriers in recruitment, implement communication strategies to target Aboriginal applicants and communities, implement staff exchange programs with community based organisations, and develop career pathways for Aboriginal staff linked to performance management.
- Aboriginal influence – promote career progressions for Aboriginal staff into decision making roles, increase Aboriginal staff participation in programs (Public Sector Management, Court Services Advanced Program etc.), implement training that supports Aboriginal cultural relevance, and utilise Aboriginal protocols on all occasions.
- Inclusivity – implement policies and procedures that create a work friendly environment and anti-racist practices, establish and promote a senior Aboriginal staff forum with links to the Corporate Executive Committee, and implement mandatory training in Aboriginal cultural awareness.

Availability

The AES implementation will be ongoing. The strategy is targeted at the DOJ workforce and potential Aboriginal applicants.

Participation

This strategy is yet to commence.

Resourcing

The Aboriginal Workforce Development Unit (AWDU) is responsible for the design, development, implementation and monitoring of the AES. The AWDU is to report quarterly to the Corporate Executive Committee on the implementation status of the AES. The AWDU has assigned one manager, two coordinators and one administrative assistant (all 50(d) positions⁶¹) to this project.

Comments

DOJ advised that the objective to increase employment of Aboriginals as permanent staff to 10 per cent does not necessarily involve solely recruitment to 50(d) positions. Currently DOJ employs 4 500 staff:

- 4.8 per cent of staff, including contractors, are Aboriginal (226 persons).
- 2.2 per cent of permanent staff are Aboriginal (99 persons).

2. Aboriginal Cadetship Program

Description

The Aboriginal Cadetship Program (ACP) is an education program to provide the opportunity for eight Aboriginal people in 2004–2005 to study full-time in an approved diploma, advanced diploma or undergraduate degree. The program is a joint venture between DOJ and the Commonwealth Department of Employment and Workplace Relations (CDEWR). The program is a strategy to increase the number of Aboriginals in DOJ in supervisory, management and professional positions with a view to increasing the number of Aboriginal people suitable for recruitment in decision-making positions. The ACP involves two components — full-time study (40 weeks) and work placement (12 weeks). The ACP provides cadets with an allowance while studying full-time and with employment during the long vacation break. Cadets will be responsible for their own Higher Education Contribution Scheme (HECS) fees.

DOJ will provide a mentor to assist and support the cadet during the cadetship. The role of the mentor involves:

- Providing ongoing advice, counselling and support to the cadet.
- Facilitating communication between the cadet and the work place.
- Supporting the cadet during the 12-week work placement.

Availability

The ACP is to commence in January 2005. Selection is targeted at Aboriginal students currently enrolled in an Australian TAFE centre or university in an approved accredited diploma, advanced diploma or undergraduate degree

61. Selection specifically targets potential Aboriginal people for participation under the *Equal Opportunity Act 1984* (WA) s 50(d).

course. Selection specifically targets potential Aboriginal people for participation under s 50(d) of the *Equal Opportunity Act 1984* (WA).

Participation

The ACP will offer:

- four cadetships to current Aboriginal employees,
- three cadetships to current Aboriginal tertiary students, and
- one post graduate cadetship in the Community Juvenile Justice Division.

Resourcing

The ACP is a joint initiative between DOJ and the CDEWR. Within DOJ the Aboriginal Workplace Development Unit (AWDU) is responsible for overseeing the program. This unit was responsible for the development of the program and will be responsible for quarterly evaluation and reporting of the ACP to the Corporate Executive Committee through the Director of Human Resources. Further the unit will be required to report regularly to the CDEWR on the implementation of the program. The AWDU has assigned one manager and one administrative assistant (both 50(d)) to implement and oversee the program.

Comments

DOJ advised that selection of a suitable candidate for the postgraduate cadetship is problematic. The eligibility criteria are currently being reviewed to allow more participants to apply. This cadetship is currently for a Masters degree in Psychology. Eligibility criteria may be extended to a Behavioural Science Degree.⁶²

3. Entry level Aboriginal Traineeship Program

Description

The Aboriginal Traineeship Program (ATP) is a job training program to assist Aboriginal people to gain employment within DOJ. The ATP is a joint venture initiative between DOJ, the Department of Premier and Cabinet and the Department of Employment and Workplace Relations. The ATP is a 12-month program involving on and off the job training tailored to meet the individual participant's training and development needs. The traineeship allows trainees to learn and apply their skills in the workplace. The Aboriginal Workforce Development Unit (AWDU) offers trainees support and assistance throughout their traineeship. On successful completion of the traineeship participants acquire a nationally recognised Certificate 3 in Business Office Administration.

Availability

The ATP has been ongoing since 1999. Selection is targeted directly at potential Aboriginal participants under s 50(d) of the *Equal Opportunity Act 1984* (WA).

Participation

Since 1999 there have been 35 participants in the ATP, of which six did not complete their traineeship. Currently 11 are completing their traineeships. Fourteen have completed their traineeships and have gained ongoing employment with DOJ. The ATP is currently admitting a further five trainees — three in the metropolitan area and two in regional areas.

Resourcing

The ATP is a joint initiative. Within DOJ, the AWDU is responsible for the design, development, implementation and monitoring of the program and is required to report quarterly to the Director of Human Resources. The AWDU has assigned one coordinator and one administrative assistant (both 50(d)) to oversee the program and support the trainees.

Comments

DOJ advised that all of the 14 trainees to have gained employment have been appointed to administrative positions, mainly in the Prisons and Courts directorates. No recruitment has occurred in the operations areas of DOJ.

62. See also comments in juvenile custodial section, below pp 287–93.

4. Level 2–4 Traineeship Program

Description

The Level 2–4 Traineeship Program is a job training program to assist Aboriginal people to gain employment within DOJ. The Traineeship Program is a joint venture initiative between DOJ and the Department of Employment and Workplace Relations. It incorporates the following programs:

- **Group workers:** 24-month training program targeted at recruiting 18 new Aboriginal participants. The participants selected will be required to obtain Certificates 3 and 4 for group workers within that timeframe.
- **Prison officers:** 12-month training program targeted at recruiting 20 new Aboriginal participants. The participants selected will be required to obtain a Certificate 3 in Correctional Practice within that timeframe.
- **Aboriginal training officer:** 12-month training program targeted at recruiting an Aboriginal applicant to provide support for the recruitment, retention and career development for the 18 group workers recruited under this program. The training officer will be required to obtain a Certificate 4 in Workplace Assessment and Training within this timeframe.
- **Aboriginal forensic health workers:** 12-month training program targeted at recruiting five new Aboriginal applicants. The participants will be required to obtain a Certificate in Aboriginal Forensic Health within this timeframe.
- **Aboriginal welfare officer:** 12-month training program targeted at recruiting a new Aboriginal welfare officer to provide support for the juvenile detainees at Banksia Hill Detention Centre. The welfare officer will be required to obtain a Certificate 3 in Human Services within this timeframe.
- **Administrative assistant:** 12-month training program targeted at recruiting an Aboriginal administrative assistant to provide administrative support to the Aboriginal Workforce Development Unit (AWDU). The administrative assistant will be required to obtain a Certificate 4 in Business within this timeframe.
- **Aboriginal program officers:** 12-month training program targeted at recruiting two Aboriginal program officers to work within the Prisons Division. The program officers will be required to undertake relevant certified training within this timeframe.
- **Graduate project officers:** 24-month training program that aims to recruit two Aboriginal graduates. The graduate project officers will be required to undertake various staff development courses provided by DOJ and the public sector within this timeframe.

Aboriginal trainees are offered support and assistance throughout their traineeship by the AWDU.

Availability

The Traineeship Program commenced in April 2003 and is due to be completed in November 2005. Selection is targeted directly at potential Aboriginal participants under s 50(d) of the *Equal Opportunity Act 1984* (WA).

Participation

The Traineeship Program is designed to cater for a total number of 50 trainees. Currently there are 21 Aboriginal trainees enrolled in the following areas:

- Aboriginal group workers (Level 2) – eight trainees
- Aboriginal prison officers – 11 trainees
- Aboriginal training officer – one trainee
- Aboriginal administrative assistant – one trainee

Resourcing

The Traineeship Program is a joint initiative between DOJ and the Department of Employment and Workplace Relations under the STEP funding program. Within DOJ the AWDU is responsible for the design, development, implementation and monitoring of the program and is required to report quarterly to the Director of Human Resources. The AWDU is also required to report to the Department of Employment and Workplace Relations on the implementation of the program.

Comments

DOJ advised that:

- Attempts to recruit Aboriginals to positions within the organisation have, in the past, been hampered by a lack of suitably qualified Aboriginal applicants. This initiative is an attempt to address the skills deficit in Aboriginal applicants and so increase the opportunity for Aboriginal people to gain long-term employment in DOJ.
- Currently 42 per cent of the target quota has been filled.

Part IV: Court services

This part provides a descriptive summary of the information we were given on the Court Services directorate, sometimes with additional material obtained by interviews with relevant staff.

1. Child Witness Service

(a) Current situation

Description

The Child Witness Service (CWS) is a support service for children who are witnesses in criminal and civil matters. Support to the child involves:

- Explaining their role in court, who the people in the court room are and their respective roles;
- Encouraging the child to discuss their worries about giving evidence; and
- Keeping the family up-to-date with the progress of the matter.

The CWS engages Child Witness Preparation Officers (CWPO) in the metropolitan area and CWS contractors in regional areas to provide individual sessions tailored to the child's requirements and the length of time available for preparation. The CWPO and CWS contractors never discuss evidence.

The CWS has recently appointed an Aboriginal Services Officer (ASO) to support the Implementation of the Gordon Inquiry recommendations. The ASO is to assist in the policy area, particularly in regards to the development and delivery of culturally relevant services to Aboriginal clients, targeting services in rural and remote locations.

Availability

The CWS is available to children who are witnesses and are required to give evidence in Western Australian courts. In the metropolitan area the service operates out of the Central Law Courts and the adjoining May Holman Centre. In regional areas the service operates out of 12 locations: Albany, Broome, Bunbury, Carnarvon, Derby, Esperance, Geraldton, Kalgoorlie, Karratha, Kununurra, Northam and Port Hedland.

Participation

The majority of CWS clients are children who have experienced physical violence, particularly sexual abuse. Between 1 July 2002 and 30 April 2003, 10 per cent of CWS clients were Aboriginal. Between 1 July 2003 and 30 April 2004, 15 per cent of CWS clients were Aboriginal. A breakdown of metropolitan and regional Aboriginal participation rates was not provided by DOJ.

Resourcing

In the metropolitan area the CWS employs four CWPO (non-Aboriginal) and one ASO. The ASO commenced in January 2004 and also works for the Victim Support Service (VSS). In regional areas CWS engages 12 CWS regional contractors (one Aboriginal).

Comments

DOJ advised that:

- The CWS recognises that statewide there is a need to better service Aboriginal clients in regards to engagement and culturally relevant assistance. It also recognises the particular need to increase access to the service in remote areas.
- The newly appointed ASO works jointly with VSS and, therefore, does not work full-time with CWS.
- In regional and remote areas the CWS engages one Aboriginal CWS contractor.
- In Bunbury and Geraldton CWS support is undertaken by Victim Support Service contractors.⁶³

63. See VSS section, below pp 255–56.

(b) CWS Initiatives

Description

The CWS has recognised the need to increase the service currently available to Aboriginal clients, particularly in regional and remote areas. The CWS has recognised that deficiencies exist particularly in respect to the engagement of Aboriginal clients and the delivery of culturally appropriate services. In conjunction with the appointment of the ASO, arising out of the Gordon Inquiry recommendations, the CWS has undertaken two further initiatives to address these issues.

(i) Training for regional CWS contractors

Training involved attending a three-day intensive training program on child witness preparation, particularly focused on working with Aboriginal children and their families. Training is further supplemented by supervision, which is provided by the Perth CWS team to assist with every case. Regional visits by the ASO and Perth CWPO staff are made every two years to each location. Training sessions and the first round of regional visits were completed in June 2004.

(ii) CWS Education Activity Book

This book targets children between the ages of 4 to 11 years. While the book is for generalised use, culturally relevant resource material has been included. The book is based on a Canadian resource book, *What's My Job in Court*. It contains information in regards to court roles and court personnel, and explains concepts such as 'beyond reasonable doubt', 'guilty' and 'not guilty'.

Availability

- (i) The training sessions were available to all regional CWS contractors. This was a one-off initiative. CWS contractor supervision is ongoing.
- (ii) The book was scheduled for release in October 2004.

Participation

- (i) All regional CWS contractors attended the training sessions.
- (ii) The coordinator of the CWS (project leader) and the ASO are currently involved in the development of the book.

Resourcing

- (i) The ASO and one CWPO were engaged to conduct regional training. Supervision is provided by Perth CWPO staff.
- (ii) The coordinator of the CWS and the ASO are engaged in producing the book.

Comments

DOJ advised that:

- i) Feedback from those who underwent the three-day training session was positive. It is hoped that training will increase service delivery and positively impact on Aboriginal referral and participation in regional areas.
- ii) Currently there is no similar resource book available in Australia.

2. Victim Support Services

(a) Current situation

Description

Victim Support Services (VSS) provides support to anyone—including children—who has suffered harm from crime. The objective of the service is to promote the rights of victims and to address their needs as victims. Services include:

- counselling and support;
- information and referral to relevant services;
- assistance in writing a victim impact statement;
- providing information on the status of police investigations;
- providing information about court proceedings;

- providing support when making an application for a restraining order;
- assisting with enquiries about criminal injuries compensation; and
- providing information on the status of convicted offenders in Western Australia through the Victim Notification Register.

The VSS engages counsellors to provide individual sessions tailored to meet the needs of the victim. Service to regional and remote VSS clients may also include Child Witness Services (CWS) support. This joint service is currently occurring in Bunbury and Geraldton. In these instances a clear divide in staffing is undertaken to ensure the integrity of CWS evidence preparation. The VSS has recently appointed an Aboriginal Services Officer (ASO) to support the implementation of the Gordon Inquiry recommendations. The ASO is to assist in the policy area, particularly in regards to the development and delivery of culturally relevant services to Aboriginal clients, targeting rural and remote locations.

Availability

The VSS is available to all victims of crime in Western Australia. In the metropolitan area the service operates out of the May Holman Centre, next to the Central Law Courts. In regional areas, the service operates out of 13 locations: Albany, Broome, Bunbury, Carnarvon, Derby, Esperance, Geraldton, Kalgoorlie, Karratha, Kununurra, Northam, Peel District and Port Hedland.

Participation

The client base is very broad (including victims of robbery, burglary, physical violence and sexual offences) and most of the clients are adults. In the third quarter of 2003–2004, 26 per cent of VSS clients were Aboriginal. A breakdown of metropolitan and regional Aboriginal participation rates was not provided.

Resourcing

In the metropolitan area the VSS employs one manager, four VSS counsellors (non-Aboriginal) and one ASO. The ASO commenced in January 2004 and also works with the CWS. The service also engages one volunteer coordinator. In regional areas the VSS employs 13 VSS contractors (one Aboriginal in Kununurra and one Aboriginal in Derby). Recent increase in funding from the Gordon Inquiry has permitted an expansion of the number of hours worked by existing VSS contractors (see VSS initiatives below).

Comment

DOJ advised that:

- The ASO is working to make the service more accessible to Aboriginal victims of crime. However, the ASO works jointly with the CWS.
- In regional and remote areas, where a large proportion of the population is Aboriginal, the VSS engages two Aboriginal contractors.
- The strategies to assist in the support of the victim (including the child witness) are problematic in Aboriginal communities, particularly in remote locations. Engaging the support of the VSS and CWS has heightened implications for the Aboriginal client and their family.

(b) VSS initiatives

Description

The VSS has acknowledged the need to increase the service currently available to Aboriginal clients, particularly in regional and remote areas. The VSS has recognised that deficiencies exist particularly in respect of access, engagement and delivery of culturally appropriate services. In conjunction with the appointment of the ASO, the VSS has undertaken two further initiatives to address these issues.

- (i) Expansion of regional VSS supported by Gordon Inquiry funding. This initiative seeks to increase the level of access and service to victims of crime in Aboriginal communities, particularly in remote areas. This initiative involves expanding the number of hours worked by existing VSS contractors from 19.0–22.5 hours per week to full-time in each region. Remote communities in the Eastern Goldfields, Pilbara and Kimberley regions have been targeted for improved access to the VSS. Services provided to the victims includes:
 - Counselling and support

- Provision of information about police investigations, court hearings, criminal injuries compensation and other criminal justice processes
- Court support, court preparation (including non-evidentiary preparation) and referral to other support services
- Assistance in understanding their rights within the criminal justice system.

This initiative recognises that Aboriginals living in remote communities have restricted access to services to support them through the criminal justice process, both as victims and child witnesses.

- (ii) Pamphlets and posters for Indigenous victims of crime. This initiative seeks to enhance the access of Aboriginal victims of crime to the VSS and CWS. Pamphlets and posters are to be distributed throughout Western Australia detailing support offered by VSS, CWS and the court, including assistance with writing a Victim Impact Statement.

Availability

- (i) This initiative aims to increase the availability of VSS in each regional area, particularly the Eastern Goldfields, Pilbara and Kimberley regions.
- (ii) The pamphlets and posters are to be available statewide. This initiative is in a developmental phase. Distribution is expected to be ongoing over the next three years.

Participation

- (i) In a sample one-month period (not specified) VSS had 77 Aboriginal referrals. Across the regions this equated to 61 per cent of all referrals.
- (ii) The ASO, the manager of VSS Contracts and Services and two Aboriginal consultants have been involved in the development of the literature.

Resourcing

- (i) Gordon Inquiry funding has been allocated to finance the increase in the number of hours worked by contractors in the 13 rural locations and assistance from the ASO.
- (ii) DOJ has allocated \$20 000 over the next three financial years for the production of this literature.

Comments

DOJ advised that:

- (i) Expansion of VSS in the remote communities of the Eastern Goldfields, Pilbara and Kimberley regions is dependent on the services provided by existing contractors, only two of whom are Aboriginal. This initiative is to be subject to Gordon Inquiry evaluation.
- (ii) Gaps exist in culturally relevant VSS and CWS Aboriginal specific marketing material.

3. Family Violence Court

Description

The Family Violence Court (FVC) was established in 1999 at Joondalup as a specialist court to deal with matters relating to family violence. Establishment of the FVC at Joondalup was a DOJ led initiative and also involved the Western Australian Police, the Department of Community Development and Legal Aid. The objectives of the FVC are:

- To improve the criminal justice response to family violence;
- To make perpetrators accountable for their behaviour;
- To support victims in the criminal justice system and ensure their safety;
- To reduce the incidence of family violence in the Joondalup area.

The two key services provided by the FVC are:

- Support to victims applying for restraining orders and undertaking risk assessment of victims;
- Case management processes which involve interagency collaboration. This includes the offender being interviewed by a Community Corrections Officer who will conduct the Spousal Assault Risk Assessment.

Offenders who appear before the FVC are referred to a specialised family violence group counselling program. Completion of the program is taken into account by the sentencing judge when making the sentencing decision.

Availability

The FVC is currently only operating at Joondalup. There are plans to expand the service across Western Australia. The FVC is available to offenders and victims of family violence and targets parties where there is or has been a familial relationship between the parties, or there is an interfamilial connection between the parties.

Participation

Approximately five per cent of FVC clients are Aboriginal. In 2003–2004 two Aboriginal offenders were referred by the FVC to family violence group counselling, of whom one completed the program and one was breached (reason not known).

Resourcing

Currently all FVC staff are non-Aboriginal. The program engages the assistance of Aboriginal Police Liaison Officers and the Aboriginal Services Officer from Victim Support Services.

Comments

DOJ acknowledged that Aboriginal referral and participation in the FVC are low. DOJ suggested that low Aboriginal referrals are due to:

- Few family violence matters involving Aboriginal people are reported to the police;
- Few Aboriginal females are using the courts for the issuing of restraining orders.
- Low participation is symptomatic of low referrals to the FVC.
- Low number of Aboriginal people living in the Joondalup area, although the number is increasing due to the additional state housing being made available.

DOJ also advised that:

- Aboriginal participation in Family and Domestic Violence Perpetrator Programs⁶⁴ is low, particularly group-based counselling.
- Changes to the legislation with respect to restraining orders may have a positive impact on FVC referrals.

4. Geraldton Alternative Sentencing Regime

Description

The Geraldton Alternative Sentencing Regime (GASR) is a court-based alternative sentencing initiative based on 'therapeutic jurisprudence' and judicial case management of adult offenders who appear before the Geraldton Court. GASR aims to deal holistically with a wide range of offenders and issues, including:

To reduce substance abuse and offending of program participants;

- To provide sentencing alternatives that take into account the psychological, physiological and social factors that contribute to substance abuse and/or offending;
- To provide therapeutic team-based support and treatment programs (such as drug counselling, medical treatment, psychological counselling, vocational/life skills) to encourage individual responsibility and rehabilitation,
- To provide counselling and stress reduction.
- To facilitate compliance with program conditions.

The GASR program applies a holistic team-based approach to offender rehabilitation and engages a variety of support and rehabilitative programs to assist with offender treatment and rehabilitation. Programs include illicit and licit substance abuse, anger management, domestic violence perpetrator treatment, psychological/psychiatric treatment, vocational programs, transcendental mediation (for stress reduction and self development), financial counselling and medical treatment.

Offenders who participate in the GASR are referred to the program by the magistrate after consultation with Community Justice Services and relevant others. Offender participation is voluntary. The offender is referred to the program for a period of three months in which time counselling and treatment are provided. During this period the offender must report back to the court for case review either weekly or fortnightly (in person or by teleconference). After satisfactory

64. See below pp 274–75.

participation in the program the offender must go before the magistrate for sentencing. Successful completion of the program generally results in mitigation of the sentence.

The team-based approach requires good coordination between the magistrate, court staff and Community Justice Services in Geraldton. The program is overseen by a steering committee comprising the court and justice stakeholders, including the Aboriginal Legal Service.

Availability

The GASR program commenced in August 2001 and is available to all adult offenders. Referral to the GASR is at the discretion of the magistrate and the offenders must agree to participate in the program.

Participation

The program has had a total of 63 referrals to date: 26 Aboriginal and 37 non-Aboriginal. Currently there are 12 participants, including six Aboriginal people, engaged in the program.

Resourcing

The program engages the court magistrate, court staff and Community Justice Service staff (Aboriginal).

Comments

DOJ advised that the program is currently being independently evaluated. Evaluation details were submitted in July 2004, but these were unavailable at the time of writing.

5. Circle Court

Description

The Circle Court is an alternative court initiative intended to provide more accessible and culturally relevant justice services to Aboriginal people living in the Yandeyarra community, 170 kilometres from Port Hedland. This initiative allows the offender to appear before a formally convened Circle Court in Yandeyarra. The Circle Court consists of the magistrate, representatives from Community Justice Services, police, Aboriginal Legal Service (ALS), Legal Aid and Yandeyarra nominated elders. The process of the Circle Court involves court members meeting with the offender and their family around the same table to hear and decide on matters relating to the alleged offence. Once the case is heard the magistrate and nominated elder leave the table to consider the judgment in private and return to the table where the magistrate communicates the outcome of the deliberation.

The Circle Court complies with the *Justices Act 1902* (WA) and is a formally gazetted Court. It provides alternative sentencing programs that allow offenders to be retained in their community; receive punishment that is culturally relevant; and, if deemed appropriate for the purpose of rehabilitation, undergo training through the Pilbara TAFE in areas such as building maintenance and agriculture. In addition to improving access to and cultural appropriateness of justice services, the Circle Court aims to restore authority to the elders and to reduce offending by returning authority and responsibility to the community.

Availability

The Circle Court is available to adult and juvenile offenders in the Yandeyarra Community. It has been in operation for nearly 12 months and in that time six court sittings have been held.

Participation

Each court sitting deals with between three and seven offenders. Adult offenders slightly outnumber juvenile offenders. DOJ advised that the court typically deals with minor offenders charged with committing disorderly conduct, driving offences, assault etc.

Resourcing

The Circle Court is a joint initiative between DOJ and the Yandeyarra Community and involves the police, ALS and Legal Aid. The magistrate and support staff are from the South Hedland court facility. Community Justice Services provide both the Community Corrections Officer and Juvenile Justice Officer to assist with court reports. The Yandeyarra community provides the elder representatives. Currently two community elders sit with the magistrate.

Comments

DOJ advised that:

- The Circle Court was initially intended to sit once a month. However, this frequency was deemed unnecessary and sittings have been reduced to one every two months.
- '[A]ll staff involved in the development and implementation are currently unavailable, as is the file with all details of specific dates and reviews.'
- To date three magistrates have been involved in court sittings – Steve Sharratt SM, Stephen Heath CSM and Ian Temby SM.
- Most penalties issued by the Circle Court have been community-based orders or fines that can be worked off or paid over time

6. Community Courts

Description

Community Courts are an alternative court-focused initiative to provide more accessible and culturally relevant justice services to Aboriginal people living in the remote locations of Warburton, Balgo, Kalumburu, Dampier peninsular, Bidiyadanga, Jigalong, Warakarna and Warmun. The objectives of the Community Courts are to establish courts that meet the needs of local Aboriginal communities, to involve the different groups living in these areas in court processes, and to reduce offending in these areas.

The initiative, which arose out of the Gordon Inquiry, is in the early stage of development and the working arrangements of the Community Courts are yet to be finalised. The Community Courts are to be formally gazetted to administer the laws of Western Australia in a format that is culturally accepted by the community and based on community specific justice models. The justice models will be determined by community consultations and community requirements. Service delivery will be determined by the community's needs and the community's capacity to become involved in the justice system. It is envisaged that community elders will provide an advisory role to the magistrate.

The project will involve modifications to existing justice facilities and the installation of new facilities to create multi-functional justice facilities in each location. The facilities will contain courts, police and other justice agencies.⁶⁵ They will have a permanent police presence but this is expected to decrease as the communities develop their own justice models. The courts will be designed and conducted in a culturally appropriate manner to encourage access and participation.

Availability

This initiative is yet to commence. Availability will be in accordance with the requirements and needs of each community. The initial building program is expected to extend over a period of three years.

Participation

This initiative is yet to commence. The vast majority of parties before the courts will be Aboriginal people.

Resourcing

The initiative is a joint venture between the police, DOJ, DCD, DIA and ATSIS. DOJ advised that court staff arrangements for Warburton are well underway. Magistrate Sharratt (previously involved in the Yandeyarra Circle Court) has been appointed to work out of Kalgoorlie and Dr K Auty (previously involved in the Koori Courts in Victoria) commenced work out of Kalgoorlie in September 2004. No further staffing details in regards to this initiative were available from DOJ.

Comments

DOJ advised that:

- Court hearings are currently undertaken in each of the locations detailed above.
- Local Justices of the Peace convene the courts on an as needs basis (perhaps several times a week) and a magistrate attends the more serious cases on average every six weeks, on a fly-in-fly-out basis.
- Over the past three financial years an average of 596 parties per annum have attended these courts with an average of 1 142 charges per annum.

65. Other agencies include the Department of Community Development (DCD), Community Justice Services (CJS) and the Department of Indigenous Affairs (DIA).

7. Cross Border Justice Project

Description

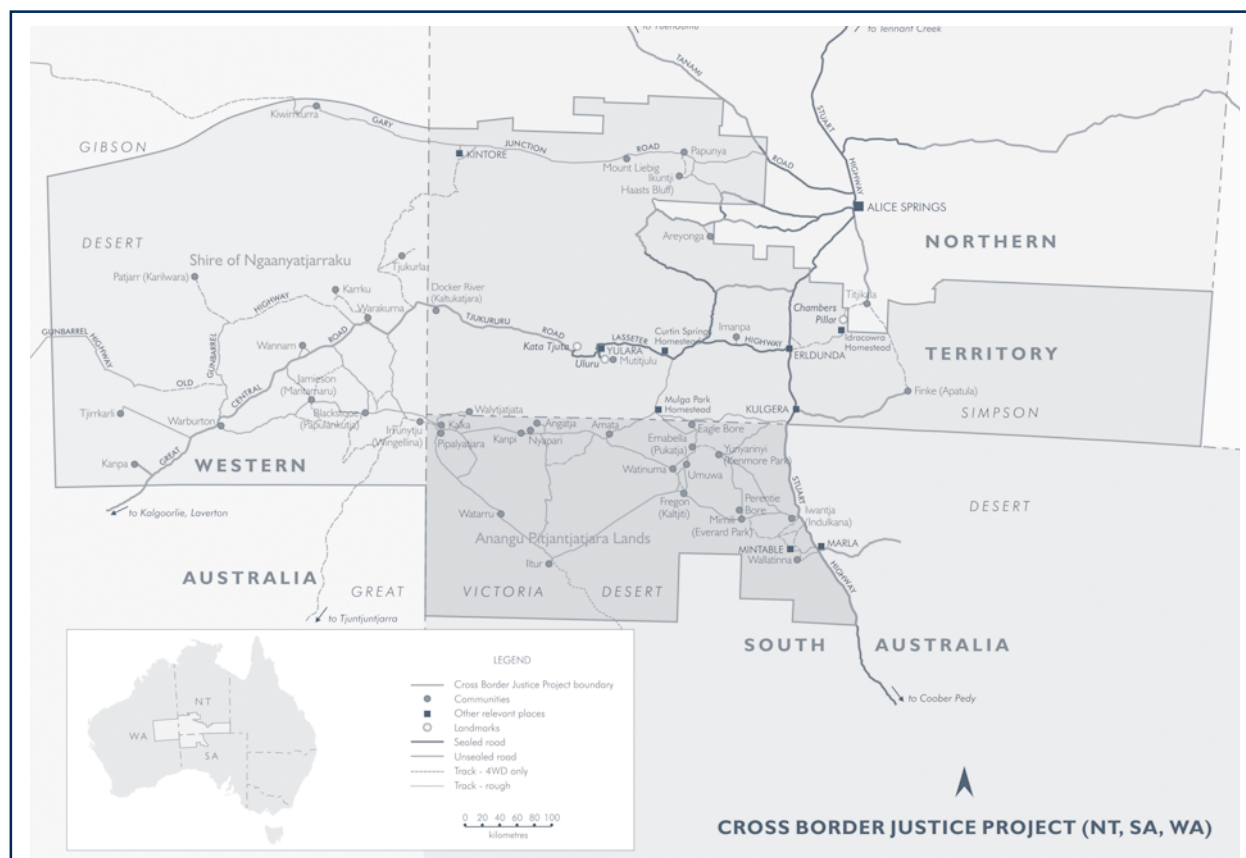
The Cross Border Justice Project is a joint initiative between the Northern Territory, South Australia and Western Australian governments to remove obstacles created by state and territory borders and to improve justice services to Aboriginal people living on the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) lands. The NPY lands have borders in the Northern Territory, South Australia and Western Australia. The total population of the area—approximately 7 500 Aboriginal people—forms a cultural block and is not confined by state boundaries. The project aims to encourage government and community involvement to facilitate and improve law and justice services in a manner that acknowledges cultural boundaries, improves administrative efficiency, and optimises the delivery of services. The project also seeks to improve cooperation between the three jurisdictions in relation to court, police and correctional services.

While the project is still in the process of being developed, six teams, with representatives from each jurisdiction, have been formed to examine and where appropriate initiate action in the following areas:

- Legislation and policies to enable the operation of courts and police in this multi-jurisdictional environment;
- Development of a cross-border NPY lands democratic profile;
- Identifying and implementing processes to assist communities, government and non-government agencies to work together to deliver justice services that are regionally appropriate;
- Improving service delivery by agencies in the three jurisdictions through an enhanced collaborative approach to cross-border service delivery;
- Approaches to enable the sharing of custodial facilities, both existing and proposed, and developing complementary programs relating to custody, alternative sentencing and interpreter services.

7

Cross Border Justice Project (Northern Territory, South Australia and Western Australia) – Map of Project Area



The project's consultation, design and implementation processes are to involve significant Aboriginal and community organisation participation. Further, the project will work in conjunction with existing state community justice projects; namely, the Western Australian Aboriginal Justice Agreement, the Northern Territory's Building Stronger Regions/Stronger Futures strategy, and the South Australian work at the COAG Anangu Pitantjatjara Trial Site and the 'Doing It Right' policy initiative.

Availability

This project is still in the process of being developed. Aboriginal communities living in the cross-border NPY lands area are the target group for this initiative.

Participation

Participation is confined to the planning phase. Six teams from the three jurisdictions have been formed. Initial consultations with NPY lands communities have commenced.

Resourcing

The Western Australian, South Australian and Northern Territory Governments are jointly funding the project.

8. Employment of Aboriginal Liaison Officer

Description

The Children's Court of Western Australia has employed an Aboriginal Liaison Officer (ALO) to work at the Perth Children's Court to provide assistance to the court and its Aboriginal clients to improve the delivery of services to Aboriginal clients. Assistance to the court entails:

- Providing support, information and advice to the judiciary and court staff on cultural issues relating to service delivery.
- Providing information and advice to the judiciary and court staff to ensure court processes and information to Aboriginal clients are delivered in a culturally appropriate and understandable manner.

Assistance to Aboriginal clients entails:

- Providing information and assistance to Aboriginal clients at the public counter of the Perth Children's Court.
- Explaining court processes to Aboriginal clients and assisting them with the signing of court documentation.
- Ensuring information is provided in a timely and accurate manner.
- Providing input on strategies to improve services to Aboriginal clients
- Assisting the Child Witness Service and the Victim Support Service to access Aboriginal clients to ensure the needs of Aboriginal victims are met.

Availability

The ALO commenced in July 2004 and works at the Perth Children's Court. Services of the ALO are available to the judiciary, court staff and Aboriginal clients and their families.

Participation

Aboriginal juveniles comprise 30–40 per cent of those appearing before the Perth Children's Court. All Aboriginal juveniles and their families may access the services of the ALO.

Resourcing

The position is funded by the Courts Division.

Comments

DOJ is to evaluate this position after 12 months.

Part V: Prison services

This part provides a descriptive summary of the information we obtained from the Prison Services directorate, with additional material obtained by interviews with relevant staff. The information is largely limited to various treatment programs in public prisons and also describes options with respect to individual counselling. No material was provided for the privately operated Acacia Prison or for the work camps that have been developed in some parts of the state.⁶⁶

1. Reasoning and Rehabilitation

Description

Reasoning and Rehabilitation ('cognitive skills') is a mainstream program that aims to replace well-established maladaptive thinking patterns with cognitive skills that can promote pro-social behavioural choices. The program focuses on self control, interpersonal problem solving skills, assertiveness, social perspective thinking, critical reasoning, cognitive style, controlling and values reasoning. The program involves group-based counselling over 76 hours and is rated medium intensity. The program was purchased from Canadian providers T3 and Associates.

The material presented is not Aboriginal specific. However, modifications in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

A total of 72 programs have run since 2000 at Albany, Bandyup, Bunbury, Casuarina, Greenough, Karnet, Wooroloo and Roebourne prisons.

Participation

For the year 2003–2004 there were 36 Aboriginal participants (20% of total participants) and 31 Aboriginal completions (86%).

Resourcing

The program engages two facilitators (prison officers) per group who are trained by T3 and Associates, Canada.

Comments

DOJ advised that:

- Delivery of the program at Broome is to commence in 2005 but the program is yet to be finalised at the Eastern Goldfields Regional Prison.
- The program is evaluated by Offender Services Edith Cowan Unit but no details were supplied.

2. Building Better Relations Program

Description

The Building Better Relations Program is a mainstream male offender program that aims to reduce further domestic violence by developing pro-social behaviour, beliefs and attitudes. The program engages behavioural treatment in accordance with *What Works*⁶⁷ and is delivered in a residential setting. It involves group-based counselling over 72 hours and is rated medium intensity. The program is based on the Duluth model⁶⁸ and is designed for male offenders of domestic violence. It is intended as a precursor for programs delivered by Centrecare and Relationships Australia in the community.

66. Note that DOJ keeps records of program delivery at Acacia for the purposes of determining if the contractor (AIMS) qualifies for 'performance linked fees' – see also below Part VII.

67. The Duluth model started in Duluth, Minnesota, USA in the 1980s. It was a comprehensive, community-based program designed to intervene in domestic violence cases. It liaised with the many agencies and practitioners who dealt with domestic violence cases within the community. An additional component of the project was the 24-week non-violence program, aimed at reducing the likelihood of reoffending.

68. See Martinson R, 'What Works? Questions and Answers About Prison Reform' (1974) 10 *The Public Interest* 22-54. Martinson concluded that nothing works in terms of treatment of offenders. He then reviewed his methodology and in 1979 published another article to say that there were treatment effects evident: see Martinson R, 'New Findings, New Views: A Note of Caution Regarding the Sentencing Reform' (1979) 7 *Hofstra Law Review* 243-258. From that research several authors have since determined what contributes to, or enhances treatment of, effectiveness. 'What works' embraces a range of principles that underpin effective treatment including the following seven principles: (1) The Risk Principle that matches the risk of re-offence to the intensity of the program; eg, high risk offender with an intensive program; (2) Criminogenic needs – programs are more effective when these needs are targeted; eg, criminogenic needs are those factors known to predict re-offending; (3) Responsivity Principle – programs are more effective when tailored to the individual learning styles of the offenders (4) Programme integrity – programs that are delivered in a manner for which they are designed and/or intended; (5) Trained skilled professionals deliver the programs; (6) Access to clinical supervision; and (7) The program should incorporate Multi-modal Approaches to program delivery.

The material is not Aboriginal specific. However, modifications in context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

The program commenced in 2002 and a total of three programs have run at Wooroloo and Casuarina.

Participation

For the year 2003–2004 there were six Aboriginal participants (43% of total participants) and three Aboriginal completions (50%).

Resourcing

The program engages two facilitators (non-Aboriginal) per group, who are psychology or social work graduates. Ideally there is a gender balance in co-facilitation to assist in role modelling.

Comments

DOJ advised that the program is being evaluated by Offender Services Edith Cowan Unit but no details were supplied.

3. One-day Relapse Prevention and one-day Drug Awareness Workshop

Description

The Relapse Prevention and Drug Awareness Workshop is a mainstream program that aims to consolidate relapse prevention techniques. It is intended for offenders who have completed other programs, are soon to be released and have tested positive for drug use. It is an opportunity to encourage participants to review their through-care options. The workshop is conducted over five hours and is rated low intensity.

The material presented is not Aboriginal specific. However, modifications in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

A total of 91 programs have been conducted since 2000 at Albany, Bandyup, Casuarina, Karnet and Wooroloo.

Participation

For the year 2003–2004 there were 48 Aboriginal participants (29% of total participants), all of whom have completed the workshops (100%).

Resourcing

For each workshop the program engages two facilitators (non-Aboriginal) who are psychology or social work graduates.

Comments

DOJ advised that no evaluations are being carried out on this program.

4. Legal and Social Awareness

Description

Legal and Social Awareness is designed for offenders with recognised or borderline cognitive impairment. It aims to increase participants understanding of rules and laws, increase moral reasoning, decrease pro-offending attitudes and beliefs, and thereby reduce recidivism. The program focuses on socio-moral decision making, understanding rules and laws, and examining attitudes towards law violation and victims. The program involves group-based counselling over 66 hours and is rated medium intensity.

The material is not Aboriginal specific; however, modifications in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

A total of six programs have run since 2000 at Bandyup and Casuarina.

Participation

For the year 2003–2004 there were six Aboriginal participants (67% of total participants), all of whom completed the program (100%).

Resourcing

The program engages two facilitators (non-Aboriginal) per group (psychology or social work graduates). Facilitators, if available, are sourced from Disability Services.

Comments

DOJ advised that:

- The program is often used as a prerequisite for the Sex Offenders Intellectually Disabled Program.
- The program is being evaluated by Offender Services Edith Cowan Unit but no details were supplied.

5. Moving on from Dependencies

Description

Moving on from Dependencies is a mainstream program that aims to reduce offending and problematic substance use. The program focuses on connections between substance use offending behaviours and associated problems, identifications of problems, relapse prevention, harm reduction and work/study options. The program involves group-based counselling (often in a residential setting) over 100 hours, plus follow-up sessions and is rated high intensity. It is designed for male and female offenders who are highly motivated with high risk needs.

The material presented is not Aboriginal specific. However, modifications in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

A total of 24 programs have run since 2000 at Albany, Bunbury, Wooroloo, Karnet, Casuarina and Bandyup.

Participation

For the year 2003–2004 there were 28 Aboriginal participants (22% of total participants) and 20 Aboriginal completions (71%).

Resourcing

The program engages two facilitators (non-Aboriginal) per group (psychology or social worker graduates). The program is linked to the Justice Drug Plan.

Comments

DOJ advised that:

- Substantial new funding has been made available for an expansion in drug treatment programs for high risk adult and juvenile offenders in prison. The funding implemented in the last financial year provided a further two Managing Anger and Substance Use drug programs⁶⁹ per year in Western Australian prisons.
- The program is being evaluated by Offender Services Edith Cowan Unit but no details were supplied.

6. Managing Anger and Substance Use

Description

Managing Anger and Substance Use (MASU) is a mainstream program and aims to improve anger management and reduce substance use problems. The program focuses on managing emotions, understanding family violence, developing alternative coping strategies and implementing relapse prevention. The program involves group-based counselling over 50 hours and is rated medium intensity.

The material presented is not Aboriginal specific and is designed for the general prison population. The program is linked to the Justice Drug Plan for the reduction of drug use by adult and juvenile offenders.

Availability

A total of 17 programs per year are available at Albany, Bunbury, Wooroloo, Karnet, Greenough and Casuarina.

69. See below pp 265–66.

Participation

For the year 2003–2004 there were 60 Aboriginal participants (36% of total participants) and 53 Aboriginal completions (88%).

Resourcing

The program engages two facilitators (non-Aboriginal) per group (psychology or social work graduates). The program is linked to the Justice Drug Plan.

Comments

DOJ advised that:

- Substantial new funding has been made available for an expansion in drug treatment programs for high risk adult and juvenile offenders in prison.
- Offender Services Edith Cowan Unit is evaluating the program, but no details were supplied.

7. Indigenous Men Managing Anger and Substance Use

Description

Indigenous Men Managing Anger and Substance Use (IMMASU) is an Aboriginal specific program, which aims to improve anger management and reduce substance use problems. The program focuses on managing emotions, understanding family violence, developing alternative coping strategies and implementing relapse prevention. There is an emphasis on experiential and visual modes; art therapy is used in some sessions. The program involves group-based counselling over 50 hours and is rated medium intensity.

The material presented is designed for Indigenous men in remote areas who have offending records characterised by violence and alcohol use. The program was written in conjunction with Aboriginal people.

Availability

A total of 43 programs have run since 2000 at Broome, Eastern Goldfields, Greenough and Roebourne.

Participation

For the year 2003–2004 there were 101 Aboriginal participants (96% of total participants) and 88 Aboriginal completions (84%).

Resourcing

The program engages two facilitators per group – a psychology or social work graduate (non Aboriginal) and an Aboriginal contractor (tertiary qualified). Ideally, an Aboriginal contractor undertakes lead facilitation. The program is linked to the Justice Drug program.

Comments

DOJ advised that:

- The program is being redeveloped in consultation with Aboriginal facilitators following discussions with community groups including Elders and program participants.
- Roebourne prison was without a suitable facilitator for some time, but the program has recently recommenced on a regular basis.
- The program is being evaluated by Offender Services Edith Cowan Unit but no details were supplied

8. Addictions Individual Counselling

Description

Addictions Individual Counselling is an individualised male offender program and aims to decrease problematic substance use. The program focuses on individual criminogenic needs while also mirroring the content of group programs. It involves individual counselling sessions of varying duration and intensity. The program is designed for prisoners who are not able to be included in group sessions. Cultural issues are taken into account when undergoing counselling.

Availability

This program is offered on a needs basis. A total of 290 offenders have received individual counselling since 2000 at all metropolitan prisons, Albany, Bunbury, Eastern Goldfields, Greenough and Roebourne.

Participation

For the year 2003–2004 there were two Aboriginal participants (40% of total participants), both of whom completed the program (100%).

Resourcing

The program engages one facilitator (non-Aboriginal) per session (psychology or social work graduate). Specialist Aboriginal facilitators are employed if necessary.

Comments

DOJ advised that:

- Prisons employ 24 psychology and social work graduates in the metropolitan area and 10 psychology and social work graduates in regional areas – all non-Aboriginal. The regional areas contract a number of specialist Aboriginal facilitators but, as they have no degree qualifications, they are not qualified to engage in individual counselling. However, they are engaged to assist in 'spiritual' counselling and 'smoking' ceremonies.
- Prisons occasionally engage the service of the Community Justice Service Aboriginal psychologist.
- No evaluation has been undertaken.

9. Noongar Alcohol and Substance Abuse Services

Description

The Noongar Alcohol and Substance Abuse Service (NASAS) program is an Aboriginal specific program and aims to address substance issues in a culturally appropriate manner. The program focuses on substance use treatment and information regarding services available upon release. The program involves group-based counselling over 36 hours and is rated low intensity. The material presented is Aboriginal specific and written by Aboriginal people to service members of the Noongar community.

Availability

A total of seven programs have run since 2000 at Casuarina and Bandyup.

Participation

For the year 2003–2004 there were 18 Aboriginal participants (95% of total participants) and 16 Aboriginal completions (89%).

Resourcing

This program is facilitated by members of NASAS who are contracted by DOJ.

Comments

DOJ advised that the program is evaluated by NASAS but no details were available.

10. Sex Offender Medium Program

Description

Sex Offenders Medium Program is a mainstream male offender program and aims to reduce sexual offending. The program focuses on taking responsibility, identifying and reducing cognitive distortions, increasing victim empathy and implementing relapse prevention. The program involves group-based counselling over 160 hours and is rated medium intensity. It is designed for medium-risk sex offenders where individuals may have committed offences involving some level of aggression and repetitive sex offences against a small number of victims.

The material presented is not Aboriginal specific. However, modifications in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

A total of 20 programs have run since 2000 at Karnet and Bunbury.

Participation

For the year 2003–2004 there were six Aboriginal participants (12% of total participants) and five Aboriginal completions (83%).

Resourcing

The program engages two facilitators (non Aboriginal) per group (psychology or social work graduates).

Comments

DOJ advised that Offender Services Edith Cowan Unit is evaluating the program, but no details were supplied.

11. Sex Offender Indigenous Medium Program

Description

The Sex Offenders Indigenous Medium Program is an Aboriginal specific program and aims to reduce sexual re-offending. The program's focus is similar to the mainstream Sex Offender Medium Program but has been adapted to ensure it is culturally relevant to the offender group. The program involves group-based counselling over 180 hours and is rated medium intensity.

Specific modifications include greater use of audio visual material about Indigenous people: 'A great emphasis [is placed] on the interaction of alcohol, violence and inappropriate sexuality, acknowledgement of the role of shame in Indigenous culture, awareness of issues arising out of issues regarding Tribal Law and the awareness of cultural differences with respect to sexual propriety and impropriety'.⁷⁰ The program is designed for Aboriginal sex offenders who would be compromised by attending a program designed for the general prison population. It was developed following wide consultation with Aboriginal people.

Availability

A total of four programs have run since 2000 at Greenough.

Participation

For the year 2003–2004 there were six Aboriginal participants (100% of total participants) and five Aboriginal completions (83%).

Resourcing

The program engages two facilitators (non-Aboriginal) per group (psychology or social work graduates).

Comments

DOJ advised that:

- The program has previously run at Eastern Goldfields Regional Prison but is currently suspended.
- Offender Services Edith Cowan Unit is evaluating the program, but no details were supplied.

12. Sex Offender Intellectually Disabled Program

Description

Sex Offenders Intellectually Disabled Program has been designed for sex offenders who have intellectual difficulties and has been modified to ensure comprehension. It is a specialised male offender program and aims to reduce sexual re-offending, increase level of observed social skills, increase insight and understanding of dysfunctional sexual behaviours, and maintain increased monitoring and control over these behaviours. The program focuses on social skills, relationships, sexuality, victim empathy and relapse prevention. The program involves group-based counselling over 192 hours and is rated medium intensity.

70. Comment from response to questionnaire sent to DOJ.

The material presented is not Aboriginal specific. However, modification in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

A total of five programs have run since 2000 at Casuarina.

Participation

For the year 2003–2004 there were seven Aboriginal participants (78% of total participants) and six Aboriginal completions (86%).

Resourcing

The program engages two facilitators (non-Aboriginal) per group (psychology or social work graduates). A facilitator from Disability Services is seconded when available.

Comments

DOJ advised that Offender Services Edith Cowan Unit is evaluating the program, but no details were supplied.

13. Sex Offender Intensive Program

Description

The Sex Offenders Intensive Program is a mainstream male offender program and aims to reduce sexual re-offending. The program focuses on taking responsibility, emotional self-management, motivation to change, intimacy and relationship skills, distorted thinking, relapse prevention, fantasy, trust, consent and problem solving. The program involves group-based counselling in a residential setting over 450 hours and is rated intensive. It is designed for male sex offenders who pose the greatest risk of re-offending and will cause the greatest amount of damage to victims.

The material presented is not Aboriginal specific. However, modification in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

A total of 11 programs have run since 2000 at Casuarina and Bunbury prisons.

Participation

For the year 2003–2004 there were four Aboriginal participants (14% of total participants) and two Aboriginal completions (50%).

Resourcing

The program engages two facilitators (non-Aboriginal) per group (psychology or social work graduates).

Comments

DOJ advised that Offender Services Edith Cowan Unit is evaluating the program, but no details were supplied.

14. Sex Offender Individual Program

Description

Sex Offenders Individual Program is an individualised offender program and aims to reduce sexual re-offending. The program focuses on criminogenic needs while also mirroring the content of group programs. It involves individual counselling sessions of varying duration and intensity. The program is designed for prisoners who are not able to be included in group sessions and, in the case of females, where such programs are not available.

Availability

This program is run on a needs basis. A total of 66 offenders have received individual counselling since 2000 at Casuarina, Karnet and Bandyup.

Participation

For the year 2003–2004 there were six Aboriginal participants (29% of total participants) and four Aboriginal completions (67%).

Resourcing

The program engages 1 facilitator (non-Aboriginal) per session (psychology or social work graduates). Specialist Aboriginal facilitators are employed if necessary.

Comments

DOJ advised that:

- Prison Services employ 24 psychology and social work graduates in the metropolitan area and 10 psychology and social work graduates in regional areas; all non-Aboriginal. The regional areas contract Specialist Aboriginal facilitators but, as they have no degree qualifications, these contractors are not qualified to engage in individual counselling. However they are engaged to assist in 'spiritual' counselling and 'smoking' ceremonies.
- Prisons occasionally engage the service of the Community Justice Service Aboriginal psychologist.
- No evaluation has been undertaken.

15. Violent Offending Treatment Program

Description

The Violent Offending Treatment Program (VOTP) is a mainstream male offender program and aims to reduce further violent offending by developing pro-social behaviour, attitudes and beliefs. The program engages cognitive behavioural treatment in accordance with *What Works*⁷¹ and is delivered in a residential setting. The program involves group-based counselling over 450 hours and is rated 'intensive'. It is designed for high-risk male violent offenders.

The material presented is not Aboriginal specific. However, modification in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

A total of 15 programs have run since 2000 at Casuarina and Albany.

Participation

For the year 2003–2004 there were seven Aboriginal participants (19% of total participants) and six Aboriginal completions (86%).

Resourcing

The program engages two facilitators per group – one psychology or social work graduate (non-Aboriginal) and one trained Prison Officer.

Comments

DOJ advised that:

- The program is delivered early in the prisoner's sentence to encourage better behaviour while in prison.
- Offender Services Edith Cowan Unit is evaluating the program, but no details were supplied.

16. Violent Offending Individual Counselling

Description

Violent Offending Individual Counselling is an individualised offender program and aims to decrease violent re-offending. The program focuses on individual criminogenic needs while also mirroring the content of group programs. It involves individual counselling of varying duration and intensity. The program is designed for prisoners who are not able to be included in group treatment programs.

71. See above n 67.

Availability

The program is run on a needs basis. Since 2000, a total of 22 offenders have received individual counselling at Casuarina and Albany.

Participation

For the year 2003–2004 there were two Aboriginal participants (20% of total participants), both of whom completed the program (100%).

Resourcing

The program engages one facilitator (non-Aboriginal) per session (psychology or social work graduates). Specialist Aboriginal facilitators are employed if necessary.

Comments

DOJ advised that:

- They employ 24 psychology and social work graduates in the metropolitan area and 10 psychology and social work graduates in regional areas, all non-Aboriginal. The regional areas contract Specialist Aboriginal facilitators but they have no degree qualifications and are not qualified to engage in individual counselling. However they are engaged to assist in 'spiritual' counselling and 'smoking' ceremonies.
- Occasionally Prisons engage the service of the Community Justice Service Aboriginal psychologist.

17. Female Group

Description

Female Group⁷² is a female offender program that aims to explore substance use issues and associated life problems, and to develop related strategies. The program focuses on stress management, communication skills, depression, relationship issues, self esteem building, relapse management and building, community supports. The program involves group-based counselling over 25 hours and is rated low intensity. It is designed for well-motivated female offenders who have experienced significant negative consequences of previous substance use.

The material presented is not Aboriginal specific. However, modification in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

A total of 28 programs have run since 2000 at Greenough prison and Boronia Pre-Release Centre.

Participation

For the year 2003–2004 there were 17 Aboriginal participants (94% of total participants) and 15 Aboriginal completions (88%).

Resourcing

The program engages two facilitators per group. Metropolitan area: two (non-Aboriginal) psychology or social work graduates. Regional area: one (non-Aboriginal) psychology or social work graduate and one Aboriginal contract facilitator from the Geraldton Drug Strategy Team.

Comments

DOJ advised that:

- The program is adapted for Aboriginal clients in northern regions.
- Offender Services Edith Cowan Unit is carrying out an evaluation. No details were supplied.

72. Although information was presented separately on the Female Relapse Prevention Program, and with different participation numbers, the two programs appear identical in both content and resourcing.

18. Female Relapse Prevention

Description

Female Relapse Prevention is a female offender program that aims to explore substance use issues and associated life problems and to develop related strategies. The program focuses on stress management, communication skills, depression, relationship issues, self esteem building, relapse management and building community supports. The program involves group-based counselling over 25 hours and is rated low intensity. It is designed for well-motivated female offenders who have experienced significant negative consequences of previous substance use.

The material presented is not Aboriginal specific; however, modifications in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

A total of 13 programs have run since 2000 at Bandyup and Boronia Pre-Release Centre.

Participation

For the year 2003–2004 there were six Aboriginal participants (21% of total participants) and five Aboriginal completions (83%).

Resourcing

The program engages two facilitators per group. Metropolitan area: two (non-Aboriginal) psychology or social work graduates. Regional area: one (non-Aboriginal) psychology or social work graduates and one Aboriginal contract facilitator, Geraldton Drug Strategy Team

Comments

Although listed separately from the Female Group, both are in essence the same program.

DOJ advised that:

- The program is adapted for Aboriginal clients in northern regions.
- Offender Services Edith Cowan Unit is carrying out an evaluation. No details were supplied.

19. Women's Anger Management Program

Description

Women's Anger Management Program is a female offender program and aims to reduce violent offending. The program focuses on substance use, impact of trauma, relationships and other issues aligned to female violent offending. The program involves group-based counselling over 72 hours and is rated medium intensity. It is designed for female offenders with current violent offences and who are due for release in the next 12 months.

The material presented is not Aboriginal specific. However, modification in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.

Availability

A total of four programs have run since 2000 at Bandyup.

Participation

For the year 2003–2004 there were four Aboriginal participants (50% of total participants) and three Aboriginal completions (75%).

Resourcing

The program engages two facilitators (non-Aboriginal) per group (psychology or social work graduates)

Comments

DOJ advised that Offender Services Edith Cowan Unit is carrying out an evaluation. No details were supplied.

Part VI: Community and Juvenile Justice Services

This part provides a descriptive summary of the information we obtained from the Community and Juvenile Justice Services directorate, sometimes with additional material obtained by interviews with relevant staff. This is the most comprehensive and detailed material that was available across the three main service delivery directorates.⁷³ The first section of Part VI covers community-based services for adults and juveniles. The remainder covers juvenile custodial services.⁷⁴

1. Victim-Offender Mediation

Description

Victim-Offender Mediation is a free and voluntary service offered to offenders to assist with making amends to their victims. It is also offered to victims to assist in offence recognition, resolution and closure. DOJ advised that mediation is based on restorative justice values and consensual mediation principles. Mediation can occur at two stages in the criminal justice process:

(i) Pre-sentence

Reparative mediation is a pre-court mediation service giving offenders the opportunity to offer the victim reparation, compensation and/or an explanation and apology in respect of the offence.

Court-based mediation was instigated from the impetus to increase personal involvement in the criminal justice process and low referral rates from reparative mediation.

Pre-sentence mediation may mitigate but not aggravate sentencing decisions.

(ii) Post Sentence

Protective mediation is a process to enable victims and offenders to reach an agreement about the level of future contact between the two parties.

Therapeutic liaison is a one-off mediation offered so victims can meet the offender to facilitate the resolution of residual closure issues.

Availability

Reparative mediation commenced in July 1992 and is a statewide service available to both adult and juvenile offenders and their victims. Court based mediation commenced in May 2003 and is provided at the Central Law Courts, Rockingham/Mandurah and Bunbury/Busselton. In May 2004 the service commenced in the Pilbara courts of South Hedland, Karratha and Roebourne. In Kalgoorlie and Geraldton the service is scheduled for commencement in 2005. Protective mediation is available statewide and is determined by the location of the victim and offender. Therapeutic liaison is available on an as needs basis.

Participation

Across the four areas of mediation from January 2003 to May 2004 offender referrals totalled 2 172. Aboriginal adults comprised 906 (41%) and Aboriginal juveniles comprised 505 (23%).

Reparative mediation: From January 2003 to May 2004, 33 per cent of clients referred were Aboriginal adult offenders and 42 per cent were Aboriginal juvenile offenders. No figures were available as to the number of Aboriginal people who participated in mediation following referral.

Court-based mediation: Since May 2003 less than five per cent of clients referred were Aboriginal. No figures were available regarding the number of Aboriginals who completed the mediation process.

Protective mediation: No referral or participation figures were available.

73. The questionnaire responses included information about NAIDOC and ANZAC Day activities. We have included these even though they are not really 'programs, plans or initiatives'.
74. See below pp 287–94.

Therapeutic mediation: No referral or participation figures were available; however, this service is restricted to long-term and severely affected victims of crime.

Resourcing

The victor-offender mediation service has a staff of 16 and engages a further 20 Contract Mediation Officers (CMOs). In regional areas preference is given to recruitment of CMOs with indigenous and community links. CMOs in Geraldton and Broome are Aboriginal. Re-entry funding provides court-based mediation resourcing.

Comments

DOJ advised that:

- While centralised data collection commenced in January 2003, limited information exists on Aboriginal participation in mediation, particularly victim participation. Approximately one in six clients participating in mediation is of unidentified ethnicity.
- There is a need for the development of more culturally appropriate processes to engage more Aboriginal victims and offenders after referral. Modifications are pending the outcome of consultations with Aboriginal people and their communities.
- Currently, the focus is on court-based mediation in an attempt to better capture and engage victim and offender clients. However, Aboriginal participation in court-based mediation is recognised to be low. DOJ attributes this to Aboriginal clients wanting the matter settled immediately rather than having a remand period and further court appearances. The ALS supports this more expeditious approach.
- The most relevant area in which to engage Aboriginal clients in mediation is protective mediation. To date, difficulties exist in locating victims, particularly in remote communities, and engaging victims and offenders to participate in mediating agreements.

2. Family and domestic violence perpetrator programs / services

Description

This specialised perpetrator treatment is to assist family and domestic violence (FDV) offenders to address their behaviour through a process of awareness raising and behaviour modification counselling. Treatment is best conducted in a group-based setting run over a period of 24 weeks. In rural and remote areas the viability of group-based programs is problematic and in its place individual treatment counselling sessions are offered.

Currently no specific Aboriginal FDV programs exist for Aboriginal FDV offenders. However, DOJ states that by virtue of the overwhelming number of Aboriginal clients in Geraldton, Port Hedland and Kalgoorlie that treatment services in these areas can be considered Aboriginal focussed services.

Availability

The treatment is available to all male offenders, including Aboriginals, who commit FDV offences. Treatment is offered on a statewide basis. In the metropolitan area the service, established in 2000, is offered in three locations – Perth, Maddington and Joondalup, which has two sites. The 24-week program is run twice a year in four locations. In regional and remote areas counselling services are offered in Albany, Bunbury, Kalgoorlie, Geraldton and Port Hedland. Plans exist for the commencement of services in Broome and in the Ngaanyatarru Lands in 2005. It is envisaged that service in the Lands area will engage a crime prevention approach and be available to victims and offenders of FDV.

Participation

Generally Aboriginal participation is low across the state. In the metropolitan area all clients, including Aboriginals, are mandated FDV male offenders. In the nine months up to 31 October 2004 participation figures of those undergoing treatment comprised seven per cent Aboriginal. (Note a further 34 per cent were of unspecified ethnicity.) Prior to this last treatment schedule only one identified Aboriginal out of 16 participants completed the program.

In rural and remote areas the majority of clients are mandated FDV male offenders. There are no Aboriginal clients in Albany or Bunbury. In Geraldton the Aboriginal participation rate is 80 per cent; in Port Hedland and Kalgoorlie it is 100 per cent. While the percentile figures are high, in reality the actual number of individual Aboriginal participants

undergoing treatment is low. In Geraldton and Port Hedland participation solely involves attending an unspecified and usually limited number of individual counselling sessions. In Kalgoorlie participation is also primarily based on attending a limited number of individual counselling sessions and, to date, the uptake of available sessions has been low.

Resourcing

In the metropolitan area there are no Aboriginal people employed in the delivery of programs. Two persons—one male and one female—facilitate each 24-week program. Kalgoorlie has contracted the services of one 0.7 FTE non-Aboriginal counsellor for individual sessions. Outreach has been contracted to perform group sessions but at this stage their service has involved establishing informal and localised contact with Aboriginals with a view to attracting future Aboriginal client participation. Geraldton and Port Hedland have each contracted one FTE non-Aboriginal counsellor for individual sessions.

Comments

DOJ advised that:

- Aboriginal participation in FDV treatment is low across the state and there is an identified need for the development and delivery of Aboriginal specific and culturally relevant programs.
- The biggest gap in service delivery exists in rural and remote locations. The high percentage participation rates in Geraldton, Port Hedland and Kalgoorlie obscures the reality of low Aboriginal participation numbers in these locations. Further, there exists the lack of any participation in the Lands area, South-West areas and throughout much of the Goldfields, Murchison/Gascoyne, Kimberley and Pilbara regions.
- While the group-based treatment approach meets Best Practice Standards, it has been difficult to apply this approach in non-urban situations. The group-based approach has both logistical and cultural impediments to implementation and participation. Conversely, the currently ad hoc nature of individual counselling compromises the intensity and integrity of the FDV treatment.
- The approach to service delivery is more flexible in non-urban situations and is based on 'what works best' in each location. Viable solutions to better match the treatment needs are being sought through community consultations and local participant feedback. Modifications to service delivery are evident in the contracting of Outreach in Kalgoorlie and the strategy to target treatment of FDV victims under the umbrella of crime prevention in the Lands area, which may in the future encourage FDV offender participation.
- Difficulties exist in recruiting qualified contractors and/or individuals suitable for FDV training in rural and remote areas. Also, as expected, the cost of operating the service is significantly greater in rural and remote areas.

3. Community Service Order Management

Description

DOJ is responsible for overseeing the management, monitoring and compliance of Community Service Orders issued to adult offenders as part of a Community-Based Order, Intensive Supervision Order, Work and Development Order, Home Detention Order and Re-Entry Release Order. Requirements to perform community work may be a condition attached to any of these orders.

The objectives of performing community work are punishment and rehabilitation. It is also a means to compensate the community for the damage caused by the offence. Community work may also be ordered if an offender defaults on fine payments. Community work may be performed for 'not for profit' organisations, local councils, communities and agencies, such as CALM, under formalised Community Service Agreements (CSA). Formalised CSAs have been established with specific Aboriginal projects and communities for the benefit of Aboriginal people. Specific projects include the Mogumba Aboriginal Project (formerly Moore River Mission) that runs three-day residential programs and includes a work and cultural sensitivity component and personal skills development.

Availability

Community work programs commenced in 1977 and are available to adult offenders, including Aboriginal people, who are subject to a community work order. Community Justice Services directly supervise community work orders issued to Aboriginal offenders in the metropolitan area, Kununurra, Broome and Geraldton. CSA's have also been established statewide.

Specific Aboriginal CSAs have been established with several Aboriginal community projects and some Aboriginal communities. Specific projects include the Mogumba Aboriginal Project, supervision of which commenced in 2002. Several regional Aboriginal communities also undertake to supervise offenders within their own community and oversee the completion of community work. The number of Aboriginal communities with CSAs is constantly changing and evolving. Agreements are dependent upon conditions in the community at the time and the preparedness of the community to undertake offender supervision at the time.

Participation

Approximately 40 per cent of all community work hours ordered are issued to Aboriginal adult offenders. No data was available in regards to the number or location of Aboriginal offenders subject to community work orders or to the rate of completion of these orders.

Resourcing

DOJ employs 23 FTE case support officers throughout the state to supervise community work orders. There are a further 16 FTE positions devoted to direct work party supervision, which includes adult and juvenile offenders.

Comments

DOJ advised that Community Service Orders usually involve more than a community work component. They usually have a supervision component and may have a treatment component.

4. Gordon Initiative – expansion of Community Supervision Agreements

Description

The Gordon Inquiry recommended the expanded use of Community Supervision Agreements (CSAs) in remote Aboriginal communities to allow more Aboriginal offenders to be retained in their own community rather than being located elsewhere or in custody. The aim of this initiative is to increase the number of remote communities participating in formalised CSAs. These agreements allow the community, in which the offender resides, to oversee the management of the offender to ensure the completion of the sentencing and release order. In an effort to reduce the rate of Aboriginal imprisonment more CSAs are to be made available to the judiciary as a valid sentencing option and as an alternative to detention.

Availability

Currently CSAs exist in the Kimberley, Pilbara and Goldfields regions. This initiative undertakes to extend the overall availability of CSAs in regional areas. Availability will depend on the ability and willingness of local Aboriginal community councils to participate in offender supervision.

Participation

To date, only adult offenders are eligible to participate. Juvenile offenders are also being supervised in their communities; however, this practice currently lacks legislative backing.

Resourcing

Three Gordon Inquiry funded 50(d) officers will assist communities participating in this initiative. Participating communities will be paid a fee for service.

Comments

DOJ advised that:

- This initiative stems from the Gordon Inquiry and will be subject to DOJ evaluation and formal Gordon Inquiry evaluation.
- Supervision of offenders in the community can be an onerous undertaking for local communities. It usually extends beyond ensuring the performance of community work. The need for extra assistance and support is recognised by the Gordon Inquiry.

Since this information was provided, a Young Offenders Act Amendment Bill 2004 (WA) has been tabled in Parliament to give statutory backing arrangements to allow juvenile offenders to be managed in a similar way to adult offenders.

5. The Strong Families Program

Description

The Strong Families Program is a government initiative involving the Department of Community Development (DCD) as the lead agency and DOJ as a key participant. The program aims to improve existing services to families through collaborative case management to ensure improved planning, coordination and delivery of services. The program is based on New Zealand's Strengthening Family Program. DOJ recognises that its responsibilities in dispensing community justice services extend beyond criminal justice responses. Rather, there is a need to engage and support the families of young offenders to assist their children to fulfil their court orders. A more coordinated case management approach to family support will assist families and positively impact on young offenders.

Availability

The program was piloted in Albany and Midland in 2000. In January 2004, in response to the Gordon Inquiry, the program was extended to 10 additional locations, making a total of five in the metropolitan area, including the Peel region, and seven in regional areas. The program is available to all families, including Aboriginals.

Participation

DOJ provided figures for 2001. In Albany 27 families went through the program, of which 35 per cent were Aboriginal. In Midland 20 families went through the program, of which 40 per cent were Aboriginal. DCD provided figures for January to May 2004. Since the project was expanded figures for the first five months show a total of 62 families are currently engaged in the project, of which 65 per cent are Aboriginal. Most of the families participating are DOJ clients, many of whom are Aboriginal.

Resourcing

The program employs a state coordinator and 12 site coordinators, four of whom are Aboriginal. Funding from the Gordon Inquiry resources the additional 10 sites.

Comments

DCD and DOJ advised that:

- The program will be subject to Gordon Inquiry evaluation.
- Referrals mainly come from DCD, the Education Department and DOJ.

6. Geraldton Aboriginal Cyclic Offending Program

Description

The Geraldton Aboriginal Cyclic Offending Program (GACOP) is a community service development program to reduce the risk of Aboriginal children coming into contact with the Community Justice Services. GACOP operates under a formalised partnership agreement between the government and the Geraldton Aboriginal Reference Group (GARG). Local non-government agencies are also involved. The program focuses on improving services and practices identified as inadequate, inappropriate and racist. Improvements in processes, social indicators and quality of life are factors predicted to positively impact on young Aboriginals and facilitate pro-social behaviour. GACOP engages a holistic community approach to improving services and assists government agencies to better target and deliver services to young Aboriginals in the community. GARG is responsible for the daily running of the program. Support and involvement of the local Aboriginal community is crucial to the running of this program.

Availability

The program commenced in 1996 and was formalised in 1997. The GACOP office is currently located just out of Geraldton and is soon to be relocated to the CBD to facilitate better access and raise the profile of the service. The program is available to local Aboriginal children and their families.

Participation

Program participants usually come from police referrals of 'at risk' children with the remaining from Aboriginal community members. The number of referrals to GACOP during the last year is estimated at 12. Most of the recent referrals are females aged 13–14 years. Generally Aboriginal community participation is dwindling. In previous years the program received up to 40 referrals annually.

Resourcing

The program is resourced by state funding at \$110 000 per annum. DOJ employs one full-time Aboriginal executive officer on a contract basis.

Comments

DOJ and GARG advised that:

- An evaluation by Estill & Associates in 2002 concluded that the project had resulted in improved relationships between government agencies and the local Aboriginal community. GARG advises that many of the evaluation's 19 recommendations have not been acted upon.
- The current prevalence of female referrals is attributed to the fact that gaps in service and support exist mostly in respect to young female Aboriginals.
- Recent dwindling participation in the program has been identified, resulting in relocation of the office to the Geraldton CBD.
- The program is reliant upon adhoc referrals usually from individuals committed to intervention principles. Government agencies remain available and committed to the project; however, local Aboriginal community support has dwindled.
- A similar program operating in the Midland area was disbanded in 2003 as it was deemed to be ineffective in urban locations. Currently an alternative urban engagement model is being developed.

7. Gordon Initiative: perpetrator programs

Description

In response to the Gordon Inquiry, DOJ has been funded to expand the availability of community-based treatment programs that address family violence and child abuse behaviours. Programs to address these offending behaviours target substance abuse, family violence and sexual offending. Program content and delivery will be culturally specific to match the therapeutic needs of remote Aboriginal clients. The target clientele is not confined to Aboriginal offenders; extended family and significant others will also be included.

Availability

The program is yet to be implemented. Treatment programs are to be made available, on an ongoing basis, to Aboriginal people living in remote communities. Program administration will initially be based in the CJS offices in Broome (Kimberley region), Kalgoorlie (Goldfields region), Geraldton (Murchison/Gascoyne regions) and the Pilbara region.

Participation

The program is yet to commence.

Resourcing

An Aboriginal Regional Consultant position has been created to advise on the design and implementation of culturally relevant programs and service delivery. Four regional development officers are to be employed in the Pilbara, Kimberley, Goldfields and Murchison/Gascoyne regions. To date, an Aboriginal person has filled the Murchison/Gascoyne position. Further, local Aboriginal co-facilitators are to be engaged with a view to full Aboriginal facilitation over time.

Comments

DOJ advised that:

- Wide-ranging community consultations will precede program development and implementation to ensure program design and delivery is culturally relevant.
- Program delivery is required to respect local governance arrangements and involve local Aboriginals in program delivery.
- Programs are intended to target Aboriginal offenders but also to engage a holistic approach to offender treatment including family and significant others in the community.
- The engagement of Aboriginal facilitators is problematic. Some communities do not feel comfortable with having Aboriginal facilitators and there are difficulties in recruiting suitable Aboriginals to fill the positions.

8. The Rural Placement Program

Description

The program is designed to divert young offenders, between the ages of 16–21 years, from custody by providing supervised residential placement at rural pastoral stations. Rural placement provides the courts with a residential sentencing alternative and may be a requirement or condition to the CBO sentence. While on placement, young offenders undergo employment and life skills training to assist with securing future employment in pastoral and related fields. Lack of appropriate employment skills has been identified as a significant factor for recidivist offending. Also, removal of the offender from their current environment reduces the opportunity to re-offend during the period of placement.

Availability

The program commenced in the 1980s. It is available to post compulsory school offenders who would otherwise face a period of imprisonment or detention. The program is not available to offenders who commit offences involving violence or sexual offending. The program operates in the Kimberley, Goldfields, Pilbara and Mid-West regions. Several pastoral stations, some run by Aboriginal communities, have been assessed as suitable and are available to undertake rural placement supervision.

Participation

Program participation is low. The program usually operates with only one or two offenders at any given time and the average duration of placement is three months. DOJ advised that the current database does not allow extraction of exact participation figures.

Resourcing

The program is administered out of four regional areas. Supervising stations are paid a fee for service.

Comments

DOJ advised that:

- Placement is intended as a diversion from custody option while affording community protection through highly intensive and constructive supervision of young offenders.
- Placement is most appropriate for local rural offenders who are interested in securing employment in related fields.
- Placement is an option offered to young offenders subject to the three-strikes legislation.
- Placement is an option sometimes used by remote communities to remove difficult to manage young offenders, subject to a CBO, from their community for the purpose of respite and removal from negative peer influences.

9. Killara Youth Support Service

Description

The Killara Youth Support Service is a community-based extended hours service to assist and support at-risk young people. The service works with young people who are at risk because of their behaviour and who may have come into contact with the police. The objective is to prevent young people developing and pursuing offending patterns of behaviour and to divert young people from the CJS. The service provides the police with an option, when dealing with at-risk offenders and minor offenders, to be referred to a support service and so reduce the likelihood of escalating Community Justice responses. The service works closely with police, families, carers and various community-based services with the aim of improving the at-risk person's connection with the community.

Availability

The service was introduced in 1991 and operates in the metropolitan area and Rockingham. The service is available 365 days of the year and is open 17 to 18 hours per day.

Participation

Overall contact with Aboriginal families is 19 per cent; casework contact with Aboriginal clients is 17 per cent, and caution contact with Aboriginal clients is 9 per cent.

Resourcing

The service is funded by Community Justice Services. It engages one manager, one team leader, two administrative officers and 12 caseworkers. Two of the caseworkers are Aboriginal (one position is 50(d)).

10. Youth Support Officer Program

Description

The Youth Support Officer Program provides a mentoring service to assist young at-risk offenders to develop and engage in constructive work and recreational activities. The Youth Support Officer (YSO) works collaboratively with the offender, the family and Community Justice Services (CJS) to provide the necessary support and supervision that may be currently lacking in the offender's life. The role of the mentor is to provide positive role modelling and to assist the young offender to complete their Community Service Order.

Availability

The program is available to young at-risk offenders, generally aged between 12 to 26 years. Older offenders with special needs, such as intellectual disabilities and mental health issues, may also be eligible for support. The maximum number of hours a YSO may work with an offender is 10 hours per week with the expectation that this would reduce over time.

Participation

Participation figures were not available as this would require an extensive manual file search.

Resourcing

The services are funded by CJS. It engages one Program Coordinator. YSOs are employed on a casual basis, when required. Aboriginal YSOs are engaged to mentor Aboriginal offenders.

Comments

DOJ advised that:

- This program is a merge of the Aboriginal Family Supervision Program and the Juvenile Justice Mentor Program.
- The changes are expected to improve administration and service delivery to at-risk young and vulnerable adult offenders.

11. Establishment of further joint Court / CJS position

Description

The extra staffing initiative is to provide improved access to and management of adult offenders in regional areas subject to fine penalties and community work orders to assist with the reduction of default, leading to custodial sentencing.

Availability

Access to locally based Community Corrections Officers (CCOs) in the Central Desert area commenced in 2003. Greater access is to be available to remote Aboriginal adult offenders in the Kimberley, Pilbara and Goldfields regions.

Participation

No figures were supplied

Resourcing

Currently there is one CCO/Sheriff Officer in the Goldfields region. Three extra CCO/Sheriff Officers are to be located in the Kimberley, Pilbara and Goldfields regions – one in each region.

12. Juvenile Justice Community Funding Program

Description

The Juvenile Justice Community Funding Program is a DOJ funded program to community based 'not for profit' organisations for the delivery of services to assist and mentor young people who have offended or are at risk of offending, and to provide support to their families and/or carers when necessary.

The program provides funding to community-based organisations that have demonstrated a capacity to assist and support: (a) young offenders who are subject to court orders, particularly in diversionary programs and those being reintegrated into the community after detention; and (b) young people who engage in high risk behaviours.

Services range from drop-in centres to intensive support and counselling. Services to Aboriginal youth must guarantee to be delivered in a culturally relevant manner. This may mean that where an Aboriginal service provider is available this provider is selected on a preferred service provider status.

Availability

The program targets service to Aboriginal and non-Aboriginal young offenders and at-risk youth between the ages of 10–17 years. It can also be of assistance to their families and/or carers. The program is provided by DOJ on an ongoing basis. Currently there are 21 service providers engaged across the state. In the metropolitan area 10 service providers are engaged. In regional areas service providers are engaged in the Avon Valley, Carnarvon, Geraldton, Halls Creek, South Hedland, Derby and Broome.

Participation

In the metropolitan area there is one Aboriginal service provider specifically for Aboriginal youth. No participation data for this service have been provided to DOJ by this organisation. DOJ was also unable to provide Aboriginal participation data for the other metropolitan service providers or for those in regional areas. The exception being the Geraldton Aboriginal Streetwork Program, which is a drop in youth centre, reporting service to a total of 644 youth over a 12-month period, of which 95 per cent were Aboriginal.

Resourcing

The DOJ funds the program \$1.67 million per annum. Additional funding has been requested to finance identified areas of need.

Comments

DOJ advised that:

- Prior to 1993 the program was known as the 'Kids in Crime Program'.
- Service provider evaluations are due to commence later this year. The lack of data relating to client participation will be addressed as part of the evaluation and accurate attendance figures will then be available.
- An outcome evaluation of every service agreement is conducted at the end of each service agreement.⁷⁵

13. Warminda COGS Program – mainstream and Indigenous

Description

The COGS (Chance of Going Straight) program is a group-based counselling program based on cognitive behaviour principles to address casual factors associated with offending and recidivism. COGS counselling focuses on problem solving in respect to avoidance strategies, substance abuse and offending behaviour. The program seeks to match the treatment needs of high-risk offenders and is aligned with other support programs, such as education and vocational training.

Community Justice Services runs two community-based COGS programs through their Warminda site. One is a mainstream COGS program that targets high-risk offenders between 16–21 years. The mainstream COGS program is relevant but not specifically Aboriginal focused. It involves 30 group-counselling sessions of two hours duration.

The second is an Indigenous COGS program, modelled on the mainstream program that has been modified to maximise its relevance to Aboriginal offenders. It involves 21 group based counselling sessions of 3½ hours in duration. The reduced number of sessions is a strategy to facilitate Aboriginal participation.

Availability

Both COGS programs are available on the CJS programs menu and are run through the Warminda site in East Victoria Park. The mainstream COGS program is available on a regular basis and can be run with low numbers. The

⁷⁵ It must be said that this statement is difficult to reconcile with the total lack of data, and the lack of data is a matter of concern when the service is funded at close to \$1.7 million per annum.

Indigenous COGS program can also be run with low numbers and is available on an as needs basis. However, often referrals have resulted in Aboriginal clients being included in the mainstream program. Twenty mainstream COGS programs and 10 Indigenous COGS programs have been run since 2000.

Participation

Mainstream COGS program – 1 January 2000 to 1 June 2004

Assessment No. (% Aboriginal)	Enrolment No. (% Aboriginal)	Commencement No. (% Aboriginal)	Completion No. (% Aboriginal)
404 (19%)	221 (22%)	188 (20%)	74 (19%)

Indigenous COGS program – 1 January 2000 to 1 June 2004

Assessment	Enrolment	Commencement	Completion
94	60	53	23

Aboriginal referral to both programs is recognised to be low, particularly referrals to the Indigenous COGS program. Aboriginal participation in enrolment, commencement and completion is also recognised to be low across the two programs.

Resourcing

Jointly the programs engage two FTE facilitators and a 0.75 Aboriginal Programs Support Officer – 50(d). The mainstream COGS program engages the Aboriginal Programs Support Officer to co-facilitate in programs where there are Aboriginal participants. The Indigenous COGS program engages this officer as the primary facilitator. DOJ advised that obtaining experienced Aboriginal staff to lead facilitate the Indigenous COGS program is problematic.

Comments

DOJ advised that:

- Referral of Aboriginals to both programs has been consistently low. Attempts to increase Aboriginal participation in COGS by the introduction of the Indigenous COGS program have not yielded improved results.
- Warminda staff indicate that in many cases Aboriginal clients have expressed a preference to attend the mainstream COGS program; possibly because there is greater anonymity in mainstream groups.
- Low program participation is not confined to Aboriginals. Attempts to re-invigorate program participation are part of the overall review of the Warminda business model.

14. Reform of CJS programs initiative

(a) General

Description

CJS provides community based counselling programs for high-risk offenders, including Aboriginal people. Counselling programs are based on cognitive behavioural principles and target criminogenic risk factors. Programs address motivation to change, emotional management, empathy skills, relapse etc. The expansion and reshape initiative, which commenced in 2003, aims to increase the availability, participation and effectiveness of community-based counselling. The program involves increasing the CJS program menu and program availability in CJS metropolitan and regional sites. It is anticipated that this will significantly reduce barriers encountered by Aboriginal clients in accessing and participating in community based counselling.

Core shifts in service delivery aim to: reduce wait lists; better target at-risk offenders; better target criminogenic needs; improve engagement strategies for resistant clients; increase the coordination of delivery of through-care programs from prison to the community; and provide a more culturally relevant Aboriginal focused program.

Availability

The initiative, which commenced in 2003, is still in the development phase. Historically community-based counselling programs have had limited availability due to poor access to transport, long wait lists, and confined menu availability

and restricted entrance criteria. These impediments are particularly relevant to Aboriginal clients. The core shifts aim to increase the availability of counselling programs statewide to Aboriginal and non-Aboriginal clients. The reform initiatives mean that offenders can now access a greater range of CJS menu programs at most metropolitan based CJS sites. However, the availability of programs in regional areas is restricted, hampered by staff recruitment difficulties and limited program menu. Regionally contracted-out counselling programs for Broome (Family and Domestic Violence Program) and the Lands area (NPY Lands Initiative) are yet to be made available.

Participation

Year	Assessment No. (% Aboriginal)	Enrolment No. (% Aboriginal)	Commencement No. (% Aboriginal)	Completion No. (% Aboriginal)
2002	98 (34%)	71 (31%)	65 (30%)	18 (20%)
2003	531 (not available)	381 (23%)	312 (23%)	123 (12%)

The number of Aboriginal clients participating in counselling programs significantly increased in the first 12 months of the program. Numbers are expected to continue to increase throughout 2004 and 2005 as the program moves into the consolidation phase. However, the rate of Aboriginal participation in assessment, enrolment and completion has significantly declined relative to non-Aboriginal participation in the first 12 months of the program.

Resourcing

In 2003 the increase in the number of counselling programs was facilitated by an increase in funding and staffing levels. The program has been allocated approximately two million dollars. Approximately 50 per cent of this is directed to staff salaries, and five FTE positions are funded with a strong regional focus. Two of the five positions have been filled by Aboriginal psychologists, one metropolitan and one regional-based.

Comments

DOJ advised that:

- The refocus of the CJS business model recognises that Aboriginal clients had fared the worst in accessing community-based programs.
- Program participation is expected to grow as more staff and regional programs become available. The current increased availability of programs has resulted in an increase in the number of Aboriginal assessments, enrolments and completions. However, the ratio of Aboriginal to non-Aboriginal participation has declined. The overall success of this initiative is not being matched when it comes to Aboriginal clients.
- Current program revision relates to better contextualising of mainstream programs as well as designing and implementing Aboriginal specific programs across the state.
- The program is to be subject to internal DOJ review and evaluation. It may be subject to a formal independent evaluation.

(b) Indigenous focused initiatives

Description

This initiative, which commenced in 2003 in conjunction with the expansion and reshaping of generic CJS programs, targets Aboriginal clients. There are three Aboriginal specific initiatives:

(i) *The appointment of Aboriginal and regional programs consultants*

This is a Gordon Inquiry initiative that aims to provide guidance and clinical supervision to Regional Program Development Officers (RPDO); and advice on the design of programs suitable for use in remote Aboriginal communities.

(ii) *Reclaiming lives*

This will be a group-based counselling program, involving up to 20 sessions, to address offending behaviour. Counselling is to target trauma and life experiences of Aboriginal clients that may lead to criminogenic behaviour. The program is deliberately different from previous Aboriginal focused group counselling. The alternative approach involves the use of story telling, artwork, meditation, affirmation and information/family tree gathering to assist Aboriginal clients to establish healthier life styles. This program is yet to be piloted. Following implementation the program is to be monitored by an Indigenous Programs Reference Group, which is yet to be established.

(iii) *Individual Indigenous counselling service*

Specialised individual counselling is to be provided to Aboriginal clients whose treatment needs are complicated by cultural issues. The counselling is to target offending and re-offending behaviour.

Availability

- (i) Not yet available – this initiative is in a developmental phase and is not yet operational. Program advice and supervision of RPDOs is pending the recruitment of Aboriginal and Regional Programs Consultants.
- (ii) Not yet available – to be available to regional and remote Aboriginal clients who have not responded to mainstream westernised counselling approaches. The program is pending the establishment of an Indigenous Programs Reference Group.
- (iii) Availability is confined to one or two clients per week and is limited to the hours provided by the part-time Aboriginal psychologist.

Participation

- (i) Nil at this stage.
- (ii) Nil at this stage.
- (iii) Limited participation, one to two clients per week.

Resourcing

- (i) Two FTE consultant positions were created in 2003. To date, one position has been filled on an acting basis. Formal recruitment, requiring behavioural science and relevant counselling experience, has not been successful.
- (ii) To date, one part-time Aboriginal psychologist is employed three days a week.
- (iii) To date, one part-time Aboriginal psychologist is employed to service currently one to two clients per week.

Comments

DOJ advised that:

- (i) This initiative attempts to better capture and service Aboriginal clients in rural and remote areas. Implementation has been restricted by the lack of suitable staff to appoint to these positions.
- (ii) This initiative is officially on hold pending the establishment of an Indigenous Programs Reference Group.
- (iii) This initiative followed the employment of the part-time Aboriginal psychologist. Competing job demands on current staff have prevented expansion of this service.⁷⁶ Expansion will depend on staff availability.

15. Kimberley Regional Justice Project

Description

The Kimberley Regional Justice Project is the largest research and community consultation initiative carried out in the Kimberley region by DOJ. The impetus for the project is to address the ongoing challenge to better meet the justice needs of Aboriginal people in rural and remote communities. Justice needs specifically relate to:

- Diverting offenders from imprisonment to alternative sanctions in the community;
- Reducing the over-representation of Aboriginal people in the CJS; and
- Enhancing community safety and access to culturally relevant justice services.

DOJ advised that the research consisted of extensive interviews and community consultations, which identified initiatives and strategies to address the region's justice needs. They include: Aboriginal Alternative Dispute Resolution training for communities; recruitment and training of Aboriginal JPs; identification of Aboriginal program specific needs for communities; enhancing service delivery for victims of crime; reviewing the system of community orders; and improving re-entry services and retention of adult and juvenile offenders in the Kimberley.

Following the information-gathering phase the project has engaged four strategies to lead the project into the implementation phase:

- An action plan list of immediate departmental reforms
- A talking list to engage with Aboriginal communities

⁷⁶ As noted in Part V, the part-time Aboriginal psychologist also provides counselling to prisoners.

- Processes for working towards partnership with Aboriginal communities
- A feedback report to Kimberley communities.

The action list detailed 18 recommendations for implementation in the Kimberley region. Implementation was handed to the Kimberley Community Justice Planning Project. This project is responsible for implementation of the regional action plans at a local community level. In particular, it is responsible for the design and implementation of individual community justice plans for local communities in the Kimberley region. Both the design and implementation of the plans are to encourage greater community involvement in law and justice issues that are inclusive of traditional methods and Aboriginal law. Local plans are to target the specific justice needs of each community and include proposals for governance to improve crime prevention and community capacity to deal with justice issues.

Availability

The Kimberley Regional Justice Project commenced in 2000 and is ongoing. The initial information-gathering phase was completed in 2002. The implementation phase under the Kimberley Community Justice Planning project commenced a one-year pilot in December 2003. The next four-year stage of the project is anticipated to commence in December 2004.

Participation

The Kimberley Regional Justice Project conducted interviews in six Kimberley towns, 26 remote communities and 27 different skin groups. In total 722 people were consulted, including 250 Aboriginal people, in three workshops across the Kimberley region. The Kimberley Community Justice Planning project has commenced work with local communities involved in the regional project.

Resourcing

The Kimberley Regional Justice Project is being funded from within the existing DOJ budget. The project has engaged one Project Officer for the pilot period. Resourcing for this project will come from joint CJS, Prisons and Courts funding.

Comments

DOJ advised that:

- Implementation of these programs is in conjunction with the Gordon Inquiry recommendations and the Council of Australian Governments (COAG) trial site in the East Kimberley. Work is aligned with the Statement of Commitment to a New and Just Relationship⁷⁷ and the Western Australian Aboriginal Justice Agreement.⁷⁸
- Recently the DOJ focus has been on pursuing 'justice planning' and attention is being focused on implementing the Western Australian Aboriginal Justice Agreement in the push to develop and implement the agreement's regional strategies before ATSIC is fully disbanded.
- As part of the Kimberley Regional Justice Plan three parallel streams of action are being progressed: community engagement, business improvement regarding access and equity, and collaboration and partnership.

16. Juvenile Justice Teams

Description

Juvenile Justice Teams (JJTs) were established to provide an alternative to formal court processing of juvenile offenders. The JJT process involves the juvenile offender attending a convened meeting of the JJT which is attended by DOJ, the police, the victim, the offender's family and relevant others, such as cultural and ethnic representatives and sometimes an education officer. Victim participation is voluntary.

The JJT gives the offender the opportunity to admit to and explain the offence, to be held accountable for the offence, to offer the victim an apology or compensation, to undertake to address their offending behaviour, and to participate in developing a restorative action plan. The action plan is intended to be an accountability, reform and compensation strategy. Successful completion of the action plan will result in the offender receiving no criminal record and no further punishment will be imposed. Offenders who fail to complete the action plan without good reason are referred back to the referring officer or to the courts.

77. Government of Western Australia and Aboriginal and Torres Strait Islander Commission, *Statement of Commitment to a New and Just Relationship Between the Government of Western Australia and Aboriginal Western Australian* (October 2001).
78. Above n 53.

The objectives of JJTs are:

- To divert minor offenders from early entry into the formal CJS system and to minimise progression within the CJS system.
- To ensure offenders are held accountable and responsible for their actions.
- To ensure accountability is relevant and achievable.
- To increase parental involvement and support in addressing their child's behaviour, including the design and completion of the action plan.
- To recognise the rights of the victim by way of an apology and/or compensation.

JJTs operate at two levels depending on the seriousness of the offence. Minor offenders are referred to Family Group Meetings. More serious offenders, who commit scheduled offences, are referred to Court Conferencing. Both have the same objectives but due to legislative requirements offenders who commit serious offences are not eligible to attend Family Group Meetings.

Availability

Family Group Meetings and Court Conferencing are available through the JJT. Family Group Meetings have been run since 1994. Court Conferencing has been run from the Perth Children's Court since 2001 and expanded to other metropolitan children's courts in 2002.

Family Group Meetings and Court Conferencing in the metropolitan area are available on a full-time basis at Wangarra, Midland, Osborne Park, Thornlie, Victoria Park and Fremantle. Family Group Meetings in regional areas are available as required at Kununurra, Halls Creek, Broome, South Hedland, Karratha, Roebourne, Carnarvon, Meekatharra, Geraldton, Kalgoorlie, Esperance, Albany, Katanning, Narrogin, Bunbury, Busselton, Mandurah, Rockingham and Northam.

There is a clear divide between the metropolitan and regional areas in the type of diversion available to young offenders. The metropolitan area has access to both family group meetings and court conferencing whereas rural areas have access to only Family Group Meetings. To increase the availability of Family Group Meetings in regional areas regional Juvenile Justice Officers (JJOs) supplant the role of the specialist JJT coordinators in the metropolitan area.

Referral to Family Group Meetings is usually through the police and referral to court conferencing is only through the metropolitan Children's Court. After referral, to be accepted by the JJT, the offender must admit to the offence and be prepared to make amends and complete the action plan. Offenders generally attend family group meetings within six weeks of referral. Offenders who attend Court Conferencing have their matter adjourned by the courts for a period of three months in which time they are to attend court conferencing.

Participation

Juvenile Justice Teams

Financial Year	Total JJT Referrals	JJT Referrals	Per cent Dealt With	Aboriginal Referrals	Aboriginal Dealt with	JJT Referrals	per cent Dealt With	Aboriginal Referrals	Aboriginal Dealt with
2000–2001	3 647	2 380	81%	488 21%	356 72%	1 267	75%	425 33%	N/A
2001–2002	3 357	2 068	80%	436 21%	348 80%	1 289	78%	537 42%	N/A
2002–2003	3 268	1 878	69%	463 25%	320 69%	1390	79%	700 50%	N/A
2003–2004 ⁷⁹	2 835	1 538	82%	351 23%	262 75%	1 297	92%	519 40%	N/A

79. Incomplete year.

Court Conferencing (Metropolitan Area Only)

	Total referrals	Aboriginal referrals	Non-Aboriginal referrals	Total Dealt with	Aboriginal dealt with	Non-Aboriginal dealt with
Oct 2001– Jun 2003	123	45 37%	78 63%	105 85%	34 76%	71 91%
Jul 2003 – Jun 2004	93	28 30%	65 70%	85 91%	24 86%	61 94%

DOJ advised that the overall success of diversion programs is not being matched when it comes to Aboriginal juveniles. The independent 1998 evaluation of the JJTs, in conjunction with an evaluation of the *Young Offender's Act 1994* (WA), found that Aboriginal juveniles did not participate in diversion to the same extent as non-Aboriginal juveniles and the situation remains unchanged. Further, DOJ verbally advised that there is better provision for diversion in the metropolitan area and that rural offenders are considerably worse off. Rural and remote offenders generally have little or no access to court conferencing or access to diversion. As a consequence, these offenders are diverted less and are liable to undergo formal court processing more.

Resourcing

In the metropolitan area the JJT employs one manager, seven JJT coordinators (three Aboriginal), six part-time Aboriginal Support Officers and six clerical officers. The Aboriginal Support Officers are engaged as case aids to specifically work with Aboriginal juveniles. In the regional areas JJTs are run by regional JJOs (one Aboriginal). Further, there are three part-time Aboriginal Support Officers engaged on a contract basis to float between areas where there is a high Aboriginal component.

Comments

DOJ advised that:

- Aboriginal children, especially from remote areas, do not appear to have the same level of access to diversions. This means that they may be fast tracked in the criminal justice system.
- In regional areas, Court Conferencing is generally not available. It does occur occasionally and informally and is a practice at the discretion of the magistrate.
- The number of police referrals is declining and the number of court referrals is increasing, suggesting that police are not as regularly utilising the option for diversion.
- The appointment of an Aboriginal Coordinator and six permanent part-time Aboriginal Support Officers in the metropolitan area is a strategy to increase Aboriginal participation.

As part of a strategy to further increase Aboriginal participation in diversion, DOJ is proposing two changes:

- Legislative amendment to allow Elders, wardens and other suitable community members in remote communities greater involvement in JJT processes by permitting them to substitute for the JJO and the police officer on JJTs.⁸⁰
- A further increase in Aboriginal staff participation in metropolitan JJTs to better engage and respond to the needs of Aboriginal juveniles and their families. This may allow for a fully Aboriginal staffed JJT.

17. Custodial Education Services

Description

Juvenile Education Services (JES) provide a nationally accredited curriculum program to juveniles detained in custody and on remand. The curriculum is modified to suit individual literacy, numeracy and vocational needs. The JES program is also culturally adapted to meet the specific learning needs of the juvenile, including Aboriginals from all over the state. The principle objectives of JES are to improve literacy and numeracy levels of juveniles in the detention centre. The program allocates half a day to national literacy and numeracy accreditation and half a day to vocational and education training. Program delivery and planned outcomes differ for each juvenile as the program's education components are individualised.

⁸⁰. A Bill to allow for this is currently before State Parliament.

Students are excused from school to attend priority offending and health related programs (e.g. Promoting Adolescent Sexual Health, which is psycho-education covering sexual health). The extra programs may involve up to 3–4 hours per week where the student may be absent from school.

Availability

JES runs 52 weeks a year in detention education centres. At Banksia Hill JES is available to all juveniles, irrespective of age. At Rangeview JES is available to all juveniles of compulsory school age and to juveniles of post-compulsory school age, according to numbers.

Participation

Banksia Hill: All Aboriginal children attend education programs at some stage of their detention. Those of compulsory and most post-compulsory school age attend JES programs run full-time.

Rangeview: All Aboriginal children of compulsory and most post compulsory school age attend. JES runs full-time.

Resourcing

JES engages one principal, one senior education officer, one custodial education and vocational officer, four community-based education officers, eight qualified teachers for literacy and numeracy programs, six TAFE teachers for vocational workshop (one Aboriginal, two Aboriginal education officers (two Aboriginal), relief teachers (varying), specialised subject teachers (library, music art, textiles) and Red Cross volunteers.

Comments

DOJ advised that:

- All school evaluation is moderated against national standards.
- In May 2004 there were 95 detainees at Banksia Hill and 57 remandees at Rangeview. Aboriginals comprised approximately 70 per cent of those detained at these facilities.
- At Banksia Hill over the 12-month period to July 2004 there were 159 Aboriginal admissions. At Rangeview over the past six months to July 2004 there were 377 Aboriginal admissions.

18. Young Offender Personal Development Program

Description

The Young Offender Personal Development Program teaches a range of skills for dealing with offending and personal issues. The program contains 12 psycho-educational models and targets cognitive behavioural skills. The program is delivered by two group work facilitators in group-based settings of six participants. Recent modifications to the program have been conducted by an Aboriginal person to better engage Aboriginal youth.

Availability

At Banksia Hill the program is run in two groups in three or six week cycles, depending on demand. The program is available to all Banksia Hill detainees unless:

- They are detained for less than six weeks;
- They have committed sexual or serious violence offences (they will do individual counselling instead);
- They have done the program in the last six months; or
- The group context is not appropriate for that person.

At Rangeview this program is titled Young Persons Development Program (as remandees are not sentenced youth).

Participation

At Banksia Hill over the past 12 months to July 2004, 47 per cent of Aboriginal detainees completed the program. At Rangeview over the past six months to July 2004, 17 per cent of Aboriginal remandees completed the program.

Resourcing

Two group workers facilitate each group. A number of group workers are Aboriginal but availability of Aboriginal facilitators depends on the work roster.

Comments

DOJ advised that:

- An extensive evaluation of the program's treatment effects is underway.
- Significant Aboriginal consultation was engaged in the development of the program.

19. Protective Behaviours Program

Description

The Protective Behaviours Program teaches youth how to identify and deal with potentially abusive situations. The program is a Gordon Inquiry initiative. The program involves 4–6 sessions and contains cognitive behaviour, interactive discussion and education components. The program is delivered by two facilitators in a group-based setting, run over a period of six weeks. The program has been co-written by an Aboriginal facilitator.

Availability

At Banksia Hill the program commenced in 2003 and is run five times a year. The program is available to all Banksia Hill detainees unless they have committed sexual offences (they will do individual counselling instead); or group context is not appropriate. At Rangeview the program is yet to commence.

Participation

Approximately 17 per cent of Aboriginal detainees participate in this program.

Resourcing

The program is facilitated by one Master of Psychology graduate (non-Aboriginal) and one group worker. A number of group workers are Aboriginal but availability of Aboriginal facilitators depends on the work roster.

Comments

DOJ advised that:

- The Gordon Inquiry has endorsed the program. No DOJ evaluation has yet been performed.
- The program is currently being tailored for use at Rangeview to accommodate the frequent turnover of remandees.
- Currently there are no Aboriginal psychologists available for counselling.

20. Positive Pathways Program

Description

The Positive Pathways Program is a project awaiting endorsement through the Juvenile Justice Reforms Strategy 2004–2008. The program is an initiative to ensure that cultural requirements are addressed in the custodial accommodation options, programs and services so that the over-representation of Aboriginal youth in detention and their community transition outcomes are improved.

Availability

This program has not yet commenced.

Participation

This program has not yet commenced.

Resourcing

A project team has been formed to consult with stakeholders, groups and individuals.

21. Palmerston Drug Rehabilitation Counselling

Description

Palmerston Drug Rehabilitation Counselling provides drug awareness and relapse prevention counselling for sentenced juvenile detainees. Drug awareness counselling is provided to juvenile remandees. The program involves therapeutic and psycho educational drug counselling in either individual or group-based sessions. At Banksia Hill the

program is run over six sessions and at Rangeview the program is run once a week. Individual counselling is conducted when required.

Availability

The program is available to identified detainees and remandees.

Participation

At Banksia Hill over the 12 months to July 2004, 30 per cent of Aboriginal detainees completed the program. At Rangeview over the six months to July 2004, 17 per cent of Aboriginal remandees completed the program.

Resourcing

Palmerston Association Inc is contracted to provide the counselling services. Palmerston provides two facilities to co-facilitate groups, one is from Palmerston and one is subcontracted from NASAS.

Comments

No formal evaluation procedure was reported by DOJ.

22. Drug Overdose Prevention

Description

Drug Overdose Prevention (DROP) provides drug and alcohol counselling to detainees and remandees with high drug use and/or users of opiates. The program involves group-based counselling and the material presented is culturally specific and adapted to meet specific needs as and when required. The program is co-facilitated by an Aboriginal presenter. Groups are conducted over five sessions at Banksia Hill and once a week at Rangeview.

Availability

This program is available to identified detainees and remandees. The program is run when there is an identified need for it.

Participation

At Banksia Hill over the 12 months to July 2004, five per cent of Aboriginal detainees completed the program. At Rangeview over the six months to July 2004, 23 per cent of Aboriginal remandees completed the program.

Resourcing

The Drug and Alcohol Office provides this program and engages one Aboriginal presenter to co-facilitate it.

Comments

No evaluation procedure was reported by DOJ.

23. Promoting Adolescent Sexual Health

Description

Promoting Adolescent Sexual Health (PASH) aims to reduce unsafe sexual behaviour by encouraging healthy sexual choices. PASH has been specifically developed for detainees and remandees and is delivered in group-based sessions. Groups are conducted over 10 sessions at Banksia Hill and a modified program over four sessions at Rangeview.

Availability

PASH is available to identified detainees and remandees.

Participation

At Banksia Hill over the 12 months to July 2004, 23 per cent of Aboriginal detainees completed the program. At Rangeview over the six months to July 2004, three per cent of Aboriginal remandees completed the program.

Resourcing

The Family Planning Unit presents this program. The program engages one Aboriginal presenter to co-facilitate.

Comments

No formal evaluation procedure is reported by DOJ.

24. Parenting Program

Description

The Parenting Program is specifically for detainees who have or are expecting children. The program covers topics such as birth, role of mother/father, relationships, child development, dealing with stress, cost issues, legal issues and community support. The program is delivered in group-based sessions to male and female detainees separately over six sessions twice a week. Where appropriate the program has indigenous perspectives and is co-facilitated by an Aboriginal presenter.

Availability

The program is available to identified detainees at Banksia Hill.

Participation

Over the 12 months to July 2004, three per cent of Aboriginal detainees completed the program.

Resourcing

The Family Planning Unit presents this program. An Aboriginal co-facilitator is engaged if required.

Comments

No formal evaluation procedure is reported by DOJ.

25. Psychological Services Individual Counselling

Description

Psychological Services Individual Counselling is a service designed predominantly to address offending behaviour. Counselling is based on cognitive behavioural therapy and also addresses cultural issues. Priority is given to sexual and serious violence offenders, juveniles with unusual or complex offences and juveniles not appropriate for group counselling.

Availability

Individual counselling is available to all detainees at Banksia Hill and Rangeview on a priority basis. A DOJ psychologist assesses all detainees on admission.

Participation

Approximately 50 per cent of Aboriginal detainees undertake some degree of individual counselling. No information was provided by DOJ in regards to the number of sessions undertaken by detainees.

Resourcing

Individual counselling is conducted by DOJ psychologists (non-Aboriginal).

Comments

DOJ advised that currently there are no Aboriginal psychologists available for counselling.

26. Sex Offending Counselling for Remote Aboriginal Youth

Description

Sex Offending Counselling for Remote Aboriginal Youth provides psycho-sexual and relapse prevention counselling for Aboriginal offenders from remote areas who have committed sexual offences. The program involves group-based counselling over eight sessions conducted by two psychologists.

Availability

This program was run once with four youths. No further details were provided by DOJ.

Participation

To date four youths have participated in the program.

Resourcing

Program delivery involves two DOJ psychologists (non-Aboriginal).

Comments

DOJ advised that:

- No formal evaluation procedure has been undertaken.
- Currently there are no Aboriginal psychologists available for counselling.

27. NAIDOC Day

Descriptions

National Aboriginal and Islander Day Observance Committee (NAIDOC) day celebrations enable Aboriginal detainees (and others) to celebrate NAIDOC day in the company of their family and significant others. The activity is to encourage community links to detainees and encourage support of detainees when released back into the community. Students in classrooms spend weeks prior to NAIDOC day researching and producing information on NAIDOC day and Aboriginal history. Preparation involves the gathering of family photographs, research and readings, posters, expressive writing and art/cooking projects. On celebration day detainees are allowed up to four adult visitors and children to visit. Performance and artwork displays are provided by the detainees and lunch is provided by the facility.

Availability

Rangeview and Banksia Hill provide the location and amenities once a year.

Participation

Almost all Aboriginal detainees participate in the day.

Resourcing

Rangeview and Banksia Hill provide the location and staffing for the day.

28. ANZAC Day

Description

Anzac Day enables juveniles to understand the concept of war and Aboriginal juveniles to understand the Aboriginal contribution to this national day. The day involves a visit by an Aboriginal Tunnel Rat from the Vietnam war and displays of posters, poetry and artwork that recognise Aboriginal identity.

Availability

Rangeview and Banksia Hill provide the location once a year.

Participation

Almost all Aboriginal detainees participate in this day.

Resourcing

All costs are met by Juvenile Education Services.

29. Cultural Studies Programs

Description

Cultural Studies Programs encourage young people, Aboriginal and non-Aboriginal, to understand Aboriginal cultural heritage and provide access to Aboriginal Elders. The program is designed and facilitated by Aboriginal Elders from different parts of the State. It involves Aboriginal storytelling, Aboriginal art programs and Aboriginal meeting places.

Availability

All Aboriginal detainees have access to this program. No further information was provided.

Participation

All Aboriginal detainees participate in varying degrees in this program. No further information was provided.

Resourcing

All costs are met by the Juvenile Education Services.

30. Regional and Metropolitan Supervised Bail Program / Facilities

Description

Regional and Metropolitan Supervised Bail Program/Facilities aim to minimise the removal of young people, including Aboriginal youth, from their families and their community. The service is for young people who have been granted bail but who do not have the support of a responsible adult to assist them with successfully meeting their bail requirements and conditions. The program seeks to provide support and supervision during the remand period and to encourage the young person to engage in personal development, recreational, educational and limited counselling activities.

Availability

In the metropolitan area bail coordinators and liaison officers are available at the Perth Children's Court and the Rangeview Remand Centre to assist young people find a responsible adult to sign the bail agreement. If necessary, DOJ provides funded accommodation—usually hostel—for the duration of the remand period. The metropolitan service was established in 1996. In regional areas, bail facilities are available in the Kimberley and Pilbara regions through agreements with local Aboriginal communities. Currently there are two regional bail facilities operating, one in each region. A third facility in the Kimberley region was suspended in March 2004. The regional bail facilities commenced in 2000. Seasonal rains and times of law/cultural business restrict access to these facilities.

Participation

Metropolitan services: No information was provided on the metropolitan service.

Regional bail facilities: In 2003, the Yandeyarra bail facility had a total of six placements, all male, averaging 24 days per placement. In the Kimberley region the Banana Well bail facility had a total of 16 placements, 15 male and 1 female, averaging 23 days per stay. The Bell Springs bail facility had a total of 33 placements, 32 male and one female, averaging 15 days per stay. This facility was closed in March 2004 due to ongoing concerns regarding the level of supervision. Future arrangements with Bell Springs are under review.

Resourcing

Overall management of the service is the responsibility of the Manager of Supervised Bail and Diversion in Perth. In the metropolitan area the service is staffed by with two supervised Bail Coordinators (non-Aboriginal). In regional areas the service is provided by Aboriginal communities on a fee-for-service basis, with supervision support undertaken by Juvenile Justice Officers and senior caseworkers.

Comments

DOJ advised that:

- It conducts an annual review of regional services, but no formal evaluation procedure of the metropolitan service was reported.
- They are currently working on expanding regional supervised bail to the following areas: Goldfields region, particularly to service juveniles from Kalgoorlie and Coolgardie, the Central Lands and Esperance areas, and the Gascoyne region.
- Extensive Aboriginal and community consultations occur before regional bail facilities become operational.
- This service reduces costs in regards to the number of admissions to Rangeview and the cost of remandee return to regional areas.
- Complex issues are involved in balancing DOJ's duty of care and issues of safe supervision of youth on bail in remote locations.

31. Recruitment and training initiatives⁸¹

Description

Juvenile Custodial Services have two Aboriginal employment initiatives to increase the number of Aboriginal people available to work with Aboriginal youth at Banksia Hill and Rangeview. Under the Level 2–4 Traineeships Program, Banksia Hill and Rangeview have engaged trainees to participate in Aboriginal group workers training. Under the Aboriginal Cadetship Program the Psychological Services Department within the Juvenile Justice division is seeking to fill a traineeship position for an Aboriginal Master Psychologist.

Availability

Group workers

Level 2–4 Traineeships are targeted directly at potential Aboriginal participants under s 50(d) of the *Equal Opportunity Act 1984* (WA). Currently there are 15 positions available under this program.

Master psychologist

The Aboriginal cadetship is targeted directly at potential Aboriginal participants under section 50(d) of the *Equal Opportunity Act 1984* (WA). The position is available to an Aboriginal psychology student.

Participation

Group Workers

Currently eight trainees are completing the program and one graduate trainee has been employed as a group worker from the program.

Master Psychologist

Currently no cadetship has been finalised.

Resourcing

The Aboriginal Workplace Development Unit is responsible for overseeing the traineeship and cadetship programs. The postgraduate cadetship is currently awaiting endorsement for funding.

Comments

As discussed in Part IV, DOJ advised that there are challenges in attracting suitable applicants to fill the various positions.

32. Aboriginal cross cultural awareness training for staff

Description

Aboriginal cross cultural awareness training for staff is conducted at Rangeview to improve staff awareness of cultural issues. Training includes the following components: Aboriginal history, beliefs, values, identity, communication and lifestyle. Sixteen sessions are run in three components in groups of five staff. The training is designed and delivered by Aboriginal presenters.

Availability

Training is available to all operational and support staff at Rangeview.

Participation

Approximately 80 staff have undergone training. There is approximately 10 per cent Aboriginal staff participation in groups of five attendees.

Resourcing

One Aboriginal welfare officer delivers training in-house.

81. This information is in some respects repetitive of what is in Part IV, but is included to allow insight into the expected impact of the employment initiatives on this directorate.

Part VII: Thematic review

1. Introduction

As we have already stated, the purpose of this paper is not to evaluate individual initiatives and programs or to provide a blueprint for change; its purpose is to provide an overview of initiatives and, in light of the LRCWA's community consultations, research and other sources, to identify issues for consideration by the LRCWA and also perhaps by DOJ itself.

Part II outlined the major policy documents that have been developed over the past five years and that are of most relevance to this project. These documents share many common threads, most notably their commitments to improving justice services to both victims and offenders, and to reducing 'unacceptable' Aboriginal incarceration rates. However, core statistical indicators on these matters are depressing. This raises inevitable questions about the extent to which DOJ's paper policies have been translated into effective action.

During the course of the LRCWA's community consultations, we were often impressed with the dedication and commitment of DOJ people working on the ground, including many community corrections officers. However, this section shows that many existing programs are not reaching Aboriginal people to the extent that their numbers in the system would require, and that many of the initiatives remain on the drawing board or in their infancy. In summary, the promises of policy documents remain as yet unfulfilled.

2. Cross-Border Justice Project, Aboriginal law and local justice plans

The Cross-Border Justice Project is very much in its infancy and some legal potholes and practical problems undoubtedly remain. However, the project has the long-term potential to advance justice system initiatives on the ground in the relevant parts of the state. In terms of the Customary Law reference, it is one of the most important structural initiatives for two reasons. Firstly, it involves a long-overdue recognition that it is possible for Australian justice systems to think beyond the boundaries of state borders – boundaries that are artificial and quite irrelevant to Aboriginal people living by their law in many parts of Australia. As we were told by senior community members at Warburton:

Aboriginal Law – older and stronger, from sky to earth and sea. Whitefella law – new, small, come lately.⁸²

Here, Aboriginal law applies across State boundaries and is the same in South Australia and the Northern Territory.⁸³

Secondly, provided that the appropriate legal structures can be established, the Cross Border Justice Project should assist in opening up opportunities for the role of Aboriginal law to be enhanced. We were also informed that, under a separate exercise, local 'justice plans' are being developed, under the Aboriginal Justice Agreement, for parts of the region, including Warburton. These plans should further assist in this regard.

3. Staffing

DOJ documents and research around Australia consistently affirm the value of Aboriginal staff, both in providing services and in being an interface between Aboriginal defendants/prisoners and the criminal justice system.⁸⁴ Although DOJ does employ a number of Aboriginal staff, it has experienced difficulties with recruitment. In part, these difficulties reflect the simple fact that many Aboriginal people are unwilling to work in a system with which they or their families have experienced negative contacts – a perception that is not eased by spiralling Aboriginal imprisonment rates. For this reason, the various cadetships and traineeships that have been established provide an important initiative and, if all goes to plan, should provide a more consistent flow of skilled personnel for DOJ over future years.⁸⁵

However, the number of people involved in such initiatives is limited, and it remains the case that, at present, there are few Aboriginal staff (or contractors) in many key areas. One example is the lack of Aboriginal people involved in

82. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 2.

83. *Ibid* 3.

84. See, for example, Prisons Division, Department of Justice, *Strategic Plan for Aboriginal Services 2002-2005* (2002); Blagg H, Morgan N, Cuneen C & Ferrante A, *Systemic Racism as a Factor Contributing to the Over-Representation of Aboriginal People in the Victorian Criminal Justice System* (Melbourne: Aboriginal Justice Forum and Equal Opportunity Commission, 2004).

85. See above Part III.

designing and delivering treatment programs in prisons⁸⁶ and juvenile detention centres. An Aboriginal Liaison Officer (ALO) was appointed in the Children's Court for the first time in July 2004; the position is to be reviewed after 12 months and, given the number of Aboriginal children appearing in the court, the ALO no doubt faces a heavy workload.

Another area of concern is victim support. The Gordon Inquiry found that in some parts of the state, Aboriginal people were unaware of Victim Support and Child Witness Services and called for policies to improve victim services for Aboriginal people who 'do not respond as often to typical methods of initiating contact as non-Aboriginal people'.⁸⁷ The Inquiry also commented on the absence of cultural awareness training for volunteers, who often provide the first point of contact. Post-Gordon Inquiry funding saw the appointment, in January 2004, of an Aboriginal Support Officer who provides support to both the Child Witness Service (CWS) and the Victim Support Service (VSS). It would appear to be an extremely onerous task for one Aboriginal Support Officer now to provide statewide support to both services.

In the metropolitan area, there are no Aboriginal people employed as Child Witness Preparation Officers or as VSS Counsellors. Outside the metropolitan area, CWS and VSS rely heavily on regional contractors. Only one of the twelve CWS regional contractors is Aboriginal. Two of the 13 VSS contractors are Aboriginal, but both are from the Kimberley region (Derby and Kununurra). The questionnaire responses expressed some hope that increased regional training initiatives will raise the number of hours worked by Aboriginal contractors to increase the availability of services, but we were advised that there is no current plan to increase the number of regional contractors. They also stated that both services are trying to target Aboriginal children through posters or workbooks.

Given that issues of victimisation within Aboriginal communities have been painfully apparent for so long, it seems surprising that the appointment of an Aboriginal person occurred only as a result of post-Gordon Inquiry funding; and it is difficult to be confident that victim services are yet resourced in a way that allows them to adequately reach Aboriginal communities.

4. Information issues and evidence-led policy making

The Aboriginal Justice Plan, the Re-entry Initiative, the Gordon Inquiry, the Prison Division's Strategic Plan for Aboriginal Services and other documents have consistently argued that justice policy should be 'evidence-led'.⁸⁸ A starting point for evidence-led policy development should be systematic data collection and accessible information on what is being done, coupled with evaluations of 'what works' for various target groups. In Western Australia, Aboriginal people are obviously a core target group but a number of issues arise with respect to the availability and accuracy of information.⁸⁹

(a) Checking information

We were not in a position to validate DOJ questionnaire responses on matters such as program availability and participation rates, and therefore have generally taken the information that was provided to be accurate. However, there were occasions when statements appeared to be ambiguous or at odds with other information sources such as Office of the Inspector of Custodial Services (OICS) and Parole Board reports.

For example, DOJ questionnaire responses indicated that the Indigenous Medium Sex Offender Treatment Program at Greenough Prison has operated at regular intervals. However, in mid-2003 OICS found that 'the last Sex Offender Treatment Program was delivered in mid-2001',⁹⁰ and Parole Board members and others have commented adversely on the program situation at Greenough and other regional prisons.⁹¹

(b) Information availability

The more serious hurdle that we faced was the ability to obtain up-to-date information. Even though we had the support of the Director General and senior executives, we experienced difficulties obtaining information in a timely manner,

86. See below pp 302–05.

87. Gordon Inquiry, above n 3, 522.

88. See above Part II. Note, especially, the structure of the Appendix to the *Western Australian Aboriginal Justice Plan*, above n 33, which identified a range of 'evidence based strategies', 'output measures' and 'effectiveness measures.'

89. The Gordon Inquiry also commented on such issues. On evaluations, see below p 312.

90. Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Greenough Regional Prison* (May 2003).

91. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003; and annual Parole Board reports. We have been told that the situation has now been rectified.

and gaps remain in our coverage, even in respect of 'flagship' initiatives.⁹² One example is that requested information on prison work camps was not forthcoming. Another is the lack of detail in the questionnaire response on the Yandeyarra Circle Court, including the comment that 'all staff involved in the development and implementation are currently unavailable, as is the file with all details of specific dates and reviews.' Another area of concern is access to translation and interpreter services, which is a matter of importance across much of the state.⁹³ According to the DOJ website, the Aboriginal Policy and Services Directorate oversees funding for the Kimberley Interpreting Services but we were given no information on the availability of these services on the ground (or on arrangements elsewhere). We were told that information could not be provided because the service is contracted out and details of service provision are with the contractor.⁹⁴

Paradoxically, we were informed that, because we had given extensions to allow more information to be provided, some of the information was out-of-date. But, as we have said, reports can only be written on the basis of the most recent available information; and the difficulties we encountered indicate that information on Aboriginal participation and impact is not collected by DOJ in a systematic format that can be readily accessed and updated.⁹⁵

Unfortunately, such problems appear systemic rather than isolated, as acknowledged by DOJ itself and in many of the other reports that were outlined in Part II.⁹⁶ Two examples may be given of initiatives where impact on Aboriginal people is an important consideration but where there have been data issues. The first relates to sex offender treatment programs in Western Australian prisons – a critical issue for Aboriginal people.⁹⁷ In a review published in 2002, Greenberg et al⁹⁸ criticised DOJ file management and record keeping but produced a highly detailed statistical analysis of the information that was available. They found little difference in terms of recidivism rates (both Aboriginal and non-Aboriginal) between offenders who had undertaken prison-based programs and those who had not, even taking into account a range of variables. However, DOJ responded that, due to the file management problems, the findings were questionable and that they should not be regarded as authoritative by agencies, such as the Parole Board, which place weight on program participation. One can only speculate as to whether the same response would have occurred if the findings had been more favourable. Apparently, further work is being undertaken to address the data deficiencies and to provide further evaluation but the status of the Greenberg report essentially remains in limbo. In the interim (almost three years), the Parole Board makes decisions without any updated evaluation and on the assumption that the existing programs do reduce the risks of sexual recidivism.

A second example concerns the three-strikes home burglary laws that attracted much critical comment during the LRCWA's consultations. Commentators predicted that the laws, which came into force in November 1996, would primarily impact upon children rather than adults, and the greatest impact would be on Indigenous children. Three years after the laws came into force, a Senate Committee raised these very issues and sought information on the number and Aboriginality of offenders caught by the laws. It became obvious during the course of evidence to the Committee that information on this crucial question had not been collated from the outset.⁹⁹ Somewhat embarrassingly, the government spokesman proved to be unaware of or unwilling to reveal readily accessible police data, which showed that the three-strikes laws had no impact on reported burglary rates.¹⁰⁰

Information gaps pose major problems (sometimes insurmountable hurdles,) for effective monitoring and evaluation. The two previous examples raise some uncomfortable questions about the strength of official commitments to evidence led policy development if evidence proves ambivalent or unfavourable. It is hoped that the processes that were undertaken for the purposes of this Background Paper, and the information that has now been compiled, will prove of assistance not merely to the LRCWA but also to DOJ in scoping its current services and in developing better information gathering processes. An investment of resources in this area seems essential if we are to have a more comprehensive understanding of the impact of programs for Aboriginal people and a system that can be readily updated.

92. See above Part I.

93. See below pp 311–12.

94. We were rather surprised by this response and would have anticipated that DOJ, as purchaser of services, would have had information readily available.

95. The most complete information appears to have been from the Community and Juvenile Justice Services Directorate.

96. For example, in the *Aboriginal Justice Plan*, above n 33, Gordon Inquiry, above n 3; and the Re-Entry Initiative papers: see discussion above p 11.

97. As stressed by the Gordon Inquiry report, above n 3.

98. Greenberg, Da Silva & Loh, above n 5.

99. Government of Western Australia, Evidence to the Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* (written submissions 96 and 96A and oral evidence of 3 February 2002). See also Morgan N, Blagg H & Williams V, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (Perth: University of Western Australia and Aboriginal Justice Council, 2001).

100. Ibid. For discussion see Morgan N, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164. As if it made any difference, the spokesman did however take pains to correct the misapprehension that 80 per cent of the children caught were Aboriginal – the true figure, he said, was 74 per cent. By the time of a second Senate Committee Inquiry in 2003, DOJ put the figure back up to 80 per cent.

5. Aboriginal content in policies and plans

As already noted, Aboriginal people constitute a major client group of DOJ. Not surprisingly, there are numerous policies and plans that relate to their treatment and to DOJ aspirations with respect to service delivery. As would be anticipated, some of them are Aboriginal-specific and others are generic.¹⁰¹

Surprisingly, there are no Aboriginal signatories to the Prisons Strategic Plan for Aboriginal Services. This may reflect DOJ structures, in that the Aboriginal Policy Directorate essentially has an advisory and facilitation role and does not carry responsibility for service delivery, other than in a few areas.¹⁰² However, it can be argued that, in principle, Aboriginal specific initiatives should always be 'signed off' by Aboriginal people; that they should be equal parties with non-Aboriginal Directors and Managers; and that they should be given resources to monitor implementation.

Taking stock of the various initiatives discussed in Parts II to VI, it would appear that generic policy documents, such as those relating to re-entry and women's imprisonment, might reach the stage of practical implementation more swiftly than Aboriginal-specific initiatives. It is therefore of some concern that several policy documents that address issues of enormous significance to Aboriginal people make no specific reference to their needs and issues. This is despite the commitments in Aboriginal justice plans/agreements and Aboriginal-specific policies to recognising the unique issues faced by Aboriginal people in the justice system.

The most striking example of this is probably the re-entry initiative. The report *Reducing Reoffending: Focusing on Re-Entry to the Community*¹⁰³ made no mention of Aboriginal people or of the issues that are raised by the concept of re-entry for them. Subsequent briefings were also largely silent on these issues. The DOJ view was, in essence, that the 2002 report reflected what had been learned from a study trip to Europe and was expressed in general terms that would allow the development of initiatives with respect to Aboriginal people.

With respect, this does not meet our concerns about the lack of reference to Aboriginal issues in major policy documents. It seems curious to set the parameters of policy initiatives without reference to the biggest and most complex client group, and without outlining the re-entry problems and aspirational targets with respect to Aboriginal Western Australians. These include glaring long-term issues such as enhancing family contact, which is a key explicit focus of the initiative, and trying to maintain a degree of cultural connection when prisoners are a long way from home. These matters were raised consistently during the LRCWA's community consultations, as were the problems for prisoners who face long and expensive journeys home to remote communities. Furthermore, although it was said that the 2002 report was only a starting point, it still provides the main official reference point for the re-entry initiatives.

The Justice Drug Strategy provides another example. The strategy targets use of heroin, amphetamine and cannabis. Its key planks are more stringent searches at prisons; pharmacotherapy for heroin users, through substitutes such as methadone or 'blockers' like Naltrexone; and the development of drug-free units in prisons. Two points arise. Firstly, there is no discussion about strategies to ensure that Aboriginal people who use such drugs will actually access such initiatives. Anecdotal evidence suggests they are under-represented in these initiatives. Secondly, there is no mention of solvent abuse, which is such a pressing and destructive problem for Aboriginal people in many parts of the state, including the metropolitan area; and we have not seen any other 'plan' to address such issues.¹⁰⁴

In summary, the re-entry initiative and new approaches to dealing with drug addiction are both welcome in principle. The question is whether there was sufficient attention to building these initiatives in a manner that meets the needs and legitimate expectations of Aboriginal people. If initiatives are not built up in this way from the outset, there is every danger that they will not reach Aboriginal people. Recent trends in Aboriginal imprisonment rates provide a strong indication that they are missing out.¹⁰⁵

101. See above Part II.

102. See above Part III. DOJ described the Directorate's role, in evidence to the Gordon Inquiry as 'an expert group in the Department with whom we can relate and who can help us in turn in interpreting justice issues back with the Aboriginal communities'.

103. McGinty J, *Reducing Reoffending: Focusing on Re-Entry to the Community* (2002).

104. The problems are not, of course, for DOJ alone. The Gordon Inquiry found that the 'limited information provided to it by the Department of Health on its drug and alcohol programs precluded any findings ... on the effectiveness of services provided' and supported the development, by the Health Department, of a Volatile Substance Abuse Action Plan: Gordon Inquiry, above n 3, Findings and Recommendations 9 and 11.

105. See above Part II; and especially the differential trends in imprisonment rates for Aboriginal people compared with non-Aboriginal people.

6. Words and actions

We have already pointed to the grim dissonance that exists between paper promises and bottom line statistical measures of victimisation and incarceration rates.¹⁰⁶ The figures are so stark that they need no repetition, but some additional comments are appropriate.

(a) Aboriginal justice policies as criticism deflectors

In evidence to Parliamentary Committees over recent years, government agencies have tended to place a good deal of emphasis on policies and plans when asked questions about existing practices or about the extent to which services are actually in place. During the Legislative Council Legislation Committee hearings on the 2003 sentencing legislation—in the context of community-based alternatives to custody—both sides of politics expressed concern at the situation 'on the ground', especially in more remote communities. The Chair commented to the DOJ representatives: 'What I am concerned about is that you use phrases such as "we hope to do this" and "we are looking at that". The Legislative Council is being asked to approve this legislation but it appears that those programs and resources are not in place'.¹⁰⁷

In 2000 the existence of the Aboriginal Justice Plan (AJP) was used to attempt to deflect the Senate Legal and Constitutional Affairs Committee's questions about the impact of the three-strikes home burglary laws, by pointing to the AJP's vision for the future. As we have written elsewhere, 'it is particularly disingenuous and distasteful to use progressive practices based on Aboriginal empowerment to defend laws which have a profoundly discriminatory impact'.¹⁰⁸ At least when in committee mode, legislators generally see through such deflection techniques.¹⁰⁹

(b) Aboriginal perceptions

More importantly, visions in policy documents have less meaning to Aboriginal people than action. During the LRCWA's community consultations, the Aboriginal people expressed general familiarity with the basic tenets of RCIADIC but frustration at what they saw as a lack of progress in the interim. They are not familiar with recent policy documents. What they are aware of are high Aboriginal imprisonment rates,¹¹⁰ tough 'law and order' measures which impact mainly on them, both symbolically and in practice; and a perceived lack of access to services and alternatives.

In most places there remained a polite optimism that things could improve and a respect for the hard work of people on the ground. However, there was a sense of growing tiredness at the rounds of 'consultations' by agencies, all too often consisting of fly in/fly out visits by high level officials, which had produced few outcomes:

We are patient people. We have waited a long time and we can wait. But we want something done and you must push hard.¹¹¹

(c) What is actually operational?

The volume of material in Chapters 3–6 demonstrates that many programs and initiatives exist on paper. However, both the LRCWA consultations and other reports have raised concerns about actual access to and availability of programs—both mainstream and Aboriginal specific—for Aboriginal people. Even a skim read of the documentation provided by DOJ reveals that a significant proportion of the initiatives are not yet operational or are barely operational on the ground. Some are still on paper, some are in their infancy, some run sporadically and a limited number are offered regularly.

The next sections consider some specific examples of access and availability in the context of prison-based treatment programs, juvenile justice services and diversionary initiatives such as juvenile justice teams and 'specialist' courts.

106. See above Part II.

107. Transcript of Evidence, 11 February 2003, 10.

108. Morgan, above n 100, 168.

109. See Senate Inquiry Report, above n 99. Political dictates, of course, generally override well reasoned Committee concerns.

110. See above Part II.

111. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003.

7. Availability and access: prison treatment programs

(a) Importance of prison treatment programs

There are at least three reasons why prison-based treatment programs are of importance. First and foremost, the premise is that the programs reduce the risks of further offending. The community consultations reaffirmed that substance abuse and associated violence are, along with sexual abuse, the most pressing problems facing Aboriginal communities – metropolitan, regional and remote. Some of the most vivid examples of this came in the more remote communities where Aboriginal law is most strongly practised and we were left in no doubt that substance abuse and violence have no part in, and are highly destructive of, Aboriginal law.

It is important to deliver programs that address such issues in a way that actually reaches Aboriginal offenders. Community-based programs (which are the responsibility of several government agencies and are certainly not a DOJ responsibility alone) are recognised to be limited, especially in the more remote parts of the state. However, many Aboriginal people from these regions end up serving time in prison—often a long way from home—for offences related to substance abuse and violence. In this sense, prisons provide an opportunity and a site for intervention.

Secondly, the provision of treatment programs to all groups of prisoners is a core prison service responsibility. In the mid-1990's, DOJ reassessed the aims of imprisonment and articulated a new philosophy based on four 'cornerstones': *custody and containment; care and wellbeing; reparation; and rehabilitation and reintegration*. The notion of 'cornerstones' was significant; while safe custody was to remain a key factor. Each one of the cornerstones was said to be essential to a modern prison system; and if any one was to fail, it would mean that the structure itself was failing. Treatment programs are a core ingredient of the rehabilitation/reintegration cornerstone. This is explicitly recognised, too, in the Prison Division's Strategic Plan for Aboriginal Services.¹¹²

Thirdly, prisoner treatment programs have particular importance in terms of prisoners returning to the community. Most prisoners serving sentences of 12 months or more are made eligible for parole by the courts, and it is for the Parole Board to decide whether they are actually released on parole and the conditions of any such order.¹¹³ The Parole Board is required to consider community risk in making its decisions and treatment programs are said to reduce the person's risk of further offending. Thus, while program completion is not an essential prerequisite for parole, it is regarded as a factor that counts significantly in a prisoner's favour.

(b) Availability and access

Although DOJ has established a limited number of Aboriginal specific treatment programs, its primary focus has been on delivering generic programs, generally based on a cognitive-behavioural model, and reflecting what have become known as the 'what works' principles.¹¹⁴ However, for several years, the Parole Board has expressed concern about the extent to which treatment programs are actually available; and, if they are, whether they will run prior to the person's 'earliest eligibility date' (EED) for parole.¹¹⁵ OICS has inspected and reported on all the state's prisons and has raised similar concerns.

The questionnaire responses and other sources confirm a number of issues of concern, including the following:

- Programs are delivered with greater regularity at metropolitan prisons (Casuarina, Karnet and Wooroloo in the public sector and the privately operated Acacia) than at regional prisons. Both the Parole Board and OICS consider that the most significant shortfalls in program delivery are to be found in what OICS calls the 'Aboriginal Prisons' – in other words, those regional prisons where at least 70 per cent of prisoners are Aboriginal; namely, Eastern Goldfields, Greenough, Roebourne and Broome.¹¹⁶
- 'Reasoning and rehabilitation' (or 'cognitive skills') is something of a flagship program and has recently been reviewed by OICS.¹¹⁷ For current purposes, the question is the extent to which Aboriginal prisoners undertake

112. Prisons Division, Department of Justice, *Strategic Plan for Aboriginal Services*, above n 84.

113. We are referring here to parole decisions made by the Parole Board. In the case of sentences less than 12 months imposed since 31 August 2003, prisoners are now eligible for 'CEO parole' – that is, release by order of the CEO of DOJ rather than the Parole Board.

114. See also below pp 302–05.

115. Such concerns have been regularly voiced in the Board's Annual Reports and in its correspondence and meetings with DOJ. The Board has articulated its concerns by reference to three questions: *what* will run, *where* will it run, and *when* will it run?

116. Albany Prison is not an 'Aboriginal prison' in terms of its proportion of Aboriginal inmates but has also suffered a lack of programs. Bunbury Prison, which houses a large number of sex offenders, is the one regional prison where programs have been consistently delivered.

117. Office of the Inspector of Custodial Services, above n 5.

cognitive skills programs.¹¹⁸ Although 72 cognitive skills programs had been offered in state prisons at the time of our questionnaire responses, no such programs had apparently run at Broome (expected to commence in 2005) or Eastern Goldfields (no potential future commencement date was indicated).¹¹⁹ Offerings appear to have been sporadic at Greenough and Roebourne.¹²⁰

- In 2003–2004, Aboriginal people constituted between 35 per cent and 38 per cent of the state's prison population but only 20 per cent of people in Cog Skills programs; 22 per cent in Moving on from Dependencies; less than 15 per cent in the medium and high intensity Sex Offender Treatment Programs (SOTP) – only two of the four Aboriginal people enrolled in the intensive SOTP actually completed the program; and 19 per cent in the Violent Offender Treatment Program (VOTP). These figures admittedly are a somewhat crude measure,¹²¹ but they do indicate that mainstream program participation rates of Aboriginal people are well below the levels that would be expected given their numbers in the prison system.
- These mainstream programs are supplemented by some Aboriginal specific programs but relatively few of these programs appear to be actually offered and they do not seem to compensate for the shortfall in mainstream programs. For example, there appears to have been just one Indigenous SOTP in 2003–2004, involving six men (and five completions). The program has run, from time to time, in two of the four Aboriginal prisons – Eastern Goldfields and Greenough. However, as noted earlier, Greenough was unable to offer programs for a significant period (a facilitator has recently been appointed after a gap of 2–3 years) and the Eastern Goldfields Program is described in the questionnaire response as 'suspended'.
- The medium intensity MASU (Managing Anger and Substance Abuse) and IMMASU (Indigenous Men Managing Anger and Substance Abuse) programs are more regularly undertaken by Aboriginal prisoners but, as noted, some prisons have been without facilitators for some periods.
- Unfortunately, information was not provided about the state's privately run prison (Acacia), which is managed by the AIMS Corporation¹²² and which, by virtue of its size, houses more Aboriginal inmates than any other prison. Without such information, it is not possible to give a clear picture of the situation with respect to access to programs for Aboriginal prisoners at Acacia. However, it may be noted that in 2003, both DOJ and OICS voiced concerns about program integrity and delivery at Acacia; OICS describing the situation as chaotic.¹²³ In addition, the OICS report revealed a range of issues with respect to Aboriginal prisoners. Most striking of all, DOJ had placed 28 'Wongi' prisoners, many from remote communities such as Warburton, at Acacia.¹²⁴ There seemed to be few program opportunities for them. Notably, some of them had been convicted of the type of sex offences that so-troubled the Gordon Inquiry, but Acacia's Sex Offender Intervention Program was inappropriate, culturally and in substance, for their needs.

(c) Summary

The problems of substance abuse, sexual offending and violence which the Gordon Inquiry charted make it all the more important to maximise the opportunities presented by prison, especially when it is so difficult to offer community-based programs in remote areas. Delivering programs to a relatively unoccupied captive audience ought to be a feasible enterprise. However, to date there appear to have been shortfalls spreading back over many years, especially in Aboriginal prisons.

On the assumption that treatment programs do work, this has costly consequences regarding equality of treatment for Aboriginal prisoners (including parole deferrals), and the risk of further offending and reincarceration. As OICS put it in the context of Greenough Prison:

The lack of programs staff has resulted in ad hoc and unsatisfactory arrangements for delivering core correctional programs. Staff advised that Hakea Prison¹²⁵ continued to transfer prisoners to Greenough Prison to participate in

118. We return later to the issue of the appropriateness of the program for some Aboriginal people.

119. Questionnaire responses.

120. Parole Board observations; Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Greenough Regional Prison*, Report No 21 (2003) [2.155]; and Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Roebourne Regional Prison*, Report No 14 (2002) [7.30]–[7.31].

121. They do not take account, for example, of variables such as the length of sentence or nature of the offences for which people have been imprisoned.

122. As a privately run facility (under the management of AIMS Corporation), it offers a range of programs that are similar to those offered in DOJ prisons, but with variations. Although AIMS operates the facility, DOJ retains ultimate responsibility for the prisoners and has responsibility for determining prisoner placement and for managing the contract for services. In its contract management capacity, it keeps statistics on programs to assess whether AIMS has complied with its contractual obligations for the purposes of paying 'performance-linked fees'.

123. Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Acacia Prison*, Report No 19 (March 2003).

124. See also below p 307.

125. Hakea is the state's main reception prison. It is at Hakea that most prisoners are assessed and are given an 'individual management plan' which includes program expectations.

courses that had no prospect of occurring. The consequence is that some prisoners were reviewed for parole and released without completing offence-specific treatment programs or had their release delayed. In either case, these prisoners were disadvantaged by the Department's incomplete service delivery arrangements. Furthermore, the unfulfilled prison service responsibilities are shifted onto the Parole Board to weigh up the balance between the risks and benefits of these prisoners remaining in custody.¹²⁶

8. Indigenous and 'Indigenised' programs

Some programs have little or no Aboriginal specific focus while others are 'Indigenised' to varying degrees. In other words, they are modified to some extent for Aboriginal participants. Another option is to deliver programs that are developed within what have been called Aboriginal 'terms of reference'.¹²⁷

(a) Current philosophy

DOJ's *Strategic Plan for Aboriginal Services* talks of 'making available and ensuring participation in programs designed to facilitate successful community reintegration, including culturally and gender appropriate programming for Aboriginal and women prisoners'.¹²⁸ As already noted, the primary focus of current prison treatment programs is on generic programs rather than Aboriginal-specific programs.

There are some complex debates in this area but, at risk of over-simplification, DOJ's view is that the cognitive behavioural model that underpins the programs is of general application and that programs do not need to be designed from an Aboriginal perspective or to be delivered by Aboriginal people in order to reach their audience.¹²⁹ However, while the content of programs may remain the same, it is recognised that some modifications *in modes of delivery* may be appropriate. The questionnaire responses from DOJ on a wide range of programs addressing issues of substance abuse, sexual offending and violence, both within and outside families, repeated the same comments:

The material presented is not Aboriginal specific; however, modifications in the context and facilitation are engaged when dealing with Aboriginal offenders. Cultural contexts are considered in discussions, expectations and report writing.¹³⁰

No details were provided as to what this means in the context of any given program.

The two main exceptions to this approach are the IMMASU and the SOTP programs. IMMASU runs quite regularly, and the Indigenous SOTP sporadically. Both are described in the DOJ questionnaires as having been developed 'in wide consultation with Aboriginal people'.

With respect to the Indigenous SOTP, it has been said that:

A greater emphasis [is placed] on the interaction of alcohol, violence and inappropriate sexuality, acknowledgment of the role of shame in Indigenous culture, awareness of issues arising out of issues regarding Tribal Law; and awareness of cultural differences with respect to sexual propriety and impropriety.¹³¹

However, it should be noted that there are no Aboriginal facilitators who have any authority to speak on Aboriginal law or who have first hand knowledge.

(b) Cultural diversity and generic programs

Many of DOJ's flagship programs are generic in an international sense. They are neither Aboriginal nor Australian in origin, but have been purchased from overseas. The most high profile examples of this are the Reasoning and Rehabilitation (Cognitive Skills) program (purchased from T3 in Canada) and the Multi Systemic Therapy initiative that has recently commenced for high-risk juveniles and their families.¹³²

126. Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Greenough Regional Prison*, above n 120, [2.156].

127. Yavu Kama Harathunian C, 'The Therapeutic Needs of Indigenous Violent and Sex Offending Males: How Can They Be Addressed?' (Paper presented at the *Probation and Community Corrections: Making the Community Safer* Conference: Perth, 2002).

128. Prisons Division, Department of Justice, *Strategic Plan for Aboriginal Services*, above n 84, 10, Objective 1.4.

129. This characterisation is derived from the descriptions of programs contained in DOJ literature and in the report by the Office of the Inspector of Custodial Services, above n 5.

130. Including Reasoning and Rehabilitation, Building Better Relationships, intensive and medium intensity Sex Offender Treatment Programs, Violent Offender Treatment Program, Legal and Social Awareness and a range of substance abuse courses.

131. Offender Services & Sentence Management Directorate, Prisons Division, *Offender Programs Service Guide: July 2004 – June 2005* (August 2004) 17.

132. On multi systemic therapy, or MST, see <<http://www.mstservices.com>>.

It is not a bad thing to draw on international experience. However, papers and reports are increasingly raising questions about the cross cultural transferability of programs.¹³³ At the recent Asian and Pacific Conference of Correctional Administrators, the Singapore delegation argued:

Currently most empirical research in corrections has been conducted in the West. Cross-cultural studies in psychology ... suggest that Asians' behaviour is different from those in the West... More empirical and well-designed correctional research therefore needs to be conducted in Asia in order to enhance our effectiveness.¹³⁴

They suggested that in undertaking research and developing programs, consideration needs to be given to the fact that Asian societies focus less on individual rights and more on collective responsibilities.

Locally, questions have been asked about the transferability to Aboriginal Western Australians of the Canadian T3 Cog Skills program. The Gordon Inquiry (2002) was advised by DOJ that a review had commenced in March 2002 with respect to the participation of Aboriginal prisoners in the program and Gordon specifically recommended that this review should include consideration of 'the specific cognitive patterns of Aboriginal offenders.' However, neither our DOJ questionnaire responses nor the recent OICS report on Cog Skills (August 2004) make reference to any findings in this regard.

In fact, OICS stated that there are as yet no evaluations as to the 'impact of race, particularly Aboriginality, on effectiveness'¹³⁵ and concluded:

[T]he suitability of the program for Aboriginal prisoners, especially traditional Aboriginal people, is problematic. The program has been delivered, apparently successfully, to Canadian Aboriginal prisoners, with some modifications in the delivery; however no evaluation of this is available. The program designers believe that the program is suitable for all prisoners and that local adaptations are sufficient to make it suitable for Australian Aboriginal prisoners. To this end, some attempt is being made to adapt the program for use with Australian Aboriginal prisoners; however, to date these adaptations are not in an accessible form and their benefit to the program has not been determined.¹³⁶

There remains a view, however, that such adaptations are inadequate. For some, there is a need to acknowledge that some of the values underlying the program conflict with the values of traditional Aboriginal communities. The concepts of 'choice', 'duty', 'negotiation', 'assertiveness', 'persuasion', to select but a few, have very different connotations in traditional communities than they do in the Perth Metropolitan area. In response, the position of the program designers now appears to acknowledge the limitations of the program for traditional Aboriginal prisoners within their own communities. Nevertheless, it is argued [by the program designers] that Aboriginal prisoners who have to live or associate with 'mainstream' Australian society can benefit from acquiring the skills needed to function competitively within that society.¹³⁷

OICS observations about notions of choice, duty, negotiation, and so on resonate loudly with what we heard in the community consultations. Clearly, Aboriginal law, with its complex tapestry of family, kinship and cultural obligations, can impose very different parameters on people's actions and decision making. In some circumstances, for example, Aboriginal law may afford people little 'choice' or ability to 'negotiate' in the sense that those words are understood in non-Aboriginal society; and Aboriginal cultural duties/obligations have quite different dimensions from non-Aboriginal duties and relationships. Furthermore, the metropolitan consultations show that it would be a mistake to think that such obligations have no relevance to 'non-traditional' Aboriginal people.

(d) Alternative models

Regardless of the views that may be held about existing programs, we are strongly of the opinion that consideration should be given to developing alternative models that build out of Aboriginal law and culture and that reinforce and connect (or reconnect) people to that law and culture. Cognitive behavioural models can be included within such a framework but do not carry exclusive authority.

133. For example, Lewis AD (ed) *Cultural Diversity in Sexual Abuser Treatment: Issues and Approaches* (Brandon VT: Safer Society Press, 1999); Larson J, Robertson P, Hillman D & Hudson S, 'Te Piriti: A Bicultural Model For Treating Child Molesters in Aotearoa/New Zealand, in Marshall W, Hudson S, Ward T & Fernandez Y, *Sourcebook of Treatment Programs for Sexual Offenders* (New York: Plenum, 1998). See also below pp 119–121.

134. Asian and Pacific Conference of Correctional Administrators, 'Practices in Dealing with the Diverse Cultural and Spiritual Needs of Inmates' (forthcoming, 2005).

135. Office of the Inspector of Custodial Services, above n 5, [3.11].

136. In a footnote, OICS wrote: 'The review was told that these modifications were not in a written form but consisted mainly of changes to the order of presenting material within sessions. Additionally, there were changes in style of delivery that, for example, facilitated more collective responses from the group, rather than the singling out of individuals, which was considered to be disrespectful': *ibid* 29, n 75.

137. *Ibid* [5.22]. In response to Recommendation 6 of the OICS Report, DOJ stated that a 'program development group ... will be established': at 52.

One model that deserves consideration in this regard is the Te Piriti Special Treatment Program for Child Sex Offenders in New Zealand.¹³⁸ This program was established at Auckland Prison in 1994. It is open to all offenders, Maori and non-Maori, and does utilise cognitive behavioural approaches; 'however, the key feature which distinguishes Te Piriti from ... other international programs for sex offenders ... has been the concerted effort ... to develop and promote a therapeutic environment within a tikanga Maori framework'.¹³⁹ It can be noted from the extremely thorough evaluation of Te Piriti that there are limits on the extent to which this framework has yet been integrated directly into 'the therapy room'. However, the program includes residence in a special Maori unit where customs and values are reinforced as part of normal living arrangements. A full-time cultural consultant is employed on the program, with responsibility for considering the 'unique culture-related needs of each individual' as well as playing an active role in program delivery. Strong linkages have also been developed with families (whanau), tribes (iwi) and Maori service providers who offer both practical and professional support.

Significantly, the Te Piriti program has proved to be very effective for both Maori and non-Maori men:

The total study sample of all men who completed the program had a 5.47 per cent sexual recidivism rate. This was significantly less than a comparable untreated control group ... who had a sexual recidivism rate of 21 per cent.... Maori men who completed the Te Piriti treatment program had a significantly lower sexual recidivism rate (4.41%) than Maori who completed the Kia Marama program (13.58%).¹⁴⁰ ... Non Maori men ... made up the majority of program participants and they were also found to have a lower sexual recidivism rate.¹⁴¹

These results, it may be noted, are considerably more favourable than Greenberg's findings with respect to Western Australia's SOTPs.¹⁴²

The contrast between the Te Piriti approach of program development and the philosophy in Western Australia could hardly be more marked. Te Piriti started from the premise that 'culture' is an important variable and was built, ground up, to wrap cognitive behavioural approaches within a tikanga Maori framework. This is quite different from the peripheral ex post facto indigenisation of generic programs that typifies the Western Australian philosophy.¹⁴³

The New Zealand model is Maori-driven, and Maori people are in a very different situation from Aboriginal people in Australia. They constitute a larger proportion of society and hold more political power. Furthermore, government initiatives in corrections and elsewhere must reflect the Treaty of Waitangi. Such models cannot, therefore, be simply transposed. However, the Te Piriti Program does show that there is value in developing alternative approaches, and that these may bear fruit for non-Aboriginal as well as Aboriginal offenders.

(e) Aboriginal service provision and program accreditation

Relatively few Aboriginal people are involved in mainstream prison programs. We understand that there are no Aboriginal programs officers within DOJ and, according to the questionnaire responses, there are no Aboriginal facilitators in any of the accredited mainstream programs relating to sexual offending, violence or substance abuse.¹⁴⁴ No information was provided about Aboriginal facilitators in Cog Skills but their involvement is likely to be very limited. In terms of Aboriginal-specific programs, there are no Aboriginal facilitators employed on the Indigenous Sex Offender Program. Aboriginal people are employed on a contract for services basis to co-facilitate the IMMASU program.

The primary focus is on group programs, as international research suggests that they have greater impact than one-on-one counselling. Individual counselling services are also limited by financial constraints. Advice from the Prisons directorate was that the services of the Aboriginal psychologist from the Community and Juvenile Justice Services are sometimes utilised for prisoners. Community and Juvenile Justice Services stated that the psychologist works part-time – three days per week.

There are examples of Aboriginal service providers delivering non-accredited prison programs, especially with respect to substance abuse. In Perth, DOJ contracts the Noongar Alcohol and Substance Abuse Service (NASAS) to deliver

138. Nathan L, Wilson N & Hillman D, *Te Whakakotahitanga: An Evaluation of the Te Piriti Special Treatment Program for Child Sex Offenders in New Zealand*, available on the website of the New Zealand Department of Corrections: <<http://www.corrections.govt.nz>>. Te Piriti (the name given by a Maori elder) means 'the bridge crossing over to a better life.'

139. Ibid 12. Tikanga means 'customs'.

140. The Kia Marama program (at Christchurch Prison) does not have the same tikanga Maori framework.

141. Nathan, Wilson & Hillman, above n 138, 9.

142. Greenberg, Da Silva & Loh, above n 5.

143. Interestingly, the questionnaire responses from the Community and Juvenile Justice Services Directorate state that an Indigenous Cognitive Skills course in the community has been 'modified to maximise its relevance to Aboriginal offenders.'

144. These include the intensive and medium sex offender programs, Intellectually Disability Sex Offender Treatment Program, Legal and Social Awareness, Building Better Relationships, Moving on from Dependencies, Managing Anger and Substance Use, Violent Offender Treatment Program and Women's Anger Management Program.

programs, though the offerings are sporadic (seven between 2000–2004; and 18 participants in 2003–2004). At the private prison, Acacia, a program was developed, mainly by prisoners, called Corroboree. However, neither of these services is 'accredited'. They have no formal status, are characterised as low intensity in terms of their contact hours and are not delivered by tertiary qualified professionals. DOJ therefore advises the Parole Board and other agencies that they do not carry the same weight as its formal programs.

Program design, accreditation and integrity are obviously important. However, Aboriginal service delivery, even of accredited Aboriginal-specific programs, is extremely limited. The LRCWA consultations and reports have indicated that Aboriginal prisoners see considerable value in Aboriginal service provision. Consequently, as OICS suggested of Corroboree, there seems to be merit in the idea of DOJ working proactively with existing programs and Aboriginal service providers to develop these initiatives to the stage of possible accreditation and/or more formal status.

9. Prisoner placement, family contact and re-entry

The Strategic Plan for Aboriginal Services emphasises Aboriginal peoples' connection with the land and is 'guided by' a number of principles. They include:

- Recognition that Aboriginal people ... have a spiritual relationship to the land, sea and waterways.
- Recognition that family is central to the fabric of Aboriginal society and critical to its well being. The rich and complex Aboriginal kinship system cannot be explained or understood within the concept of the nuclear family. The kinship system places great importance on certain familial obligations and responsibilities.¹⁴⁵

The re-entry initiative also spoke in strong terms of the importance of enhancing family contacts through visiting arrangements and enhanced home leave schemes. In a state as large as Western Australia, it is extremely difficult to balance these objectives with geographical factors and security concerns. However, there are many issues of concern, most clearly articulated in the various reports from OICS. In brief, they include the following:

(a) Custodial placements

Children in detention must serve their sentences in Perth, sometimes thousands of kilometres from home:

In terms of distance and family and cultural dislocation, their situation is akin to offenders from London serving their time in Reykjavik, Tunisia or Budapest.¹⁴⁶

In the case of adults, both Eastern Goldfields and Broome prisons are primarily minimum-security facilities. This means that, at present, medium or maximum security prisoners who come from the Kimberley or the central desert will serve the bulk of their sentences in prisons a long way from home and cultural roots. One of the more striking manifestations of this is found at Acacia Prison. Although Acacia is privately run, it is DOJ that decides where prisoners are to be placed in the total prison system. OICS Acacia Inspection report commented:

We were both puzzled and disturbed by the presence of so many Wongi men at Acacia, including people from as far away as Warburton, Jamieson and Blackstone – remote communities near the South Australian border. In many prisons, such as Eastern Goldfields and Roebourne, one encounters a spirit and attitude on the part of Aboriginal prisoners that helps to lift them above sub-standard surroundings. We have never previously encountered any group that appears so unhappy and out of place as the Wongi's at Acacia.¹⁴⁷

DOJ accepted that there were problems and said that the situation was being reviewed. However, in its 2003–2004 Annual Report, OICS wrote:

The greatest single deficit remains still the failure to develop a convincing custodial management strategy for the regions, particularly those regions where 'Aboriginal prisons' currently predominate. This matter really cannot be allowed to drift indefinitely... This question has been exacerbated by the fact that the prison population has begun to climb again.... A lack of fit between available accommodation and services and the needs of the prisoner population has been exposed, most notably an inadequate number of minimum-security and medium security beds in the right places and available at the required times. The worst symbol of this continues to be the number of Wongi and Pitjandjara prisoners who are held at Acacia Prison rather than Eastern Goldfields.¹⁴⁸

145. Prisons Division, Department of Justice, *Strategic Plan for Aboriginal Services*, above n 84, 6.

146. Morgan, above n 100, 302.

147. Office of the Inspector of Custodial Services, above n 122, [6.5].

148. Office of the Inspector of Custodial Services, *2003–2004 Annual Report*, 12–13.

There is no doubt that these placements are a cause of some distress not only to prisoners themselves but also to their distant families. To alleviate the problem, OICS has suggested both family assistance for travel and increased use of technology.

(b) Use of video link and other technology

In evidence to the second Senate Inquiry on the three-strikes laws, the DOJ spokesman was asked how children in detention are able to keep in touch with families a long distance away. He was effusive in his praise of videoconferencing:

It is truly amazing to see how quickly these kids take up the technology, such that they were talking to the camera and screen where their parents were, in Derby or wherever, just as if they were right next door. It was quite an amazing sight.¹⁴⁹

This amazement has not translated to sustained system-wide action. As far as we understand, prisons do sometimes facilitate video links to families; however, there are quite substantial costs associated with this. Firstly, the prisoner must pay – at the time of the Acacia inspection, \$9.60 for 10 minutes at that prison and \$4.00 for 20 minutes at public sector prisons.¹⁵⁰ Secondly, the family must get to a place with a link, such as a Community Justice Services office in town. In reality, therefore, video links are not common (54 at Acacia over 12 months prior to March 2003 – an average of less than one per prisoner every six months). On top of this, telephone calls are also expensive.

It is to be hoped that, as internet access improves, these problems will be alleviated somewhat. Singapore, it may be noted, has already developed sophisticated video link and internet visiting arrangements, due to what it calls the 'tyranny of distance'.

(c) Moving through the prison system

Another area of concern relates to position of Aboriginal prisoners once they are imprisoned. The basic idea is that prisoners should work their way through different levels of accommodation and, ideally, be released from a minimum-security prison. However, OICS reports reveal a number of problems in this respect. It would appear that Aboriginal prisoners are not working their way through the system to the same extent as non-Aboriginal prisoners. For example, they are invariably over-represented in the lower levels of accommodation, work and gratuities;¹⁵¹ and are under-represented in minimum security. On 10 November 2004, there were only 60 Aboriginal prisoners out of a total of 300 (i.e. 20%) at the two metropolitan minimum-security prisons.

In Part II, we referred to the initiatives that have been undertaken for women prisoners, including the establishment of the Boronia Pre Release Prison. On 10 November, it held 54 inmates. On a proportional basis to their prison numbers, around 27 should be Aboriginal. In fact, the figure is around 18. The reality of female Aboriginal imprisonment remains at Bandyup and small enclaves in regional prisons with little access to programs.¹⁵²

(d) Cultural meeting places

'Meeting places' or 'cultural areas' have been established in many prisons, specifically to meet the cultural needs of Aboriginal inmates and to provide a place where they can meet and talk. However, in practice, management regimes have often limited access. OICS wrote, in its Acacia Report:

This curious phenomenon (of establishing a defined cultural area but then preventing access) is one we have also observed at Casuarina, Bandyup, Roebourne and Eastern Goldfields. Such tokenism is insulting, hypocritical and unacceptable.¹⁵³

(e) Funerals

One of the most consistent complaints during the LRCWA consultations (metropolitan, regional and remote) related to arrangements for prisoners to attend funerals. Participants complained about both the approval process and the

149. Legal and Constitutional References Committee, transcript of evidence (Canberra: Parliament of Australia, 25 January 2002) 219.

150. Office of the Inspector of Custodial Services, above n 123, [4.38].

151. For a sustained discussion of this at Acacia, see Office of the Inspector of Custodial Services, *ibid*, ch 6.

152. On 10 November 2004, Greenough Prison held 22 Aboriginal women (more than Boronia) and 7 non-Aboriginal women. Broome held 9 Aboriginal women, Roebourne 12 and Eastern Goldfields 16.

153. Office of the Inspector of Custodial Services, *Inspection of Roebourne Regional Prison*, above n 119, [6.14]. The report drew attention to the far better arrangements at Wooroloo Prison.

security arrangements that apply if approval is granted. In particular, it was stated consistently that the approval processes do not understand Aboriginal family structures and obligations. Several OICS reports have drawn attention to the same issues and have found it very difficult to obtain clear information about the approval process.¹⁵⁴

This is an area that calls for review in terms of DOJ's own recognition that 'the rich and complex Aboriginal kinship system cannot be explained or understood within the concept of the nuclear family. The kinship system places great importance on certain familial obligations and responsibilities.'

(f) Getting home

Another issue that was raised during the consultations, and which is a matter of grave concern to the Parole Board, is the procedures that are in place for people to return home, especially given the distances that they may have to travel. At present, as we understand it, if prisoners are not picked up directly from the prison, they are generally given a bus ticket to get them to a town, or in some cases a roadhouse, where they can be picked up. Travel is generally by road but an alternative, in some communities, is for families or communities to pay for airfares. It is not uncommon for Aboriginal prisoners to have their parole deferred for a few days to allow travel arrangements to take place.

Getting home is the crucial first stage in re-entry and it is very expensive to keep prisoners in jail any longer than necessary; around \$260 per day in the state's prisons and just over half that cost at Acacia.¹⁵⁵ A reallocation of resources could be considered to facilitate firm and timely travel arrangements, including the payment of airfares.

10. Availability and access: diversions and specialist courts

A number of 'diversionary schemes' and alternatives to traditional courts have been established over recent years. These include police cautioning and Juvenile Justice Teams (JJTs) for juveniles and 'specialist courts' for adults. However, there are issues of availability and access for Aboriginal people with most of these initiatives.

(a) Juvenile Justice Teams and cautioning

Police cautioning and JJTs were given statutory force under the *Young Offenders Act 1994* (WA). From the outset, the Aboriginal Justice Council and others expressed concern that the data showed differential patterns of cautioning between Aboriginal and non-Aboriginal youth. For example, from quite early on, the majority of contacts involving non-Aboriginal youth and the police tended to be dealt with by means of a caution rather than by arrest and charge. However, it took much longer for this to be the case for Aboriginal youth. Although the 'gap' seems to have narrowed, current figures still indicate a difference between the two groups in terms of cautioning rates.¹⁵⁶

The reasons for these differences are complex, but they can probably be explained, in part at least, by geographical factors, in that JJTs are more fully developed in the metropolitan area and are underdeveloped in regional areas. In 2002, the Senate Inquiry into the three-strikes home burglary laws concluded:

[Aboriginal] children suffer most from the operation of the mandatory sentencing legislation because they are not protected from its excesses by factors such as diversionary processes to anything like the same extent as other children.¹⁵⁷

Although government spokesmen have sometimes been reluctant to acknowledge this, it is explicitly recognised in the questionnaire responses. The Young Offenders Amendment Bill 2004 (WA), currently before State Parliament, also contains provision for appropriate community members to sit in lieu of police or Juvenile Justice Officers in remote locations. This proposed amendment is to be welcomed, though challenges will still remain about ensuring equality of access.

(b) Family Violence Court

The Family Violence Court (FVC) was established in 1999 at Joondalup as a specialist court to deal with matters of family violence. The FVC aims to provide more coordinated support services to victims, including assistance with

154. See especially Office of the Inspector of Custodial Services, *Inspection of Roebourne Regional Prison*, ibid 79–83; and *Inspection of Acacia Prison*, above n 123, [6.15].

155. See especially Office of the Inspector of Custodial Services, *Inspection of Acacia Prison*, above n 123, ch 7.

156. See Aboriginal Justice Council of Western Australia, *Our Mob Our Justice: Keeping the Vision Alive* (Perth: Aboriginal Affairs Department, 1999) 29–31.

157. Senate Inquiry Report, above n 99, [3.53].

violence restraining orders, and to encourage perpetrators to undertake specialised family violence counselling. Successful completion of this counselling is taken into account by the magistrate in sentencing.

While family violence straddles all sectors of society, it is accepted that it is especially prevalent amongst Indigenous communities. However, only five per cent of FVC clients (and none of its staff) are Aboriginal. In part, this is probably because relatively few Aboriginal people live in the court's catchment area, but DOJ also suggested it may reflect Aboriginal people's perceptions of court processes and their reluctance to access services. To date, it is clear that the FVC has not significantly reached Aboriginal people.

(c) Drug Court

The Drug Court operates on the basis of deferring sentence and imposing conditions that require offenders to attend programs and demonstrate a capacity to stay off drugs through urinalysis testing. Their performance is then taken into account on sentencing. The DOJ questionnaire responses did not contain information on the Drug Court but a recent evaluation found that few Aboriginal people had accessed the court.¹⁵⁸ This was attributed to a number of factors, including:

- The system excludes alcohol (which is a legal substance and not subject to urinalysis);
- The regime offers little or nothing for people whose primary problem is 'sniffing'; and
- The lack of Aboriginal-specific detoxification and treatment facilities.

The legislation governing the Drug Court's operations changed after the evaluation was conducted. We have no information on whether this has increased Aboriginal participation rates, but the factors noted above remain the same. For this reason, many Aboriginal people will remain outside the Drug Court's sphere.

(d) Geraldton Alternative Sentencing Regime

The Geraldton Alternative Sentencing Regime commenced in August 2001 and is the only specialist court that seems to have a relatively high proportion of Aboriginal clients (26 out of 63 referrals). Again, the basic idea is that successful completion of the program is taken into account in sentencing. The reasons for the higher proportion of Aboriginal participants are probably due to demographic factors and the fact that the program appears to draw on Aboriginal support services, including the Aboriginal Legal Service¹⁵⁹ and Aboriginal Community Corrections staff.

11. 'Aboriginal courts'

Dr Harry Blagg has prepared a more detailed paper for the LRCWA on what may broadly be termed 'Aboriginal Courts'.¹⁶⁰ For present purposes, a few short observations will suffice.

(a) The Yandeyarra Circle Court

The Yandeyarra Circle Court commenced operation in mid-2003. It is designed to provide 'more accessible and culturally relevant justice services' to people living in the community, which is around 170 kilometres from Port Hedland. The magistrate continues to exercise formal authority but the proceedings are more informal. The parties, including family members, sit around a table and the magistrate has the assistance of Elders, with whom sentencing dispositions are considered.

The Yandeyarra court initiative appears to have been driven by the magistrate who serviced the area at the time (Magistrate Sharratt) and the Yandeyarra community, with support from Community Justice Services and local Aboriginal organisations. Magistrate Sharratt had a strong relationship with Yandeyarra but was transferred shortly afterwards to Kalgoorlie. We were given little concrete information on the court's operations since then but on the information available it appears that, although other magistrates have sat at the court, it now meets less frequently and his transfer may have affected the continuity of services.

158. Indermaur D, Morgan N & Roberts L, *Evaluation of the Perth Drug Court Pilot Project* (Perth: Department of Justice, 2003).

159. The Aboriginal Legal Service appears to have been less supportive of the Drug Court because of perceptions that it would be more onerous than a normal sentence and because of the issues outlined in the text above.

160. Blagg H, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia', Background Paper No 8, see below pp 317–40.

(b) Proposed community courts

The DOJ submissions provide details of long-term plans for 'community courts' in a number of remote locations. The plans are not expected to become operational until the 'multi function justice facilities' anticipated by the Gordon Inquiry are constructed in each location. It will obviously be some time before this happens and, in the interim, it seems likely that individual magistrates will continue to develop their own ways of 'doing business' in such communities.

Although the initiative is broadly termed 'community courts', it should not be assumed that the courts will follow the Yandeyarra model. Given local differences, including the strength and health of different communities, it seems inevitable that community input will take different forms in different places.¹⁶¹ For instance, it is seems likely that, in some places, Aboriginal community members will play a very significant advisory role, but that in others their input will be more limited. On the other hand, in some it may be largely 'business as usual' in the new courtrooms. Individual magistrates will no doubt continue to play a pivotal role, reflecting their local knowledge and experience.

(c) Equivalents to the Victorian Koori Courts

The DOJ documentation on 'Aboriginal Courts' refers only to remote communities, and does not make reference to the possibility of developments akin to the Koori Courts that operate in some metropolitan and regional sites in Victoria. The Koori Courts operate somewhat differently, and face rather different issues, at their different sites. For example, the Shepparton Court has apparently been dealing with a more homogeneous group of Koori people and has been able to tap into strong Koori community structures. On the other hand, the Broadmeadows Court has dealt with a more transient population where community supports were harder to nurture. However, our observations, undertaken as part of a separate project, and other evaluations agree that they have been a valuable innovation.¹⁶²

The LRCWA metropolitan consultations revealed that, when examining Aboriginal law, it is important not to ignore Aboriginal people living in metropolitan and regional areas. On our observations, the Koori Courts provide a mechanism that can assist in reconnecting people who are not from remote areas to positive cultural values and to reinforcing those values. They also gave Aboriginal defendants a far more positive view of court processes and enhanced their sense of justice.

The need to consider metropolitan and regional initiatives of this sort is given added impetus by our findings that Aboriginal people currently have very little access to mainstream specialist courts such as the Drug Court and the FVC.¹⁶³

12. Access and availability: Community and Juvenile Justice

(a) Planned and current programs

The submissions from the Community and Juvenile Justice Services directorate (CJJS), summarised in Part VI, provided details about numerous programs, plans and initiatives. However, many of the programs/initiatives have yet to reach implementation, including:

- Kimberley Regional Justice Project;
- Perpetrator Programs for family violence and child abuse under the Gordon initiative;
- Appointment of Aboriginal and regional programs consultants;
- Reclaiming Lives program; and
- Positive Pathways program.

In terms of programs that are operational, Aboriginal participation rates in the Strong Families Program appear to be at expected levels but, as the CJJS directorate acknowledges, Aboriginal participation rates are generally a problem. Examples of this include the following:

161. DOJ questionnaire responses and personal communications.

162. Blagg, Morgan, Cuneen & Ferrante, above n 84.

163. The appointment to the Western Australian magistracy of Dr Kate Auty, the magistrate who ran the first Koori Court at Shepparton, provides an invaluable potential resource.

- Family and Domestic Violence Perpetrator Programs: only seven per cent of those undertaking these programs in the metropolitan area are Aboriginal and relatively few programs are offered in other parts of the state.
- Geraldton Aboriginal Cyclical Offending Program: participation is dwindling (12 referrals over the past 12 months).
- Rural Placement Program: very low numbers.
- Killara Youth Service: less than 19 per cent of all contacts are with Aboriginal families/children.
- Juvenile Justice Community Funding Program: No statistics available (except for one program in Geraldton).
- Warminda Cogs Programs: relatively low enrolment and completion rates.
- Individual Indigenous counselling: provided by part-time psychologist, limited participation
- Custodial Programs: participation rates appear relatively low (eg, 17 per cent of Aboriginal detainees at Banksia Hill have completed the Protective Behaviours program).

(b) Supervised Release Review Board Concerns

Broadly speaking, the Supervised Release Review Board is a parole board for juvenile offenders. Over recent years, including in its latest Annual Report, the Board has expressed a number of concerns about service delivery for juvenile offenders. These include, in particular, problems relating to re-entry and the availability of pre-release rehabilitation programs.

Homelessness and dislocation are problems facing many young people and are factors that increase their vulnerability to abuse and their likelihood of further offending. However, the Board has expressed strong concern at the lack of real attention to these issues:

Over several years, the Board has repeatedly expressed concern, in its Annual Reports and in correspondence since 2000 with the Department for Community Development and the Department of Justice at the lack of accommodation for certain juveniles who are eligible for release under supervision. The problem occurs where family support is non-existent, inadequate or undesirable and, by reason of the detainee's background and record, private or government agencies are unable or reluctant to give support....

Whilst welcoming [the re-entry programs for adults] the Board is concerned at the apparent absence of consideration of the position of juvenile detainees. There are no programs for juveniles, which correspond to those provided for adults, to assist their accommodation upon their return to the community, and no specific or adequate pre-release programs for juveniles. Nor has there been any apparent investigation into the problem.¹⁶⁴

On the question of programs for rehabilitating serious offenders and preparing them for release, the Board wrote:

[T]he lack of pre-release programs was emphasized by recent cases before the Board which involved two offenders who had been convicted when 14 and 15 years of age respectively of extremely serious sexual offences. They had been in detention for approximately 4 years and came before the Board aged 18 and 19 years. Given that they had spent their formative adolescent years in custody, one would expect pre-release programs to be put in place to assist in their evaluation for release into the community, and to enable suitable rehabilitative measures. Under what is apparently Department of Justice policy, no such programs were available, except to a very limited extent and only if the Board was prepared to decide in advance that it would be prepared to make a Release Order.

13. Victim services

We have already pointed to concerns relating to the provision of VSS and CWS for Aboriginal victims (a matter of concern also to the Gordon Inquiry).¹⁶⁵ Although initiatives have been taken, there still appears to be a long way to go before service provision meets required levels.

Figures provided by the Victim Offender Mediation Unit also show low Aboriginal participation rates in a number of areas. Reliable figures do not exist across all of the unit's operations, especially with respect to post-referral and completion rates, but only five per cent of court-based mediation referrals involved Aboriginal clients from May 2003 to June 2004.¹⁶⁶ However, it may be noted that the Aboriginal Alternative Dispute Resolution Service also facilitates mediation in a number of cases.¹⁶⁷

164. Supervised Release Review Board, *Annual Report for the Year Ended 30 June 2004*, 4-5. The report does not specifically mention Aboriginal and non-Aboriginal issues but since three quarters of detainees are Aboriginal, it goes without saying that the problem is mainly one for Aboriginal youth.

165. Gordon Inquiry, above n 3.

166. See above Part VI.

167. See above Part III.

14. Interpreter services

Dr Michael Cooke's background paper has discussed the importance of effective translation and interpreter services in courts.¹⁶⁸ Even where Aboriginal people do speak English, it may not be a first language. There can also be gaps between 'Aboriginal English' and 'legal English', where the subtleties of the law are misunderstood or misinterpreted. The LRCWA's community consultations confirmed that these are issues of great significance across much of the state.

Although attention tends to focus on interpreter services in the context of courts, it is obvious that language issues affect all parts of the justice system, including services to victims and prisoners. This has been formally recognised in the *Western Australia Government Language Services Policy Statement*.¹⁶⁹ This recognises 'the cultural diversity of Indigenous communities, the complexity and diversity of Indigenous languages and that for many Indigenous people, English is a second language'.¹⁷⁰ Pursuant to this statement, DOJ has issued its own *Language Services Policy and Practical Guidelines*, in which it states:

It is recognized, and of great concern to DOJ, that Indigenous people are disproportionately over-represented within the criminal justice system. As such DOJ is proactive in establishing constructive and productive partnerships with Indigenous people to ensure that there is equality of access to justice services. This includes special provision for language services needs.¹⁷¹

In addition, it states that:

[I]t is the responsibility of each Business Area to develop policies and practices appropriate to their legislative and administrative circumstances to ensure that language difficulties are not a barrier for customers with limited English fluency.¹⁷²

None of the responses from the different business areas of DOJ made any reference to the provision of language services. According to the DOJ website, the Aboriginal Policy and Services Directorate oversees the contract for Kimberley Interpreting Services, but as noted earlier, they were unable to provide details.¹⁷³ There was no information about language service provision with respect to other directorates or other parts of the state.

It may be that there are services of which we are not aware but it is clear that there are deficiencies. OICS has drawn attention to these issues in the context of prisons on a number of occasions.

A recent District Court case provides a poignant example.¹⁷⁴ The defendant was a 33-year-old man from a remote desert community who was convicted of criminal damage by fire. He had a history of substance abuse, mainly cannabis and alcohol, but his prior criminal record was not extensive and he had no previous prison sentences. The offence occurred when he set fire to a Toyota Landcruiser which belonged to 'two young fellas' who had been 'teasing and hitting him'. Initially, he was held on remand at Hakea and Eastern Goldfields prisons for 119 days. He was then granted bail but did not comply with its conditions (he went to a different community, he said, to avoid contact with the 'two young fellas'.) He was returned to custody, spending about a week at Eastern Goldfields before being transferred to Hakea. He was sentenced seven weeks later.

For much of the custodial period (approximately seven months), efforts were apparently made to engage the services of an interpreter for the purposes of a psychiatric assessment and sentencing. It is clear from various transcripts and reports that 'there was no structured service provision in place'. Eventually, a one-off arrangement was reached with one individual. The problems were of obvious concern to the Chief Judge:

[T]he court can eventually provide an interpreter but on the last occasion we did it cost us several thousand dollars because someone had to be brought from the Northern Territory.

There was no interpreter in court, though an Aboriginal Legal Services field officer was present. The defendant would undoubtedly have understood little of the formally worded questions to which he was required to respond:

168. Cooke M, 'Caught in the Middle: Indigenous Interpreters and Customary Law', Background Paper No 2, above pp 77–120.

169. July 2001.

170. As quoted in Department of Justice, *Language Services Policy and Practical Guidelines* (2002).

171. Ibid 3.

172. Ibid 4.

173. See above pp 296–97.

174. For privacy reasons, we are not publishing the name of the case, which was heard on 18–19 August 2004.

[Y]ou have been convicted on your own confession of one count of causing damaged by fire. Being now called upon have you anything to say why sentence should not be passed on you according to law?

In sentencing, the Chief Judge said:

Mr X has been in custody for 7 months and it has been particularly difficult for [him] because he doesn't speak English. It is very difficult to find an interpreter and so he has done a lot more time in many ways than anybody else who had served 7 months. The difficulties we have had with interpreters have been well and truly ventilated in the court.

These comments, the information provided to us, and OICS's observations lead to only one conclusion: that in some parts of the state there is a serious gap between the DOJ Language Services Policy and actual service delivery. This affects courts, prisoners and, no doubt, victims.

15. Evaluations

It will now be apparent that very few of the initiatives and programs on which information was provided by DOJ have been formally evaluated in terms of the extent to which they have reached Aboriginal people or their effectiveness in reducing offending behaviour. This was sometimes acknowledged as a weakness and DOJ has, over the last two years, solidified its relationships with universities and other evaluation bodies; and there are a number of evaluations in progress, including adult offender program evaluations through Edith Cowan University.

However, two general observations must be made:

- The information gaps we identified earlier in this section pose significant hurdles with respect to both factual understanding and potential evaluation. Put simply, it is not possible to carry out effective evaluations unless accurate data are collected at the outset of a program; good evaluations cannot be conducted ex post facto.
- We have no research into 'what works' for Aboriginal people in Western Australia.

Part VIII: Conclusion

1. Introduction

The strongest single theme in this paper is the gap between the promises of paper policies and what is happening on the ground. Despite numerous documents deploring unacceptable levels of Aboriginal incarceration, the numbers have risen rapidly to previously unthinkable levels, far in excess of the situation in other Australian jurisdictions. Recently there has been an increasing emphasis on improving Aboriginal community safety, but documentation on substance abuse, violence and sexual abuse continues to make bleak reading.

Violence, sexual abuse and substance abuse are not part of Aboriginal law and culture and are seen by Aboriginal people as their biggest problems. The challenge facing DOJ and other government agencies is simple enough; it is to narrow the gap between policy and life on the ground. Meeting that challenge is extremely difficult but is essential if Aboriginal law and culture are not to be further decimated.

For the purposes of this project, it is important not only to consider how it may be possible to open up 'spaces' for Aboriginal law to operate in the future but also to identify areas of shortfall in mainstream justice service delivery, as well as any practices that appear to destroy Aboriginal culture and identity. As the LRCWA consultations showed, Aboriginal people see mass imprisonment as one of the most destructive factors and as part of the problem not the solution.

2. Summary of findings

The thematic review in Part VII revealed a number of potential bright spots for the future. These include the generally increased focus on services to regional and remote areas, the cross border initiatives, and initiatives to expand the operations of Juvenile Justice Teams in more remote areas. Proposals to develop community courts are to be welcomed, but introduction of specialist Aboriginal courts in metropolitan and regional centres, akin to the Koori Court initiative in Victoria, should also be considered. It remains to be seen whether these initiatives reach fruition.

This review has also revealed numerous areas of concern and apparent shortfall, including:

- Problems with information availability.
- Lack of detailed evaluations in core areas (including treatment programs).
- Provision of victim services.
- Provision of interpreter services, including to victims and prisoners.
- Insufficient Aboriginal content in generic policy documents.
- The gap between policy documents and action, and the use of policy documents to deflect criticism of actual practice.
- Lack of availability of programs to address sexual offending, violence and substance abuse for Aboriginal prisoners, especially in regional 'Aboriginal' prisons.
- The need to consider new forms of program development rather than attempting a peripheral ex post facto 'indigenisation' of generic programs.
- The dislocation of Aboriginal detainees and prisoners from land, culture and family.
- Aboriginal prisoners do not move through the prison system to the same extent as non-Aboriginal prisoners and they tend to endure the worst prison conditions.
- Issues of funeral attendance by Aboriginal prisoners.
- Re-entry issues for Aboriginal prisoners, including getting home.
- Aboriginal under-representation in juvenile diversionary schemes.
- Aboriginal under-representation in alternative courts such as the Drug Court and the Family Violence Court.
- Limited treatment programs for juveniles.
- Lack of focus on re-entry issues for juveniles.

Most of these problems are not of recent origin and it may be that a further injection of resources would be required in some areas. However, it may also be necessary to consider the allocation of current funding. For example, adult imprisonment is very expensive, costing on average over \$260 per prisoner per day¹⁷⁵ in public sector prisons. Of this, approximately 60 per cent is attributable to 'direct' or 'on-site' costs. The remaining 40 per cent goes to administration costs, including general corporate overheads and the provision of some prisoner services such as treatment programs.¹⁷⁶ As we have seen, program delivery has been poor over a sustained period in some prisons, especially the regional Aboriginal prisons. In the case of juveniles, the costs of detention are around \$625 per detainee per day (and a total of \$60 per day under community supervision).¹⁷⁷

3. Imprisonment rates

Trying to understand trends in imprisonment rates is a very complex exercise, as evidenced by the fact that official predictions are often a long way off the mark.¹⁷⁸ One reason for high Aboriginal imprisonment rates is, of course, high rates of offending. However, unless one espouses the absurd notion that Aboriginal Western Australians are many times more evil than their interstate colleagues, this cannot explain why Western Australia's Aboriginal imprisonment rate is so much higher than the rest of the country.¹⁷⁹

Much of the explanation for our high imprisonment rates must lie in systemic issues within our criminal justice system. This is not the place for a full examination of these issues but the findings in chapters 2 and 7 reveal a number of factors that influence the imprisonment rate. These include:

- Conflicting messages from governments and Parliament to the courts – consistently told to reduce imprisonment but to get tough.
- Aboriginal people have borne the brunt of punitive law and order initiatives such as the three-strikes laws.
- Aboriginal youth have less access to diversionary options.
- Aboriginal people are rarely accessing alternatives such as the Drug Court.

175. Around \$8 000 per month, or \$96 000 per annum.

176. Office of the Inspector of Custodial Services, *Inspection of Acacia Prison*, above n 122, ch 7. The costs at Acacia (the private prison) are far less. The total amount paid under the contract for on-site costs and AIMS corporate overheads is around \$100 per prisoner per day. On top of this, there are DOJ costs of \$34 per prisoner per day. These costs cover contract management, depreciation and capital depreciation. Overall, Acacia's costs are around 55 per cent of the costs in the public sector prisons. Some of this is attributable to economies of scale.

177. Supervised Release Review Board, *Annual Report for the Year Ended 30 June 2004*.

178. See above Part II.

179. See Weatherburn D, Fitzgerald J & Hua J, 'Reducing Aboriginal Over-Representation in Prison' (2003) 62 *Australian Journal of Public Administration* 65–73; Blagg, Morgan, Cuneen & Ferrante, above n 84.

- Initiatives such as the Pre Sentence Order (introduced in 2003 as an alternative to imprisonment) depend on the availability of structured programs in the community. Such programs are lacking across much of the State.
- Aboriginal people (at least in regional Aboriginal prisons) have less access to prison based programs that facilitate parole release and should reduce re-offending.
- Aboriginal people, especially women, are disproportionately imprisoned for fine default.
- The decriminalisation of public drunkenness in 1988 probably had little practical effect as other more serious charges (such as the 'trifecta' of disorderly conduct, resist arrest and assault public officer) were still available.
- New trifectas (and worse) have emerged. At Warburton we observed numbers of young men being sentenced for 'unlawfully on the curtilage' (*Police Act*); 'stealing' (petrol worth \$1.00 under the Criminal Code); 'possession of a deleterious substance' (Community By-Laws); and 'supplying a deleterious substance' (Community By-Laws). All of these charges arose essentially out of a single escapade.
- The removal of imprisonment as a penalty for certain offences in 2003 is unlikely to have a practical effect as most of them have not, in any event, attracted prison sentences.¹⁸⁰
- There is no evidence that abolishing short prison sentences has had the desired effect; in fact, Aboriginal imprisonment rates have soared over the past 12 months.

The compounding/cumulative impact of these factors should also not be underestimated. Less access to diversion leads to earlier entry to the formal criminal justice system; less access to specialist courts leads to incarceration; incarceration leads to cultural dislocation; and lack of programs causes delayed release and increased chances of re-offending.

4. Coordinating systemic change

The language in government these days is commonly that of 'inter-agency collaboration', of a 'whole of government approach' or of a 'joined up approach.' It is undoubtedly the case that addressing Aboriginal justice issues will require such an approach, and the Gordon Inquiry may have helped to drive changes that will assist in this regard. However, two areas of concern may be noted.

Firstly, Western Australia does not have good Aboriginal structures upon which to build coordinated justice initiatives, especially in regional areas.¹⁸¹ There are steps being taken in that regard, notably with the Kimberley Justice Plan and the Cross Border Justice Project, but these are in their infancy. By comparison, it may be noted that Victoria has established Regional Aboriginal Justice Advisory Councils under the aegis of their Aboriginal Justice Agreement. These advisory councils are independent Aboriginal-controlled bodies, with representatives from all relevant agencies. Our observation is that they provide a mechanism that should prove helpful in promoting multi agency initiatives on the ground in that state.

Secondly, even if the focus is on a whole of government approach, there is a need for good coordination within individual government departments in order to drive systemic and sustained change. Otherwise, there is every danger that we simply see an array of ad hoc initiatives which fade away when individuals are no longer there to drive them. The Gordon Inquiry expressed concern on this score with respect to prison based treatment programs: 'The Inquiry finds that programs should not place excessive reliance on any single officer or employee and accordingly risk the program lapsing when that person ceases employment'.¹⁸² Concerns also arise with respect to most of the 'specialist' courts. Until now, the various initiatives appear to have been very dependent on individual judicial officers. For example, Magistrate Sharratt drove the Yandeyarra Circle Court and its operations appear to have tailed off since he left; the Geraldton Alternative Sentencing Regime is attributable to Magistrate King; and, for a long time, the Drug Court was highly dependent on Magistrate Wager. It is to be hoped that pending legislation will ensure greater support and coordination in the longer term.

OICS has also expressed concern about coordination in the context of Aboriginal imprisonment:

[G]eneral progress with regard to the prison system has been maintained, though there remains a great deal to be done. The greatest single deficit remains still the failure to develop a convincing custodial management strategy for

180. Morgan N, 'The Abolition of Six Month Sentences, New Hybrid Orders and Truth in Sentencing: Western Australia's New Sentencing Laws' (2004) 28 *Criminal Law Journal* 8.

181. For a discussion of building community-owned as opposed to community-based initiatives, see Blagg, above n 159.

182. Gordon Inquiry, above n 3, 237.

the regions, particularly where 'Aboriginal prisons' currently predominate. This matter really cannot be allowed to drift indefinitely. The interested parties have never been brought together in one place at one time for a full consultation, and it would seem desirable for some kind of Roundtable to be convened ... in much the same way as happened in 2003 with the Drugs Roundtable....

It was ... a welcome move that a work camp was established at Wyndham during the year; virtually all of the prisoners sent there are Aboriginal people from the east Kimberley region and the fact that they are able to be sent there straight from courts seems to be a valuable mechanism. On the other hand, despite the great energy and commitment of the people on the ground and the head office Manager, the Department still does not have an integrated work camp or outstation strategy – something that would naturally fit within a fully developed custodial management strategy for the regions.¹⁸³

5. Monitoring and benchmarks

The Aboriginal Justice Council was established, pursuant to a specific RCIADIC recommendation, to monitor the implementation of the RCIADIC recommendations. It was abolished in 2002 on the basis that the money it cost (approximately \$250 000 per annum) could be better spent. At the time, it was stated that the Aboriginal and Torres Strait Islander Commission (ATSIC) and various state government departments would create a new monitoring body and resource new research.

To date, this has not happened. There is no Aboriginal justice-monitoring agency and there have been no monitoring reports from ATSIC or other agencies akin to those of the Aboriginal Justice Council of Western Australia. The community consultations revealed great disquiet at this state of affairs. As argued by Greg Marks, there is a great deal to be said for setting benchmarks and then ensuring that these are independently evaluated and monitored. At present, the structural arrangements do not exist for this to happen. This is unfortunate. Monitoring, benchmarking and evaluation are integral to ensuring that decisions about public expenditure are evidence-led and, most importantly, to transforming the world of paper bullet points in policy documents into concrete achievement.

As argued by Greg Marks,¹⁸⁴ there is a great deal to be said for setting benchmarks and then ensuring that these are independently evaluated and monitored. At present, the structural arrangements do not exist for this to happen. This is unfortunate. Monitoring, benchmarking and evaluation are integral to ensuring that decisions about public expenditure are evidence-led and, most importantly, to transforming the world of paper bullet points in policy documents into concrete achievement.

183. Office of the Inspector of Custodial Services, *2003–2004 Annual Report*, 13–14.

184. Marks G, 'The Value of a Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area', Background Paper No 3, above pp 121–42.

Appendix: DOJ Aboriginal programs, plans and initiatives review

Title	
	Name of program, plan or initiative
Location	
	Which department and where
Objectives	
	Planned outcomes
Format	
	Style of delivery, duration & intensity of program, plan or initiative
Content	
	Type of treatment, strategies engaged
Design	
	Cultural relevance, Aboriginal involvement in design, planning, implementation and monitoring
Target Group	
	General or Aboriginal specific
Facilitation & Resourcing	
	Staffing re numbers (specify Aboriginal and non-Aboriginal) and qualification
Availability	
	How many and how often program, plan or initiative run – 2000 onwards
Participation	
	Number of Aboriginals and % of Aboriginal – adult and juvenile re attended and completed
Evaluation	
	Formal and informal, level of Aboriginal involvement
Comments	
	Relevant history and background to program, plan or initiative Suggestions re success and/or gaps in service delivery
Contacts	
	Department & person responsible for review details

background paper 8

A new way of doing justice business? Community justice mechanisms and sustainable governance in Western Australia

Harry Blagg*

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1. Introduction

This paper explores the current and potential contribution of Aboriginal community justice mechanisms to the goal of improving security and safety in Aboriginal communities and ensuring the maximum possible ownership of justice and justice related processes by Aboriginal communities. The main focus of the paper is on developments in remote regions; however, many of the issues raised have resonance for Aboriginal people in rural and urban areas. The paper is based on evidence from the community consultations undertaken as part of the Aboriginal Customary Laws Reference,¹ a literature review, and experience gained from a decade of researching Aboriginal justice issues.

The emergence of Aboriginal community justice mechanisms in a variety of forms across Australia may signal an important long-term shift in the way the justice 'business' is transacted between Aboriginal communities, government and the judiciary. Community-based projects designed to involve Aboriginal communities have been in existence across Australia for a number of years; however, most of these have been relatively ad hoc and informal. Such projects have, therefore, tended to lack sustainability, being dependent on the energies and good will of a few key players (Aboriginal and non-Aboriginal) and prey to shifts in government policies and priorities.

2. Community-based or community-owned?

While there is some consensus between government and Indigenous communities about the need for greater Indigenous involvement in the justice process, there is considerable uncertainty over the precise form this involvement should take and how it can best be achieved. There is also some disagreement over what the term 'involvement' means. Aboriginal people and justice agencies may hold radically conflicting definitions of the meanings attached to the term. Many community justice initiatives generated by government and criminal justice agencies have tended to be what I will refer to as *community-based* as opposed to *community-owned*. Community-based services simply relocate the service to a community setting, rather than reformulate the fundamental premises upon which the service is constructed. Expressed another way, the community setting becomes a kind of annex to the existing structures of the system.

Unfortunately, many justice agencies have tended to mistake community-based for community-owned and have, often unwittingly, appropriated the notion of community justice to further unreconstructed administrative and legislative agendas. Aboriginal notions of justice reform should not be confused with processes simply designed to either extend the reach of the existing justice system or make the existing justice system run more smoothly. They may, in fact, challenge some dominant assumptions about the role of law and justice mechanisms in Aboriginal communities. As I will demonstrate later,² community consultations in remote areas, conducted by the Law Reform Commission of Western Australia (LRCWA), revealed a number of instances where community-defined priorities differed significantly from those of law and justice agencies.

Improving service delivery

There is a marked tendency for government to see the role of community justice as either improving service delivery or involving the community in discrete initiatives that are fundamentally the invention of non-Indigenous organisations. One gathering of Aboriginal women in Western Australia in the mid-1990s, who came together to discuss the problem of Aboriginal family violence, made an incisive distinction between *programmatic* solutions to issues of communities (where resources are used to expand the capacity of government agencies to resolve a particular problem)³ and *community* solutions (where resources are invested in communities in a way that empowers them to resolve the particular problem). This shrewd observation goes to the heart of current debates about the nature of partnerships between Aboriginal communities and government agencies. I am not trying to suggest that discrete programs are not important or that government agencies should not involve communities in the delivery of services; rather that these processes should not be presented as strategies designed to expand Aboriginal control over justice business or as self-governance strategies.

1. The paper draws heavily on the face-to-face discussions with communities and Aboriginal organisations as well as a number of non-Aboriginal government and non-government organisations. However, the interpretations placed on these discussions are those of the author, and do not necessarily reflect the views of the Law Reform Commission of Western Australia as a whole.

2. See below pp 321–23.

3. Aboriginal Women's Task Force and the Aboriginal Justice Council, *A Whole Healing Approach to Family Violence* (Perth: Aboriginal Justice Council, 1995). In this particular instance, women wanted to see investment in community structures, such as women's safety committees, run by Aboriginal women.

The issues of community/government partnership in the design and delivery of community justice mechanisms featured prominently in the LRCWA's consultations with Indigenous people. This concurs with the 1986 review of Aboriginal Customary Laws by the Australian Law Reform Commission (ALRC), which found a significant investment by Indigenous people in the development of what they termed 'local justice mechanisms', involving 'increasing Aboriginal input in various ways in application of the general law'.⁴ Indeed, the ALRC found that communities were more interested in discussing these matters than the 'application of Aboriginal customary laws or practices'.⁵

Constructive hybridity

The LRCWA consultations similarly found that many Aboriginal people, particularly in remote areas of the state, want to see official recognition given to Aboriginal forms of adjudication and punishment. However, more attention has been devoted to identifying ways in which Aboriginal values and principles can be incorporated into the non-Aboriginal justice system, through a process of what I will term 'constructive hybridisation'.

This emphasis on constructive hybridity is in keeping with emerging national and international good practice where Indigenous populations are concerned. For example, one recent review of emerging practices in Australia, New Zealand and Canada, refers to a 'synthesis and synergy' approach to reform, involving a gradual convergence of Indigenous and non-Indigenous values, beliefs and practices.⁶ This is not the same thing as bringing Aboriginal law and non-Aboriginal law together in their entirety or as part of some single template. From the LRCWA consultations it was apparent that many Aboriginal people who continued to practice law in their daily lives (i.e., performed ceremony, practised skin relations, spoke Aboriginal language/s, etc) did not see much scope for combining Aboriginal law and non-Aboriginal law within a single written framework.

3. Law and representations

The most frequently voiced reasons for this were that the Aboriginal and non-Aboriginal laws were simply too different and, perhaps most importantly, they had some well-grounded fears that Aboriginal law would inevitably be appropriated by the white man's law if written down, classified and codified (these being essentially non-Aboriginal practices). It would then no longer be 'their' law – ownership would pass to lawyers instead. Aboriginal law would, they feared, inevitably be subordinated and colonised by non-Aboriginal forms of legal process and subject to its ways of conducting business that would further disempower Aboriginal people. Should the two laws be brought together through a process of written codification, because the general law claims sovereignty over the written legal form, then inevitably the general law would come to *represent* non-Aboriginal law; perpetuating what Edward Said referred to as 'orientalism': that powerful tendency for the 'west' to dominate, reconstruct, subjugate and 'speak for' the cultures of colonised societies.⁷

Many Elders consulted by the LRCWA wanted to see their law acknowledged as a form of law (rather than simple 'lore') and wanted Aboriginal people to be allowed to practise it in their traditional ways. The Elders wanted to see the two laws working 'side by side' in a situation of mutual respect and recognition. But many did not feel Aboriginal law could survive even the most benevolent annexure by the 'whitefella' legal system. To remain an integral whole it had to remain separate.

Indigenous knowledge

Through generations of negative interaction with the western legal system, Aboriginal people have a very clear perception that their own mechanisms for storing, presenting and transmitting legal knowledge are often in conflict with those of the non-Aboriginal law and, moreover, are held to be inferior. Generally, 'oral' histories are rarely granted an equivalent 'truth status' as written accounts in western paradigms of knowledge:

[T]raditional Indigenous sources are seldom ever consulted, their exclusion typically justified on the grounds that the oral literatures characteristic of so many Indigenous societies are less reliable than written forms.⁸

4. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

5. Ibid 7.

6. Havermann P (ed), *Indigenous People's Rights in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 1999) 7. Havermann suggests that in postcolonial societies there currently exists what he calls a 'diasporan space, where cultures collide and combine...inexorably constructing hybrid identities'. However, 'settler' states are still reluctant to share power with Indigenous populations: at 5.

7. Said E, *Orientalism* (Hammondsworth: Penguin, 2003).

8. Marshall-Beier J, 'Beyond Hegemonic Statements of Nature: Indigenous Knowledge and the Non-state Possibilities in International Relations', in Chowdhry G & Nair S (eds), *Postcolonialism and International Relations: Reading Race, Gender and Class* (London: Routledge, 2004) 88.

Traditional knowledge falls on the wrong side of a system of binary oppositions (what Marshall-Beier refers to as 'discursive dichotomies') constructed by white colonists to mark the boundaries between the 'superior west' and its 'inferior other'. These binary oppositions include: order versus anarchy, culture versus nature, rational versus irrational, civilised versus savage, etc.⁹ Historically, they have functioned to marginalise Aboriginal forms of knowledge and to legitimate European cultural hegemony.

To avoid this cultural appropriation the simple solution is to leave the core of Aboriginal law alone and 'unwritten', focusing instead on creating a series of non-colonising agreements and partnerships between Aboriginal and non-Aboriginal communities on issues of concern. There are numerous points of intersection between Indigenous and non-Indigenous domains, and these generate issues that could not be dealt with easily by traditional law and penalty – they include alcohol-related issues, family violence, juvenile crime and antisocial behaviour. The non-Aboriginal system has also struggled to provide solutions to these crises in Aboriginal communities. It is around these issues that some constructive hybrids could be seeded and nurtured. However, to do so, we need to constantly be on guard against imposing non-Aboriginal values on Aboriginal people and perpetuating systemic forms of discrimination.

4. Institutional racism

While Indigenous people in Australia are among the most imprisoned people in the world,¹⁰ the systems that police, judge and incarcerate them have tended to remain stubbornly eurocentric in philosophy and practice. Urban, rural and remote communities consulted by the LRCWA have expressed a deep sense of alienation from the criminal justice system. Many believe that the present system has failed them and cannot provide adequate levels of security and justice. Furthermore, it cannot take adequate account of the specific cultural needs of Aboriginal people at all levels of the criminal justice system. This tendency has been variously described as structural, institutional or systemic racism.

Racist outcomes

These forms of racism are different from individual racism because they describe the *outcomes* of activities and processes rather than *intentions* and *attitudes*. They reflect organisational, rather than individual, failure to understand the impact of policies and procedures on marginal and excluded groups in society.¹¹

Bowling offers the following definition of institutional racism:

Institutional racism is the *process* by which people from ethnic minorities are systematically discriminated against by a range of public and private bodies. If the result or *outcome* of established laws, customs or practices is racially discriminatory, then institutional racism can be said to have occurred. Although racism is rooted in widely shared attitudes, values and beliefs, discrimination can occur irrespective of the intent of the individuals who carry out the activities of the institution.¹²

Work recently undertaken in Victoria, for example, suggests that the ongoing over-representation of Indigenous Australians in the criminal justice system cannot be accounted for solely in terms of greater levels of offending by Indigenous people or the prejudices of individuals within the system, although that may play an accompanying role.¹³ It is the intrinsic nature of the structures themselves that should be the major focus of attention and the ways they, albeit unintentionally, disadvantage socially excluded and marginalised groups in the population.

Unintended consequences

Laws and policies that may appear to be 'facially neutral' may have greater impact on particular groups in ways not envisaged when they were promulgated.¹⁴ Systemic forms of racism have been recognised as a contributory factor

9. Marshall-Beier, *ibid*; Said, above n 7.

10. Aboriginal people in Western Australia are 'the most imprisoned of the imprisoned': Blagg H, 'Aboriginal Youth and Restorative Justice: Critical Notes from the Australian Frontier', in Morris A & Maxwell G (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart, 2001).

11. Blagg H, Morgan N, Cunneen C & Ferrante A, *Systemic Racism as a Factor in the Over-Representation of Aboriginal People in the Victorian Criminal Justice System* (Paper presented at the Equal Opportunity Commission and Aboriginal Justice Forum, 2004).

12. Bowling B, cited in Sir William Macpherson of Cluny, *The Stephen Lawrence Inquiry* (London: Home Office, February 1999) [6.33].

13. Blagg, Morgan, Cunneen and Ferrante, above n 11.

14. See Morgan N, Blagg H & Williams V, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (Perth: Aboriginal Justice Council, 2001); Blagg, Morgan, Cunneen and Ferrante, above n 11.

in high rates of Indigenous incarceration across the world.¹⁵ There are a number of examples of this. Western Australia's mandatory sentencing laws¹⁶ have, in ways not foreseen by the architects of the laws, clearly impacted greater on youths from remote Aboriginal communities whose offences, if committed in Perth, would have been eligible for a caution or referral to a family group conference.

Overcoming unintended forms of discrimination against Indigenous people requires structural reform and a willingness to think outside the square. Most importantly, it requires deep and ongoing dialogue with Aboriginal people before such policies are implemented, and a greater investment in structures and processes that genuinely empower Indigenous communities. Aboriginal-owned community justice mechanisms might hold the key to empowerment.

5. Aboriginal community justice mechanisms

In recent years there have been several promising developments in Australia that offer, if not exactly a road map, then certainly a number of potential pathways to change. These include:

- developments in Queensland, following the Cape York Justice Study and the Aboriginal Women's Task Force on Violence, particularly the establishment of local Community Justice Groups;
- community capacity building initiatives across Australia under the Council of Australian Governments – in Western Australia this is the Kutjungka/Tjurabalan process;
- innovative structures and processes introduced under Aboriginal Justice Agreements in New South Wales and Victoria, leading to initiatives such as Circle Sentencing and Aboriginal Courts, as well as some very proactive mechanisms for ensuring Aboriginal participation, such as the Regional Aboriginal Justice Councils in Victoria;
- initiatives in the Northern Territory as part of the Territory's Law and Justice Strategy, such as the Kudjula Crime Prevention Committee structure; and
- a number of processes of local consultation as part of Western Australia's Aboriginal Justice Agreement and the development of local justice plans.

Space precludes a full examination of these initiatives. However, some brief reference will be made to them in the following sections of this paper. However, before doing so, it is worth briefly describing some of the salient features of Aboriginal-owned community justice mechanisms. Ideally, they combine a number of key ingredients, including:

- a strong focus on achieving sustainability, durability and resilience in structures, processes and programs;
- a willingness to take into account Aboriginal law and culture in the way structures, processes and programs are devised and executed;
- a commitment to nurturing the necessary governance structures; and
- a process of capacity building, both in Aboriginal communities and in the government agencies that partner with them.

The two diagrams on page 322 provide a representation of community justice structures and mechanisms.

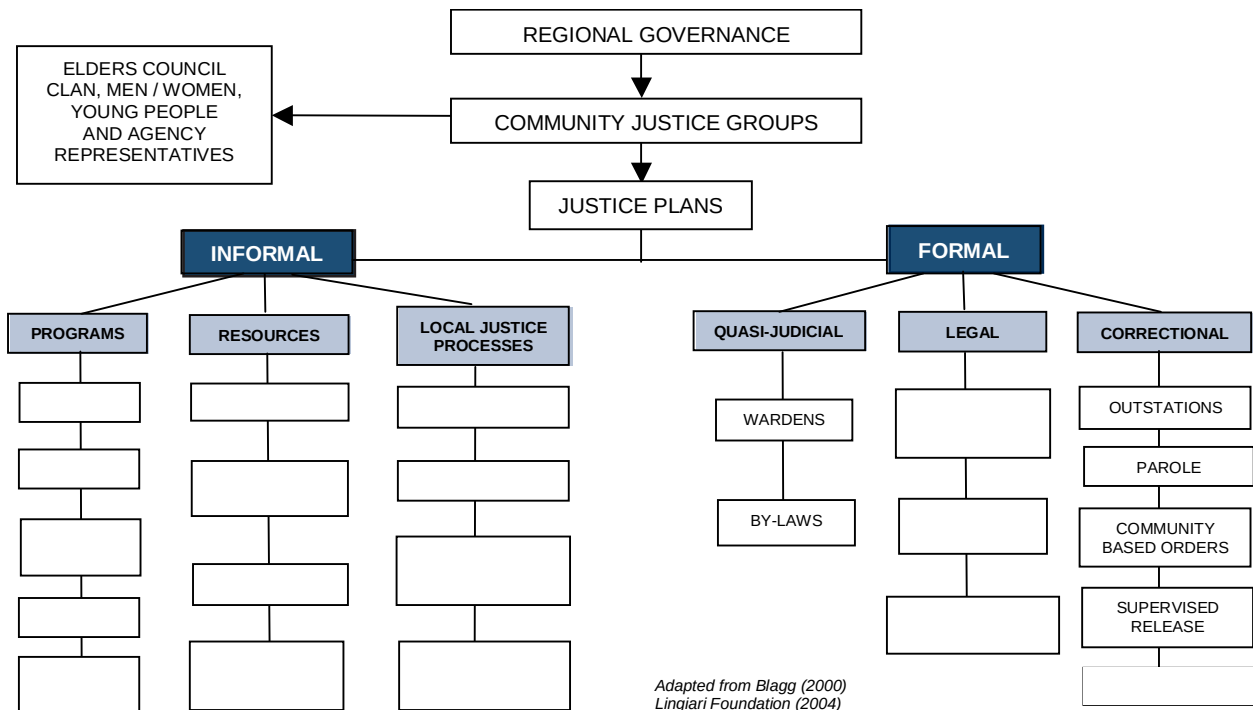
Top-down versus bottom-up approaches to crime prevention

A distinguishing feature of these new initiatives is the extent to which they are, what are called in the crime prevention literature, 'bottom-up' as opposed to 'top-down' initiatives, and have involved significant dialogue between Indigenous communities and non-Indigenous government organisations. Sustainability, sound governance, capacity building and a respect for traditional practices are now widely acknowledged as key factors in achieving long-term success. The road to justice reform in Aboriginal Australia is littered with the wreckage of promising one-off initiatives, pilot projects and local strategies that have failed to be refinanced, nurtured and maintained by all levels of government. Despite the energies of both Aboriginal and non-Aboriginal people involved in running programs in Aboriginal communities, they eventually fail, leaving bitterness and disillusionment in their wake.

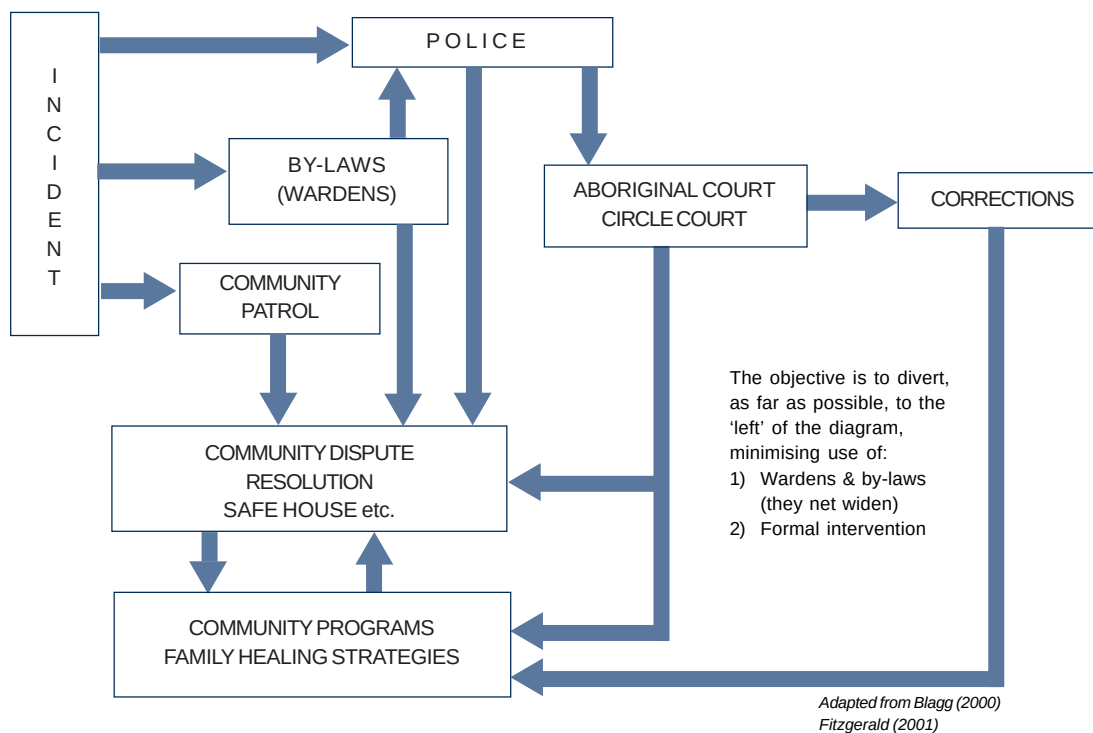
15. Capobianco L & Shaw M, *Crime Prevention and Indigenous Communities: Current International Strategies and Programmes* (International Centre for the Prevention of Crime, July 2003).

16. See Morgan, Blagg and Williams, above n 14; Morgan N, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 *Criminal Law Journal* 293.

Regional Governance – Main Table



Intervention Options



Preventing crime and disorder in Aboriginal communities is of crucial importance. Not only is crime prevention an important goal in itself, reducing levels of crime and disorder may also be an essential pre-requisite for establishing other healthy structures in communities, which may otherwise be rendered dysfunctional by alcohol and substance abuse, family violence and antisocial behaviour. States and territories are attempting to devise means of engaging with Aboriginal people in urban, rural and remote parts of Australia on crime prevention issues.¹⁷ Western Australia's Office of Crime Prevention has been involved in funding a number of grassroots crime prevention initiatives targeting Aboriginal issues.¹⁸ There are some valuable lessons to be learned from the crime prevention experience.

6. Crime prevention and community safety

One recent review of crime prevention and Aboriginal people¹⁹ suggests that initiatives are needed to counter the failure of the mainstream criminal justice system to reduce levels of offending and victimisation in Aboriginal communities or reduce levels of over-representation. A number of inquiries into problems of disorder and victimisation in Australian Indigenous communities have also pointed to systemic failure by the justice system.²⁰ Cunneen argues that simply rolling out crime prevention programs devised for urban, non-Indigenous contexts into Aboriginal communities without considering issues related to Indigenous participation and control, the principle of self-determination and the diverse needs of Aboriginal people in urban, rural and remote locations, is a recipe for continued failure.²¹ Crime prevention programs most suited to Aboriginal contexts are those providing a holistic framework, as Cunneen observes in relation to family violence prevention:

The common themes in evaluations of family violence programmes include the need for holistic approaches, the utilisation of community development models which emphasize self-determination and community ownership, the provision of culturally sensitive treatment which respects traditional law and customs and involves existing structures of authority such as elders, including women.²²

Community-based crime prevention initiatives of this kind are badly needed within Aboriginal communities. These initiatives should be tailored through consultation with Aboriginal communities to meet the specific needs of the communities and focus on developing mechanisms for reducing contact with the formal criminal justice system. The Cape York Justice Study identified community crime prevention as a priority area for action on the Cape. The study astutely observed:

In the area of crime and justice, these strategies will need to be complemented by more specific community-based crime prevention and intervention strategies and initiatives. As far as the formal criminal justice system is concerned, these community-based strategies must be supported by efforts to divert offenders to these community-based interventions wherever possible.²³

There is an embedded recognition that the existing criminal justice system must work with and support community initiatives and 'be more sensitive and responsive to Indigenous needs and circumstances to ensure that it does not, as is presently the case, make things worse'.²⁴ The three key strategies identified in the study—crime prevention, diversion and improved mainstream justice—are emblematic of a new approach to Indigenous justice issues.

Nurturing a community base

Crime prevention strategies may need nurtured, stable, community structures as a prerequisite for the successful intervention in a number of areas. However, many Indigenous communities lack the necessary infrastructure within which to embed social crime prevention initiatives. As Hazelhurst argues:

When considering the social reconstructive potential of crime prevention, we quickly realise that it may well be futile to attempt to separate objectives to reduce crime from social development issues. In the absence of a 'community base', 'community based crime prevention' is a theory in search of reality.²⁵

17. For a list of state/Commonwealth initiatives see the Commonwealth Attorney-General's website: <<http://www.ncp.gov.au/agd/www/ncphome.nsf>>.

18. For a summary, see <<http://www.crimeprevention.wa.gov.au/>>.

19. Cunneen C, *The Impact of Crime Prevention on Indigenous Communities* (Sydney: Institute of Criminology, 2001).

20. Fitzgerald T, *The Cape York Justice Study* (Brisbane: Department of the Premier, 2001) <<http://www.communities.qld.gov.au/community/publications/capeyork.html>>; Aboriginal and Torres Strait Islander Women's Task Force on Violence, *Report* (Brisbane: Department of Aboriginal and Torres Strait Islander Policy and Development, revised ed, 2000) <<http://www.indigenous.qld.gov.au/pdf/taskforce.pdf>>; Memmott P, Stacy R, Chambers C & Keys C, *Violence in Indigenous Communities* (Canberra: National Crime Prevention, 2001).

21. Cunneen, above n 19.

22. Ibid 9.

23. Fitzgerald, above n 20, 113.

24. Ibid.

25. Hazelhurst KM (ed), *Legal Pluralism and the Colonial Legacy: Experiences of Justice in Canada, Australia, and New Zealand* (Sydney: Avesbury, 1995) xxi.

Thinking differently about crime prevention may involve having to nurture the community base at the same time as developing crime prevention strategies. This is a complex process (which is why we so often get it wrong) requiring considerable inter-agency coordination and constant attention to the issues of participation and control highlighted in Cunneen's study.²⁶ While reviewing practice on a global level related to Indigenous crime prevention, Capabianco and Shaw argue:

Crime prevention can take many forms, but strategies which focus on social development, and recognise the cross-cutting nature of the causes of crime and victimisation, have much potential for developing the capacities of individuals and communities to tackle causes. Given the severity of the problems facing Indigenous populations, the arguments for building programmes which are cross-cutting and 'whole of government' are even greater. The urgency of a proactive approach to community safety which recognises the strong links between social and economic factors, and the health of their communities, is greater among Indigenous populations than in any other population group.²⁷

Expanding the notion of crime prevention to include broader issues of community safety is very much a feature of contemporary crime prevention thinking in Australia and stems from work on international best practice.²⁸

Multiple risk factors

It is now widely accepted, that risk factors linked to unemployment, family breakdown, disengagement from education, poverty and social exclusion are important in shaping criminal careers and contribute to repeated forms of victimisation. Studies involving Indigenous communities identify additional, multiple risk factors. These encapsulate the above but also involve a catalogue of issues linked to the specific historical experiences of Indigenous people and their ongoing marginalisation, including forced removal policies, dispossession and institutional racism. These experiences are rarely taken into account in criminal justice programs as situating factors.

[M]any contemporary criminal justice systems use classification systems ... based on research on general offending populations rather than minority groups.²⁹

On the other hand, the criminal justice system has also been slow to evolve strategies which work with the particular strengths of Indigenous cultures, particularly possible sources of cultural resilience.³⁰ Working *with* Aboriginal culture, as opposed to working against the cultural grain, will also require an understanding that Aboriginal people may view invitations to become involved in local crime prevention initiatives with some misgivings. As Hommell suggests, the very term 'crime' deters many Aboriginal people due to its association with over-policing and deaths in custody. Additionally, many crime prevention strategies have involved excluding Aboriginal people, tagging them as the stereotype 'crime problem' in urban shopping malls and the streets of country towns.³¹

'Solving the Aboriginal problem'

Aboriginal people may not see criminal justice agencies as being in existence to *solve their problems*, when they have existed, historically at least, to *solve the Aboriginal problem*. One group of Aboriginal women consulted in Bandyup Prison (the majority of whom had histories of abuse, violence, abandonment and neglect) were asked whether they would report violence against them to the police. They said they 'would never go to the police for help ... The police are not a service – the service is to lock you up'.³²

An emphasis on community safety will result in stress being placed on the neglected issue of Aboriginal victimisation and on the 'multiple'—rather than simply criminogenic—risks factors identified by Capabianco and Shaw.³³ Indeed, some important preventive programs may not even describe themselves as crime prevention initiatives at all. For example, structured youth activities programs (always in high demand in remote communities) may not be directly

26. Cunneen, above n 19.

27. Capabianco & Shaw, above n 15, 6.

28. Sherman L, Gottfredson D, MacKenzie D, Eck J, Reuter P & Bushway S, *Preventing Crime: What Works, What Doesn't, What's Promising* (Washington DC: National Institute of Justice, 1997).

29. Capabianco & Shaw, above n 15, 7.

30. Hommell R, Lincoln R & Herd B, 'Risk and Resilience: Crime and Violence Prevention in Indigenous Communities' (1999) 32 *Australian and New Zealand Journal of Criminology* 2.

31. Blagg, above n 10; C Cunneen, 'Constructing a Law and Order Agenda' (1989) 38 *Aboriginal Law Bulletin* 6–9.

32. Law Reform Commission of Western Australia, *Thematic Summaries of Metropolitan Prison Consultations* (2004)

33. Above n 15. I have called these elsewhere those 'multiple or compound forms of crisis' that tend to exist in the Aboriginal context: Blagg H, *Crisis Intervention in Aboriginal Family Violence: Summary Report and Strategies and Models for Western Australia* (2000) <http://www.padv.dpnc.gov.au/projects/crisis_interv_summ.pdf> 28.

targeted at crime reduction but may reduce crime nonetheless as a spin-off from positive engagement with young people.

The national picture in relation to Aboriginal crime prevention initiatives and those that show particular promise has been comprehensively painted by Cunneen.³⁴ One of the longest running initiatives in Western Australia is the Derby Family Violence Prevention Project, established in the late 1990s. The project operates in Derby and the Mowanjum Aboriginal community and has evolved to take into account cultural factors by, for example, having separate young men's and young women's spaces and programs, and working with close support from local Elders. The project is supported by the local shire and an inter-agency support group, and has had a strong focus on alcohol issues (the project was initially situated in the sobering-up shelter), as well as on the philosophy of early intervention. The latter is particularly important in the Aboriginal context. Firstly, Aboriginal youths tend to form intensive relationships, often involving violence, earlier than many non-Aboriginal youths (so we may not just be preventing violence in later relationships but also intervening in current ones). Secondly, there are some embedded myths about Aboriginal men's lawful entitlement to violence (based on a distorted version of Aboriginal law) that need to be challenged early.³⁵ Thirdly, there are some very damaging cultural practices (that affect adults as well as young people) such as the destructive practice of 'jealousing'.³⁶ The LRCWA's consultations in Derby and Mowanjum revealed a strong sense of ownership of the program locally.³⁷

Value adding

The Derby model breaks free of some old, rigid thinking in the crime prevention field. Local people have been allowed to create initiatives in light of their own priorities and, rather than constantly creating new systems and structures, the initiatives have tended to rely on existing local structures and networks, adding value to them in the process. Critical writing on Aboriginal community initiatives has focused attention on the need for government to relinquish control and allow Aboriginal communities to define the issues for themselves and then work in partnership with government agencies to implement strategies. The principle of self-determination underpins this approach.

8. Self-determination and devolution

Self-determination does not necessarily imply complete independence; indeed, such a process could be devastating for communities. It speaks, instead, to Aboriginal aspirations for a renewed social contract between Aboriginal and non-Aboriginal Australia. One prominent commentator suggests that:

[S]elf-determination does not necessarily entail secession or the creation of separate states but can be articulated through the *restructuring* and *renewal* of existing relations between Indigenous organizations and Government to create arrangements to reflect and support a diversity of Indigenous circumstances.³⁸

'Restructuring and renewal' have a similar resonance to Havemann's notion of 'synthesis and synergy'.³⁹ Both imply dialogue and a willingness to think imaginatively (in current parlance, to 'think outside the square') when dealing with Aboriginal communities and to let go of pre-existing forms of 'common sense'. Self-determination also involves being aware of the different life circumstances of Aboriginal people – there cannot be a 'one fits all' solution.

A 'vibrant and decentred Aboriginal law'

A similar awareness informs the approach taken by the Cape York Justice Study to the question of self-determination, which envisages a role for a 'vibrant decentred Aboriginal law' within a pluralistic framework, rather than one 'single imposed system'.

34. Above n 19.

35. Because these myths of Aboriginal male entitlement to violence draw on, supposedly, cultural factors, they need to be challenged on a cultural plane, and only Aboriginal people are equipped to do this. The reason why so many violent offender programs fail with Aboriginal men may be the fact that they neglect the cultural dimension in favour of purely cognitive/behavioural forms of treatment.

36. Blagg H, *Working with Adolescents to Prevent Domestic Violence: The Aboriginal Town Model* (Canberra: Attorney General's Department, 1998) vol 2. I describe 'jealousing' as a set of deliberate strategies, often involving multiple players, designed to arouse jealousy in relationships to test out commitment. Jealousing generally leads to or involves violence. Jealousing is viewed as a form of family violence in the West Kimberley, due to its tendency to destabilise family life. People in the Derby area believe it results from the disruption of skin relationships since colonisation, the interpolation of western ideas about relationships, and the general sense of insecurity engendered by community fragmentation. See also Crime Research Centre and Donovan Research, *Young People's Attitudes to Domestic Violence* (Canberra: Attorney General's Office, 1999).

37. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Derby and Mowanjum*, 4 March 2004. For recent positive appraisal of the program, see Polina A & Perdrisat I, *A Report of the Derby/West Kimberley Project: Working with Adolescents to Prevent Domestic Violence* (Canberra: Attorney General's Department, 2004).

38. Jonas W, *Aboriginal and Torres Strait Islander Social Justice Commissioner, Community Justice, Law and Governance: A Rights Perspective* (Speech given at the Indigenous Governance Conference, Canberra, 3–5 April 2002) 2 <http://www.hreoc.gov.au/speeches/social_justice/community_justice.html> (emphasis added).

39. Havemann, above n 6.

There needs to be an institutional space or spaces created for the accommodation of Aboriginal law within the broader Australian legal system. There must be institutional design for the administration of local order by Aboriginal communities. There must be 'pods of justice' distinct in form and function, autonomous but contributing to a federal whole. Authority must be devolved to Aboriginal communities so that they may first determine the law and order issues of theirs.⁴⁰

Fitzgerald's vision of devolution shifts discussion firmly in the direction of negotiated settlements with Aboriginal communities, creating new 'sub-contracts' with Indigenous communities with '[c]entralised government deferring to local institutions to organise local life to the greatest extent possible'.⁴¹

Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner argues for an approach based on the development of 'governance structures and regional autonomy' and identifies community justice mechanisms as 'an integral component of Indigenous governance'.⁴² They are essential, the Commissioner insists, to deal with the damage that both violent communal behaviour and the practices of the justice system continue to inflict on Indigenous communities. However, to be successful, community justice mechanisms 'must be accompanied by a return of control and decision making processes to Indigenous communities'.⁴³ Current forms of government control are 'based on a perpetuation of the marginalised position of Indigenous people, combined with a denial of any collective or historical dimension to Indigenous people's experiences'.⁴⁴

9. The Northern Territory

The Northern Territory experience is instructive in a number of areas. The development of law and justice initiatives in remote communities, as part of the Territory's Aboriginal Law and Justice Strategy, reveals the importance of nurturing credible structures of self-management on Indigenous communities and the importance of government agencies working in partnership with these structures. The success of initiatives such as Night Patrols⁴⁵ and community owned Safe Houses (generally women's initiatives), backed up by the authority of community law and justice committees, community councils and clan structures, provides a number of valuable insights into the potential for Aboriginal self-management and self-policing.

Establishment practices and the cycle of failure

A number of reports⁴⁶ illustrate the importance of what they call 'good establishment practices' when developing initiatives for remote communities. While the authors are writing mainly about Night Patrols, the lessons are applicable to other community justice initiatives. They note the tendency for initiatives in remote communities to be established, enjoy brief success, then fail – a process they call the 'cycle of failure'. This cycle is largely a consequence of 'poor establishment practices', including inadequate community consultations and planning, and a lack of appropriate outside support for initiatives by government agencies.⁴⁷ Ryan also blames the breakdown of 'traditional social management and control structures under the impact of social change' as well as 'alcohol related issues' and 'inter-generational and inter-familial conflicts'.⁴⁸

To break the cycle of failure, Ryan recommends a 'phased process of support' for remote communities wanting to establish patrols.⁴⁹ This process would be designed to assist the community in assessing its preparedness (culturally and structurally) for the patrol, and then to assist it in setting up community support structures and operational support mechanisms. These principles have informed a number of successful law and justice initiatives within communities in the Northern Territory (such as Lajamnu and Ali Curong) where Women's Night Patrols and Safe Houses work with traditional 'Elders' committees and a community 'Law and Order' council to police 'no grog' policies and prevent family violence. There is no quick fix; these strategies may take up to two years to mature.

40. Fitzgerald, above n 20, 113.

41. Ibid.

42. Jonas, above n 38, 2.

43. Ibid 3.

44. Ibid.

45. Night Patrols, or Community Patrols as they are known in Western Australia, originated in the Northern Territory. The original scheme was the Julalikari Patrol in Tennant Creek, praised by the Royal Commission into Aboriginal Deaths in Custody as a model for local self-policing and crime prevention. They are discussed later in the paper.

46. See, for example, Ryan P, *Lajamanu Night Patrol Service* (Darwin: Office of Aboriginal Development, 2001); Ryan P & Antoun J, *Law and Justice Plans: An Overview* (Darwin: Office of Aboriginal Development, 2001).

47. Ryan, *Lajamanu Night Patrol Service*, ibid.

48. Ibid 2.

49. Ibid 5.

Community safety and justice planning workshops

Ryan also summarises a number of critical issues in a paper on Aboriginal Law and Justice Strategy (ALJS),⁵⁰ including the lessons from 30 Law and Justice workshops,⁵¹ called 'Community Safety and Justice Planning Workshops', kindred processes to the 'Negotiating Table' proposed in the Kimberley region⁵² and the 'round table' approach currently being adopted in the far north of Queensland as part of the government response to the Cape York Justice Study.

Ryan notes the importance of 'workshopping' issues:

The experience of the ALJS is that workshopping with the communities is important in order to understand and work constructively with the traditional and contemporary history of individual communities that often shaped the community dynamics, management systems and community responses and concerns. Workshopping was also useful in identifying community capacity, and the likely strengths and impediments that may affect the process. These can vary from community to community.⁵³

The workshops provided the forum from which community law and justice committees emerged. These became 'the vehicle which communities have used to address many of the safety and violence concerns they were reporting'.⁵⁴

The workshops had a number of purposes: they were a means of gathering information; engaging the community through a participatory planning process; ensuring that local 'accumulated knowledge' provided the basis for strategies; and facilitating community debate on 'complex and sensitive issues'. Importantly, the workshops stimulated a 'process of community cohesion building' by bringing together a diversity of groups and organisations.⁵⁵

Gender and communication

The workshops included a number of separate male and female sessions, followed by joint meetings. This culturally appropriate process was necessary so that the divergent views of men and women could be identified – they often defined the issues in different ways and had different priorities; men saw alcohol and women saw family violence as the main problem. Moreover, separate workshops reflected (and respected) the different roles men and women performed in terms of ceremony and their contrasting (though complimentary) roles and responsibilities. It was recognised that in many forums women were often unable to access decision-making processes due to 'vested interest male groups' who controlled the agenda and dictated the recommendations from the meetings.

Other issues encountered that have direct bearing on conditions in remote Western Australian communities included problems associated with clan and family differences, Ryan writes:

Systems for communicating information around an Aboriginal community are often complex and can be difficult to use for the unwary. Communication systems are often predicated on obligatory and affiliate systems and are linked to responsibilities for clan and extended family.⁵⁶

Ryan also notes a number of other salient factors: the presence of different language groupings can lead to frequent failures of information sharing around the whole of the community; and different tribal and clan groups may not wish to meet together – a not uncommon scenario in Western Australian communities such as Balgo where separate 'top' and 'bottom' camp meetings are normal practice.

Law and justice planning

The significance of the law and justice planning process lies in its capacity to finely tune strategies that meet the requirements of individual communities and to work with the grain of local culture and tradition. Each plan is unique to that particular community; however, there are a number of common processes and strategies. A typical remote community Law and Justice Committee would have a dual role, one formal and the other informal. On the one hand, it would act as the point of interface with the formal criminal justice system, be involved in pre-court conferences,

50. Ryan P, *Indigenous Community Engagement in Safety and Justice Issues: A Discussion Paper* (Darwin: Aboriginal Law and Justice Strategy, 2004).

51. The remote communities involved included Ali-Curing, Ngukurr, Numbulwar, Port Keats, Lajamanu, Yuendumu and Willowra.

52. Discussed below p 336.

53. Ryan, above n 50, 3.

54. Ibid.

55. Ibid 4.

56. Ibid 5.

make recommendations to the courts, develop diversionary strategies and act as a focal point for community justice issues. On the other hand the committee would be involved in community-level dispute resolution, coordinating community responses to law and order issues, and maintaining relations with outside agencies (police, corrections, family and children services, and others).⁵⁷

Northern Territory Law Reform Committee

The recent *Report of the Committee of Inquiry Into Aboriginal Customary Law* by the Northern Territory Law Reform Committee supports the practice of law and justice planning within communities. Furthermore, the Committee sees Aboriginal customary law playing a role in this process.

Aboriginal communities should be assisted by government to develop law and justice plans which appropriately incorporate or recognise Aboriginal customary law as a method in dealing with issues of concern to the community or to assist or enhance the application of Australian law within the community.⁵⁸

The Committee noted that issues within communities differ enormously and that there cannot be a 'one-size-fits-all' solution; rather solutions needed to be tailored to meet community defined needs 'in any way that the community thinks appropriate'.

The inquiry's general view is that *each Aboriginal community will define its own problems and solutions*. Models may deal with alternative dispute resolution, family law issues, civil law, criminal law, or with relationships between Aboriginal communities and government officers/private contractors while in Aboriginal communities, and so on.⁵⁹

The committee recognised—based upon a wealth of oral and written testimony—that traditional law and its forms of dispute resolution can work very effectively on some community issues. For example, the Committee envisaged scenarios where, suitably resourced, communities would develop protocols with police on the cautioning of juvenile offenders – a practice also advocated in the Cape York Justice Study. The only limitation placed by the Committee on community plans was that they should not infringe human rights.⁶⁰

However, there were other issues that may require the involvement of the general law. Family violence was identified as an area where Australian law might have advantages, given concerns that customary practices in this area may simply reinforce the power of male Elders, who might themselves be perpetrators. At the same time the Committee acknowledged that Aboriginal dispute resolution mechanisms, which have a basis in traditional law, have been effective in family violence in some communities.⁶¹ The Northern Territory experience reveals instances where Aboriginal law has been unable to meet the demands placed upon it by alcohol and family violence. The Ngaanyatjarra, Pitjantjatjara, Yankunytjatjara (NPY) Women's Council has been a consistent advocate for white law and white police to deal with issues it sees as being beyond the competence of Aboriginal law in the NPY region. Other Aboriginal women's voices, however, argue that Aboriginal law can be effective in combating family violence and provide examples of the two laws working together on these issues.

The Kurduju Committee

The Kurduju Committee brings together the communities of Ali-Curong, Lajamanu and Yuendumu. Each community has been involved in developing law and justice strategies for some years under the Territory's Aboriginal Law and Justice Strategy. Each community has its own law and justice committee which implements the community's law and justice plan. The Kurduju Committee was formed because of frustration with government agency strategies on family violence in remote communities, particularly the lack of recognition given to existing work on communities that has proven successful.⁶² The community committees felt that the image being portrayed of Aboriginal women in remote communities was one of helpless, docile victims of traditional violence, incapable of developing strategies to combat violence. The implication being that only law and policing strategies driven from outside the community and based

57. Ibid.

58. Northern Territory Law Reform Committee, *Report of the Committee of Inquiry Into Aboriginal Customary Law* (Darwin, 2004) recommendation 4.

59. Ibid [1.5].

60. Ibid [6.10].

61. Ibid [5.2].

62. During a visit to Lajamanu and Ali-Curong by the author in 2000, the law and justice committees expressed some unease at the views being expressed in urban areas about the inability of communities and community structures to work on family violence issues. In one instance a family violence prevention lawyer in Katherine publicly suggested that Lajamanu was incapable of dealing with family violence and that the male elders ran the policy on family violence to their own ends. This outraged the women on the committee who ran their own Night Patrol and Safe House and worked with the police to combat the problem. The lawyer was forced to publicly retract her statement.

upon the general law could be effective. In its submission to the Northern Territory's Committee of Inquiry Into Aboriginal Customary Law, the Kurduju Committee rejects this view.⁶³ It also raises questions about the relevance of strategies devised in urban areas to the realities of life in remote communities. This was particularly the case in regard to policies and programs on family violence based upon western feminist principles and targeted towards increased criminalisation of family violence. The submission is particularly critical of 'legal services' that are simply dropped onto communities with no understanding of the cultural context or the fact that these communities operate under two laws, not one. The Committee sees its role as fostering better coordination and cooperation between agencies and the communities and providing sound advice on appropriate strategies. It sees a need for community capacity building, improved access to legal services (providing these are willing to work within a community building paradigm), and mechanisms for ensuring that matters relating to Aboriginal law are taken fully into account by the courts and other justice agencies.⁶⁴

10. Community structures

As I have intimated earlier, we have to be on guard against tendencies to impose non-Aboriginal definitions of 'community' onto Indigenous communities. The term is problematic when used in connection with Aboriginal notions of collectivity, obligation and loyalty. The notion of community is heavily value laden and resonates with images of collective solidarity and *gemeinschaft* that are quite inappropriate to Indigenous communal practices, which tend to be labile and fluid and only consistent in relation to the demands made by family, clan and skin.⁶⁵ Moreover, Aboriginal townships are artificial constructs, fractured along numerous demographic, racial, religious, affiliate and elective fault-lines. Mosey writes in relation to the *Kutjungka* region in the East Kimberley:

The word 'community' is very deceptive when applied to the conglomerate of language groups, ages, families, and vastly differing agendas, both Aboriginal and non-Aboriginal, existing in the Kutjungka region. In fact, most 'communities' seem to only operate as a community of people with a common purpose when they are supporting their football team, or for the purposes of external administration and funding service provision.⁶⁶

Another dimension of this issue that needs to be addressed is the way government administration created 'regional' structures that do not correspond to Aboriginal patterns of life. Aboriginal communities which associate with the spinifex areas of the state voiced some concerns that they were governed from salt-water regions. It is only recently that this problem has been addressed, through developments such as the 'cross-border' policing arrangements being negotiated between Western Australia, the Northern Territory and South Australia on joint policing of the NPY lands, and the kinds of arrangements being proposed in relation to self-management in the Kutjungka/Tjrabalan region.⁶⁷

A number of professionals with significant experience working in the desert/spinifex areas of the state voiced enthusiasm for some governance structures linking communities from the Balgo area, through to Wiluna and Warburton, rather than constantly feeding initiatives through existing regional governance structures (which run from west to east).⁶⁸ The abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) regional councils in June of 2005 raises particular concerns in this regard. ATSIC regional councils represented one of the only alternatives to the rigid geographical administration of government. There is a real danger that future regional structures that replace ATSIC regional councils will bear little relation to the traditional groupings of Aboriginal people. Government defined regions are artefacts of the bureaucratic imagination and bear little resemblance to the lines of connection operating in Indigenous communities. Community consultations suggested that 'town' agencies (Broome and Port Hedland for example)—even Aboriginal ones—did not understand desert issues where Aboriginal law still governed most aspects of daily life. A number of remote communities consulted by the LRCWA wanted to see some big meetings organised specifically to deal with the law issues that faced people living in these remote regions.

63. Combined Communities of Ali-Curong, Lajamanu and Yuendumu Law and Justice Committees, *The Kurduju Committee Report* (December 2001) <[http://www.dcdsca.nt.gov.au/dcdsca/intranet.nsf/Files/RDPublications/\\$file/Kurduju.pdf](http://www.dcdsca.nt.gov.au/dcdsca/intranet.nsf/Files/RDPublications/$file/Kurduju.pdf)>.

64. Ibid.

65. The notion of community within the 'western' tradition is heavily imprinted simultaneously with images of the rural idyll and what Benedict Anderson called the 'imagined community' of the nation state. Anderson B, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso and New Left Books, 1983). There are significant tensions between these constructions of community and those operating within the Aboriginal domain.

66. Mosey A, *Dry Spirit: Petrol Sniffing Interventions in the Kutjungka Region (WA) 1999–2000* (Mercy Community Health Service and Office of Aboriginal Health, 2002) 8.

67. See below pp 334–35.

68. Thanks to Trevor Jewel of Mercy Community Health Services for discussing this issue.

Desert meetings and desert facilities

For example, Elders at the Kunuwaratji community consultation wanted to convene a 'bush meeting' where all Elders in the area would meet with members of the judiciary to talk about Aboriginal law; the meeting would be open to all communities in the East Pilbara. Similarly in the Goodabinya community (Marble Bar) the men's meeting wanted to hold a big meeting involving all the East Pilbara communities and representatives from the key agencies, police and judiciary to discuss a range of issues; they were especially concerned with issues of alcohol, drugs (ganja, amphetamines) and antisocial behaviour.

The Jigalong community had been discussing the possibility of establishing an Outstation Program for some years, and there had been regular discussions with government agencies regarding the process. A camp at Puntawari, 40 kilometres east of the community, had been established but with only rudimentary infrastructure. One potential use of the Puntawari camp was as a place to send young 'troublemakers' who, away from town influences, would be taught the traditional ways by Elders. There had also been plans to use Puntawari as a 'family healing centre' – a place for families who had been experiencing family violence, as well as for men after release from prison; the view being that many were not ready to be just dropped back into family/community life. The problem was that government agencies saw this as too costly, as places such as Puntawari were too 'remote' from existing centres. Aboriginal people in these areas want to see the necessary capacity generated for such structures to be viable.

During the LRCWA's meetings with prisoners, this problem was also voiced in relation to prison building. There were demands for investment in rural and remote facilities as well as outstations.

Instead of prisons, build a community facility that can be used regionally or by several communities. Its main purpose is rehabilitation and restoration through education/training, employment training, courses for employment opportunities, drug, alcohol, violent and sex offending. Staffed by trained Aboriginal people and non-Aboriginal people who are not prejudiced. A place that family can come to and stay especially when death occurs in or out of prison, or when children are born so people in facility can do the cultural business and family is not made to suffer because person is in prison.⁶⁹

And:

Why build a new prison in Roebourne, when you could build a facility run by Elders, out in the desert? Allow people to shame their own people; relations might be best [for this].⁷⁰

Holistic strategies are premised on the assumption that systemic problems require systemic solutions rather than piecemeal reforms. Past reforms in the area of Indigenous over-representation in the criminal justice system have suffered from a tendency to see the issue as a suite of discrete problems that can be resolved by simply expanding services employed in the non-Aboriginal context. Agencies are permitted to work in a piecemeal and fragmented fashion, working on their own discretely defined set of problems, in isolation from other agencies and from the communities themselves. Furthermore, strategies are often enacted with little thought given to the unintended consequences they may have on other initiatives in play. Examples of this abound in the area of policing, perhaps the most sensitive issue in relation to Aboriginal people and the justice system.

11. Policing communities and community policing

Problems occur when the aims and goals of intervention are determined in advance rather than arrived at through negotiation with Aboriginal communities. The community—that is, the community-based service delivery model I criticised in the introductory section—becomes simply the focus of intervention rather than partners in defining the priority issues.

The tension between 'effective' policing and reducing levels of contact with the system was apparent in the LRCWA's community consultations. It occurred, for example, in situations where priorities and campaigns defined as important in the metropolitan area—such as road safety—were implemented in an unmediated fashion on remote communities in ways that undermined community cohesion by imposing unrealistic norms of lawful behaviour.

69. Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Pilbara*, 6–11 April 2003, 17.

70. Author's field notes from Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Pilbara*, 6–11 April 2003.

Communities wanted to see a police presence to halt the violence and disorder and break the cycle of crime in communities that ensured high levels of contact with the system (family violence, grog running, sniffers out of control, young people 'humbugging' and running amok). At the same time they were bewildered when the police then focused excessively on what were perceived by the community as minor, *non-destructive* acts of law infringement, essential under the realities of Aboriginal life in remote communities, leading to *increased, not reduced, contact with the system* (fines and incarceration) and seriously disrupted life in the community.

The LRCWA's thematic summaries of consultations with Aboriginal people in remote communities and in prison identified such concerns. These involved situations where unlicensed drivers drove only around the community or on dirt roads, or where, so called, 'un-roadworthy' vehicles were using dirt roads. The police maintained that they were simply imposing the law. The communities considered this to be unfair because these laws do not take into account the unique conditions of remote Aboriginal communities.

Roadworthy: where are the roads?

The communities question the relevance of notions such as 'roadworthy' to situations where roads (in the urban and rural sense) do not exist. They suggest that before imposing these laws the government should first fix up the roads – equal implementation of the law is not matched by equal treatment in terms of infrastructure. Below are some typical examples from the consultations.

It is the case that many Aboriginal people do not have driver's licences; however, they are not driving on main roads or in towns.⁷¹

A lot of Aboriginal people were jailed for driving without a licence or for travelling between communities but not on a gazetted road ('back roads'). Jailing for minor offences, such as these 'doesn't make sense'. Aboriginal people need to travel between communities and the back roads allow them to move freely between the communities. The police sometimes close back roads. The communities use the back roads to travel to and from court and to transport the sick to enable them to receive medical treatment.⁷²

Aboriginal people in the communities without a driver's licence may still have to travel to court and there is usually no other option but to drive.⁷³

Funeral business is very important business, people have to go and have no choice. The police know this and wait for you up the roads, check vehicle and licences. Put the people in gaol.⁷⁴

You will break Aboriginal law if you don't go to a funeral.⁷⁵

Police are strict on transport – pull you in for cracked headlight, even going to funerals.⁷⁶

The meeting voiced considerable criticism of police behaviour at funerals and their tendency to lie in wait for Aboriginal people driving to them. There was also some anger that the police treated driving conditions in the area as similar to urban areas, imposing standards of roadworthiness inappropriate in places where there were no roads.⁷⁷

These aren't sealed roads, you have more problems with cars, this is the desert.⁷⁸

Problem-oriented policing

The problem in relation to policing remote communities is the tendency for the police (although this applies equally to other agencies engaged with communities on issues as diverse as health, mental health, education and family violence) to arrive with a predetermined formula and simply impose it on the community. This model of policing has been criticised as being rigid and mechanistic, and unsuited for work in diverse cultural settings. Problem-oriented approaches, a concept first popularised by Herman Goldstein, are decentralised and proactive, where police work with communities to define the key or 'hot' issues in the locality, as defined by the community. The problem in some

71. Ibid.

72. Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Pilbara*, 6–11 April 2003, 14.

73. Ibid.

74. Ibid 13.

75. Ibid.

76. Author's field notes from Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Pilbara*, 6–11 April 2003.

77. Ibid.

78. Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Jirungadji Village, Nullagine*, April 2003.

remote areas is the tendency for the police to operate in isolation from key priorities as defined by the community.⁷⁹ This problem has been identified elsewhere, when police arrive to fulfil what they perceive to be their overriding goal, which conflicts with locally established priorities. McNamara, for example, provides evidence from Canada where Native Constable programs were established on Aboriginal lands, operating on a traditional incident-driven model of policing.⁸⁰ The underpinning approach was to impose law and order on communities, without reference to the impact this may have on other important strategies, reducing over-representation and increasing self-determination:

Native Constable programmes were primarily concerned with making policing more effective. They were not fundamentally concerned with reducing incarceration rates of Aboriginal people, though supporters of the programme would likely prefer this to happen. If it didn't, however, the programme would not be seen to have failed. Social control, not self-determination, was the main concern.⁸¹

The LRCWA was told by senior police officers that rolling out police services on to remote communities, as part of the Gordon Inquiry implementation strategy,⁸² would inevitably mean an increase in the number of Aboriginal people being arrested and jailed. Communities might consider this to be an acceptable price to pay for reduced levels of family violence and child abuse. They may not, however, see increases in already unacceptable levels of incarceration for vehicle and property related offences as acceptable, just or fair.

Warden schemes and by-laws

This has occurred in relation to justice initiatives such as warden schemes and by-laws. Unfortunately they have been sold as a panacea for a host of law and order and security issues on remote communities and have been over-sold as a solution.

The history of warden schemes in Western Australia is linked to the *Aboriginal Communities Act 1979* (WA), which originally applied to areas in the West Kimberley region. The Act provides for Aboriginal councils to make by-laws for certain purposes. 'The council of a community to which this Act applies may make by-laws relating to community lands for or with respect to a number of specified matters'.⁸³ However, the question of enforcement of the by-laws constructs a tension between the council's ability to develop law and its inability to implement it. Under s 7(2)(a), the enforcing authority is clearly the police: the by-laws 'may empower a member of the police force'. Although, one critic of the Act noted the intent of the law was that the police officer would be an Aboriginal Police Liaison Officer.⁸⁴

McCallum also reports consultations with communities on the issue:

Time and again, it was stressed by community member councillors that they are unable to implement or enforce their by-laws adequately, as they lack the legislative power under the current terms of the Act to enforce by-laws. Despite the original intentions of the Act, enforcement is still the domain of a member of the Police force. Unfortunately, this does not address the reality that most Aboriginal communities simply do not have access to frequent Police support.⁸⁵

McCallum recommended that the Act be amended to give enforcement powers to wardens. However, experience suggests that this, itself, may create more problems than it resolves. Consultations with communities suggested that enforcement powers might not always be utilised with the interests of the whole community in mind. There were a number of competing views on the question, with some people in communities believing that wardens should have strong powers to enforce community by-laws, while others were of the view that wardens should work under the police, with the latter retaining the enforcement powers. Others firmly believed that police and wardens should work in partnership but independently of one another.

There is an inherent tendency for coercive policing powers to be misused unless restrained by oversight, visibility and mechanisms of accountability. This is recognised in both law and policy in Western Australia. One senior Aboriginal man in the Kimberley said that it was unreasonable to expect Aboriginal people in communities to behave any

79. Goldstein H, *Problem Oriented Policing* (London: McGraw Hill, 1990).

80. McNamara L, 'Aboriginal Justice Reform in Canada: Alternatives to State Control', in Hazelhurst K (ed), *Perceptions of Justice: Issues in Indigenous and Community Empowerment* (Sydney: Amesbury, 1995).

81. Harding R, cited in McNamara, *ibid* 3.

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

83. *Aboriginal Communities Act 1979* (WA) s 7.

84. McCallum A, *Final Report to the Aboriginal Affairs Planning Authority on the Review of the Aboriginal Communities Act, 1979* (WA), as it Applies to the Kimberley Region of Western Australia, Vol 1 (Peth: Aboriginal Affairs Planning Authority, 1992).

85. *Ibid* 7.

differently from anyone else when granted wide coercive powers without legal and administrative constraints. In his view, warden schemes and by-laws should be abolished, in favour of self-policing based on Aboriginal customary principles, supported by more effective policing by the general police.

Whatever the views on warden schemes and by-laws, there was a virtual unanimous desire in communities for a full-time police presence. The view from Warburton was typical.

The situation persists that there is no full-time police presence between Laverton in Western Australia and Marla Bore in South Australia, in spite of the fact that the area is occupied by 4 500 predominantly Ngaanyatjarra and Pitjantjarra people with well-documented problems of serious offending, chronic substance abuse and community safety. Similarly, the administration of justice occurs on the basis of a visiting magistrate on circuit, who has little exposure to the law and justice issues in the social and cultural contexts of those communities.⁸⁶

New post-Gordon strategies will see a full-time police presence on nine remote communities, including Balgo and Warburton. It is hoped that these strategies will improve law and order on these communities, perhaps making by-laws and warden schemes redundant (many offences under by-laws are offences under the general law). Running both simultaneously could be a recipe for net-widening; offenders being charged with both by-law and general law offences. The LRCWA has witnessed instances where offences against by-laws and the general law have combined to create a new kind of 'trifecta' in remote areas. During consultations in the Pilbara there were situations where by-laws and warden schemes were being offered to communities close to towns, with a police presence as a solution to law and order problems in the communities. Surely, improved liaison with the police would be a better solution. On the other hand, warden schemes and by-laws do enjoy support in some communities. Bidyadanga in the West Kimberley has had some success in developing by-laws on alcohol related issues that have wide community support.

Aboriginal community patrols

Aboriginal community patrols provide an alternative means of self-policing in remote Aboriginal communities. This is the model currently being employed in the Northern Territory and Queensland, where patrols run by communities without formal police powers work through mediation and Aboriginal forms of dispute resolution, leaving enforcement to the police. Patrols fulfil a diversity of functions, largely determined from within Aboriginal communities. A recent review of night patrols in the Northern Territory by the Tangentyere Remote Area Night Patrol Unit, for example, found a diversity of activity typical of Indigenous patrols:

Night Patrols perform a huge range of functions, according to the needs of their communities and the resources they have available. They act as a nexus to connect people and services such as clinics, courts, Police, community government councils, and family. They mediate disputes, remove people from danger, keep the peace at events such as sports carnivals, are consulted by agencies such as courts for input into sentencing, and play a crucial role in the development of community justice groups.⁸⁷

Aboriginal Patrols and Community Justice Groups across Australia are the 'major and longest running crime prevention programs in Indigenous communities'.⁸⁸ Cunneen argues that local evaluations of patrol programs have been positive, showing reduced levels of juvenile offending (including criminal damage, motor vehicle theft and street offences), reduced fear of crime, and reductions in drug and alcohol related problems.⁸⁹ Cunneen's review of crime prevention initiatives confirms reviews by Blagg and Valuri⁹⁰ and Memmott;⁹¹ the latter arguing that patrols are a 'tried and proven program type', effective on a local level in reducing crime and antisocial behaviour by:

intervention, mediation and dispute resolution between people in conflict, and the removal of potentially violent persons from public or private social environments.⁹²

Western Australia has a number of long-running and well-established Aboriginal community patrols operating across the state. There are currently 21 community patrols in Western Australia, active in rural towns and in metropolitan

86. The Shire of Ngaanyatjaraku and Warburton Community, *Ngaanyatjaraku Community Law and Justice Submission to the Attorney General of Western Australia* (Warburton: Shire of Ngaanyatjaraku and Warburton Community, 2002).

87. Walker J & Forester S, 'Tangentyere Remote Area Night Patrol' (Paper presented at the Crime Prevention Conference, convened by the Australian Institute of Criminology and the Commonwealth Attorney General's Department, Canberra, 12–13 September 2002).

88. Cunneen, above n 19, 50.

89. Ibid 50.

90. Blagg H & Valuri G, *An Overview of Night Patrols in Australia* (Canberra: National Crime Prevention and ATSI, 2003); Blagg H & Valuri G, 'Self-Policing and Community Safety: The Work of Aboriginal Patrols in Australia' (2004) 15 *Current Issues in Criminal Justice* 205–220.

91. Memmott, above n 20.

92. Ibid 67.

Perth. The role of patrols varies significantly from place to place and includes crime prevention, reduction in the fear of crime, and community safety. The majority of patrols are funded principally with grants from the Department of Indigenous Affairs, with support from Community Development Employment Projects for patrollers' wages. However, a number (in Perth, Geraldton and Kalgoorlie) have been selected for increased funding due to factors associated with the larger scale of their activities.⁹³

Aboriginal patrols differ markedly from mainstream police, in that they are largely staffed by volunteers, operate without an arsenal of formal police powers and do not offer a 'commodified' security service, in the manner provided by private security. There are similar developments in other post-colonial societies (such as in South Africa and South America) where devolved local governance structures are developing their own forms of policing. These are called 'local capacity policing' because the forms of policing developed are owned by the community and are aware of local sensibilities and needs. They are directly involved in strengthening the capacities of communities to develop resilient governance structures.⁹⁴ They have emerged particularly in situations where Indigenous people have been unable to attract consistent and adequate forms of policing by state authorities.⁹⁵ A number of patrols, such as the Zwelethemba program near Cape Town in South Africa, combine self-policing with local dispute resolution.⁹⁶ In some ways these are reminiscent of the law and justice strategies in the Northern Territory.

Aboriginal community patrols are, essentially, local policing initiatives by Aboriginal people, evolved to intervene in situations where Indigenous people are at risk of enmeshment in the criminal justice system, or where they face multiple hazards associated with community disorder, alcohol, drugs and violence.⁹⁷ The term 'policing' is employed in a very wide sense to describe a range of preventive measures designed to head off disorder and ensure community safety. Bayley and Shearing describe these broad forms of policing as 'anticipatory regulation and amelioration'.⁹⁸ The resilience of community patrols, both in Western Australia and nationally, illustrates that it is possible to develop strategies that involve Aboriginal people in policing their own communities without an arsenal of formal police powers. Patrols rely on good working relationships with the police and other agencies but, because they are not involved in the direct implementation of the criminal law, they can remain functionally independent of them. This could be said of community justice mechanisms generally.

12. The Kutjungka/Tjurabalan regional process

The need for sound coordination and capacity building processes is now widely acknowledged by government (in theory, if not always in practice). The recent inquiry into child abuse and family violence in the Aboriginal community assigns considerable importance to capacity building and the improved coordination of services as necessary steps to reducing family violence in the long term.⁹⁹ The capacity building approach informs new initiatives around work with children, young people and families by the Department of Community Development. The approach is intended to 'work with', rather than 'work for', these groups and find common solutions.¹⁰⁰ There is little one can take issue with in these ideals – the problems begin when the ideals are operationalised. Some recent initiatives reveal the difficulties associated with the constructing capacity in remote regions. Developments in the Kutjungka (East Kimberley) region

93. A note on the 'Ten Man Committee'.

Patrols have been in existence in some form or another in Western Australia for a considerable period of time. During the consultations, Elders in the Pilbara region recalled the 'Ten Strong Men' or 'Ten Man' committee, which operated from the Strelley community some years ago (until the mid/late-1980s) to pick up people drinking in Port Hedland and Roebourne and take them back to the community. A variant of the committee also operated out of Jigalong (covering Newman). The Ten Man committee is mentioned by the ALRC, in relation to 'Dispute Settlement' and 'Self Policing' along with a number of other self-policing initiatives across Australia: see ALRC, above n 4, 105. They would pick up drunken, rowdy people from Port Hedland/Roebourne and transport them back to the Strelley community to face a community meeting: '[T]he community selects what is called the 'tem-man' committee. The committee's function is to apprehend and bring wrong-doers before a community meeting. The meeting will ... determine an appropriate punishment' (at 106). The scheme ceased operating because of complaints about violence and loss of police support. Many Aboriginal people, as well as the non-Aboriginal law, would have difficulties with the degree of coercion and violence used to 'apprehend' and 'punish' wrongdoers. The LRCWA consultations found no clear consensus as to whether the structure would be appropriate—or acceptable—today. Some from the Port Hedland area said it would not work, or be tolerated, any more (for example, due to the degree of coercion employed). They said that they could no longer force people to come back to the community. The LRCWA was told that the Ten Man committee was accused of 'kidnapping' by church and welfare groups and also lost the support of the police. On the other hand, elders from Jigalong and Kunawaradj in the remote East Pilbara, said that the Ten Man committee had been effective and that the situation in regards to alcohol and violent behaviour had worsened in its absence.

94. Wood J & Font E, 'Building Peace and Reforming Police in Argentina: Opportunities and Challenges for Shantytown' (Paper presented at *In Search of Security: An International Conference on Policing and Security*, Montreal, February 2003); Leach P, 'Citizen Policing as Civic Activism: An International Inquiry' (Paper presented at *In Search of Security: An International Conference on Policing and Security*, Montreal, February 2003); Johnston L & Shearing C, *Governing Security: Explorations in Policing and Justice* (London: Routledge, 2003).

95. Leach, *ibid*; Shearing CH, 'Transforming Security: A South African Experiment' in J Braithwaite and H Strang (eds), *Restorative Justice and Civil Society* (Cambridge: Cambridge University Press, 2001).

96. Shearing, *ibid*.

97. Blagg & Valuri, *An Overview of Night Patrols in Australia*, above n 90; Blagg & Valuri, 'Self-Policing and Community Safety', above n 90.

98. Bayley DH & Shearing CH, 'The Future of Policing' (1996) 30 *Law and Society Review* 592. It is becoming common practice in the literature on policing to distinguish between the police as an agency and *policing* as a broader activity carried out by a diversity of government and non-government organisations as well as the private sector.

99. Gordon Inquiry, above n 82.

100. Department for Community Development, *Capacity Building Strategic Framework, 2004 to 2006*, Draft Report (Perth: Department of Community Development, 2004).

provide an interesting case study. Conditions in the Kutjungka region of Western Australia, particularly around the remote Aboriginal community of Balgo Hills, have been the source of considerable disquiet for some time.

A recent coronial inquiry into the deaths of two young petrol sniffers by suicide at Balgo¹⁰¹ in November 2002, identified a catalogue of problems facing the community. The coroner cited a South Australian coronial inquiry regarding a number of deaths in similar circumstances in the Anangu Pitjantjatjara Lands identifying a cluster of interconnected factors at work, including poverty, despair, lack of hope, family violence, extreme marginalisation and dispossession, absence of educational and employment prospects; noting that these factors were also present in the Balgo case. While acknowledging that steps are being undertaken in the area to combat the problem, the coroner sombrely observed:

Regrettably, at the time of the inquest hearing living conditions are still poor, health standards and hygiene standards are low, available food is of questionable quality, there are no jobs and in spite of the commitment to funding by various Governments, the quality of life does not seem to be improving.¹⁰²

The crises identified in the Kutjungka region in the coroner's report have been well documented in previous surveys, inquiries and reports on the area. An inquiry by Mosey¹⁰³ on petrol sniffing recommended the urgent need to establish youth-focused facilities in Balgo, along with exploring the potential for setting up out-station programs similar to the successful Mount Theo program established by the Yuendumu community in the Northern Territory. Mosey also saw a need to work with the families of sniffers, not just with them in isolation. He noted that some successful initiatives in the Northern Territory had worked with families to build resilience and capacity and had chosen not to work with the sniffers directly.

There is agreement among close observers of official reaction to sniffing outbreaks that the issue tends to induce panic and paralysis, and a stampede towards the next quick solution:

There is something about the 'petrol sniffing syndrome' which makes holes in human beings capacity to think. The failure to think, or maybe it is the failure to know how to think about it, seems to lead to repetitive paralysis of concerted action.¹⁰⁴

This stampede tends to trample over painstakingly seeded knowledge on the issue, while searching for the panacea. The view from those with considerable experience living with people in the Kutjungka region tends to suggest a profound fracturing of identity—particularly male—caused by the changes forced upon Aboriginal society by contact with the non-Aboriginal world. McCoy explores the issues employing the Kutjungka notion of *kanyininpa*, which he takes from the earlier work in the region by the anthropologist Myers. *Kanyininpa* translates as 'holding', 'looking after', 'nurturing', and refers to the 'ritual occasion when older men mediated the authority of the *tjukurrpa* (dreaming) to younger men at Law time'.¹⁰⁵ In a sense, issues such as petrol sniffing reflect the difficulties some young men have in finding a meaningful passage to adulthood in the absence of this 'holding' process and the care of older men that came about as a result. Inexorably, it seems, issues such as petrol sniffing link back to questions of Aboriginal law and how it can be granted a respectful space within community building initiatives. The ongoing Kutjungka/Tjurabalan regional initiative offers some valuable ideas on how this can be achieved.

The Munjurla study: 'a roadmap through the spinifex'

The Munjurla study is a 'scoping, profiling and planning process' carried out as part of the Western Australian Council of Australian Governments' trial.¹⁰⁶ The trials are being conducted in all states and territories and are essentially attempts to forge stronger links between state and Commonwealth governments and Aboriginal communities. The Western Australian initiative is in the Kutjungka/ Tjurabalan region – a 39 000 square mile area of the East Kimberley, that includes the Tjurabalan Native Title Determined Area and communities such as Balgo, Mullen, Billiluna, Ringers Soak and Yagga Yagga.¹⁰⁷

101. Hope A, *Record of Investigation into Deaths of Owen James Gimme and Mervyn Miller* (Perth: Coroners Court of Western Australia, 2004).

102. Ibid.

103. Mosey, above n 66. I am extremely grateful to Trevor Jewel of Mercy Community Health Services for forwarding the papers by Mosey and for discussing the issues.

104. San Roque C, *Petrol Sniffing: An Exercise in Surviving Psychic Pain*, Background Paper (Carpa Manual: Intjartname Aboriginal Corporation, undated).

105. McCoy BF, *If We Come Together Our Health Will Be Happy: Aboriginal Men Seeking Ways to Better Health* (Melbourne: School of Population Health, University of Melbourne, 2003).

106. Lingiari Foundation, *The Munjurla Study: A Scoping, Profiling and Planning Process in Respect of the WA COAG Site Trial for the Purposes of Informing the Negotiation of a Comprehensive Regional Agreement* (Broome: Lingiari Foundation, 2004).

107. The determination of these places as constituting a 'region' is in itself a significant break from the 'west to east' regional construction.

The Munjurla study should be required reading for anyone involved in law and governance issues in remote areas, not least because of the respectful stance it adopts towards Aboriginal law and custom while breaking out of the blame and finger-pointing style that often harms initiatives of this kind. The focus is very much on reconciliation rather than recrimination. The style in which the research for the report has been conducted has been strongly influenced by the values of an Appreciative Inquiry,¹⁰⁸ which deliberately focuses on potential strengths rather than dwelling on perceived weaknesses.

[The report s]pells out a new way of doing business with remote Aboriginal communities based on strong and enduring partnerships between the region, governments and the private sector, and an acceptance of shared responsibility for joint action to meet agreed outcomes. In particular, it is about identifying practical ways in which people of the Tjurabalan-Katjungka region, governments and the non-government sector can work collaboratively and cooperatively together.¹⁰⁹

The study focuses on issues of great significance for the construction of resilient communities, pointing to a profound lack of capacity for self-governance in the region exacerbated by an 'absence of strategic relationships and networks to the outside world'.¹¹⁰ The report places emphasis on, amongst other things, the need to nurture new partnerships, a regional approach, a commitment to best practice, sustained involvement and capacity building; the aim being to enable increased social stability, participation and engagement, sustainability, governance capacity and economic independence.¹¹¹

The study sees the crux of the problem in 'relational' terms. There are relationships, which have been fractured and broken that need a process of reconciliation and trust building, and there are others that have never truly existed and need to be nurtured. Relationships between the region and government 'have been damaged by an historic pattern of unequal interaction'; relationships with philanthropic organisations and the private sector 'have not been built'; relationships between different Aboriginal interests 'need to be reconciled'; and relationships that historically 'bonded community members together that have been damaged by substance misuse and violence' need to be healed.¹¹²

The report recommends 'new structural arrangements and processes'.¹¹³ These include the creation of a Regional Forum (representing the disparate Aboriginal voices and interests in the area), a partnership process it calls a 'Main Table' to negotiate formal agreements with government, and a series of 'Side Tables' or working groups comprising government, non-government and community representatives to tackle priority issues such as alcohol, community safety, education and training, health, housing and infrastructure, land and cattle.¹¹⁴ The Side Tables could function similarly to Community Justice Groups, providing a space within which communities could negotiate directly with relevant organisations on the development of relevant community owned justice mechanisms

The process is holistic in the sense that it draws together a variety of strands, such as economic empowerment, community development and capacity building, crime prevention and community safety (usually dealt with as discrete issues) within a single envelope. It is also noteworthy that the process nests levels of government (local, regional, state, Commonwealth) with other interests (philanthropic, private sector) and Aboriginal self-governance as a necessary prerequisite for progress:

What makes the arrangements fundamentally different from those that currently exist is the that social capital and capacity is purposely built into the structures by ensuring that decisions and action are informed by people with relevant knowledge, skills and experience. In particular these structures are designed to strategically link the region to relevant expertise and networks including access to the highest levels of government, the philanthropic and private sector.¹¹⁵

The Munjurla Study illustrates that progress in remote areas is a long-term process requiring a diversity of inter-linked strategies. Community justice is an important dimension of this evolving process.

108. Appreciative inquiries are underpinned by the belief that workers in organisations have invaluable knowledge – as well as a tacit and intuitive understanding – of their domain: they are also a primary source of 'energy' for innovation and change. It is an approach to organisations, 'based on strengths rather than weaknesses, on visions of what is possible rather than what is not possible'. As Leibling and Price argue: 'Unlike traditional social science research, which tends to focus on problems and difficulties, AI tries to allow good practice to emerge, and aims to understand what makes good practice possible. What are the conditions under which we perform best?', Leibling A & Price D *The Prison Officer* (London: Waterside Press, 2001) 6.

109. Lingiari Foundation, above n 106, 8.

110. Ibid.

111. Ibid.

112. Ibid 11.

113. Ibid.

114. Ibid 13.

115. Ibid.

A number of the law and justice strategies discussed in this paper involve working with the courts as well as police and other justice agencies. There has been significant growth of interest in this particular area of Aboriginal involvement in recent years, culminating in some interesting developments.

13. Aboriginal people and the courts

Innovation in the 1990s, in the wake of the Royal Commission into Aboriginal Deaths in Custody, tended to focus on the 'front end' of the criminal justice system through the creation of diversionary options for juvenile offenders, such as police cautioning and family conferencing. These were very successful in taking out of the system a population of first and minor offenders and increasing the opportunities for families and victims to participate in the justice process – although success rates have been greater for non-Aboriginal young offenders, who have been the main beneficiaries of diversionary mechanisms.¹¹⁶ One underpinning reason for these initiatives was a belief that they would increase Indigenous involvement in the justice process.

Less attention was paid to the courts themselves as a place for Indigenous participation. While the involvement of Indigenous people in sentencing has taken place on a local level for a considerable length of time, arrangements have tended to be relatively ad hoc and dependent upon the energies and commitment of local magistrates, prosecutory authorities and senior members of the Indigenous community. Recently, however, there has been a tendency to give these proceedings greater formal recognition in some states and link them to broader Aboriginal justice strategies designed to increase Indigenous involvement in the criminal justice system.

Urban, rural and remote Aboriginal communities consulted by the LRCWA have expressed a sense of alienation from the criminal justice system. Many believe that the present system has failed them. The LRCWA's consultations have identified a desire for a greater role by Indigenous people in the court process, and for a reconfiguration of the layout of the court itself to make it more accessible and comprehensible to Indigenous people.

The LRCWA has seen a number of local initiatives, such as the Circle Court at Yandeyarra, which do enjoy the backing of Indigenous communities. Such initiatives do not involve changes to fundamental legal principles, significantly increasing the level of involvement by Indigenous people; although in other states some legislative reform has enabled similar processes. Aboriginal Courts and Sentencing Circle Courts as currently being rolled out in Victoria (Koori Courts), New South Wales (Circle Sentencing Courts), Queensland (The Murri Court and Rockhampton Court) and South Australia (Nunga Court) fit into the definition of a creative hybrid. While they have not all been community initiated in the first instance, most initiatives (certainly those in Victoria and New South Wales) have been energised and supported by Aboriginal justice strategies in those states and have the strong backing of the relevant Aboriginal Justice Council. For reasons of brevity I intend to concentrate on the New South Wales Circle Sentencing Court and the Victorian Koori Court.

Aboriginal Courts are not based upon Aboriginal Customary Law as such, and operate within the framework of the general law. This is not to say that Aboriginal values and principles are excluded from the process. These courts may reduce the sense of estrangement many Aboriginal people feel when confronted by the non-Aboriginal system.

Alienation from the court

Lack of understanding of cultural issues in courts raises some considerable difficulties for Aboriginal people, as one Aboriginal person told the LRCWA:

White man doesn't understand the black man law. There is no understanding of Customary Law protocols. Pre-sentence and Court reports should include cultural matters, such as the significance of avoidance relationships. Lack of understanding of these avoidance principles sometimes causes Aboriginal people to break their law and get punished when they return to the community and even while a trial is going on. The trial itself creates situations where law is broken. For example, where a mother-in-law testifies about a son-in-law, people coming into Court who have avoidance relationships and are forced to sit or stand with each other.¹¹⁷

Furthermore, as they are currently configured, courtrooms are spatially, culturally and linguistically non-Indigenous – there are no Indigenous cultural points of reference. Moreover, they are presided over by figures of authority to whom

^{116.} Blagg, above n 10.

^{117.} Author's field notes from Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Pilbara*, 6–11 April 2003.

Indigenous people usually cannot relate and with whom they have little or no connection. Aboriginal people maintain that the alienation many experience in the system is a factor in the high rates of repeat contact with the system, failure to attend court, and failure to comply with court orders.

Aboriginal people have told the LRCWA that they would ultimately wish to see Aboriginal judges and magistrates, as well as mechanisms for ensuring that non-Aboriginal judicial officers are correctly briefed about Aboriginal defendants. The Geraldton consultations, for example, found support for an Aboriginal Court 'parallel to the existing ones' (the Victorian Koori Court being identified as a useful model), while consultations in Bunbury, Broome and Fitzroy Crossing found considerable support for establishing an Aboriginal Court in those regions.

Why Aboriginal courts, why sentencing circle court?

Multiple influences have contributed to the emergence of Aboriginal Courts. They include a number of factors discussed already in this paper, such as the continuing over-representation of Indigenous people in the criminal justice system and the failure of the established system to deal with Indigenous offenders. This has encouraged the search for alternative solutions to the problem. Some working close to the problem, such as magistrates, have been keen to implement key recommendations of the Royal Commission into Aboriginal Deaths in Custody, including those focusing on Indigenous involvement in the justice process.¹¹⁸ Also, though having less direct influence, the emergence of restorative justice philosophy and practice has provided a further rationale for experimenting with alternative forms of justice. Restorative justice philosophies tend to support initiatives seeking to relax the rigid uniformity of legal process, and encourage a relative plurality of justice mechanisms to flourish. The interest in Aboriginal Courts comes along at the same time as other initiatives (such as 'therapeutic jurisprudence') which attempt to make the court process more sensitive to particular problems or issues – such as offending linked to drug use. However Marchetti and Daley reject claims that Aboriginal Courts are simply another variant of therapeutic jurisprudence, arguing that they exist in a category of their own 'due to the greater role played by the Indigenous community in the process, and the changes they bring to the ways business is conducted'.¹¹⁹ They suggest an increasing synergy between Indigenous and non-Indigenous values; 'the black robe appears to be deferring to the black face, at the same time, Indigenous people are embracing portions of white law'.¹²⁰

This approach has some support from experts in jurisprudence, who maintain that the Westminster system, and its system of common law, is sufficiently robust and flexible to accommodate a diversity of customary rules.¹²¹ Aboriginal Courts and Circle Sentencing Courts share similar objectives, such as reducing Aboriginal over-representation in the prison system, providing credible alternatives to imprisonment, reducing the failure to appear rate in court, and reducing the rates at which court orders are breached.¹²² At the community level they may empower Aboriginal communities and overcome some of the alienation many experience. Circle Sentencing Courts, already being piloted in Yandeyarra, also provide a valuable means of involving Indigenous people more directly in the justice process. Having evolved in Canada to suit conditions in remote communities, this model may well be appropriate to conditions in outlying areas, because it is more 'portable' – requiring only basic infrastructure.

New South Wales has thus far pursued the Circle Sentencing option, with strong backing from the state's Aboriginal Justice Advisory Council.¹²³ The initial scheme was piloted in Nowra and is being rolled out in other parts of the state. Lilles offers this description of the circle:

It engages the community and the criminal justice system as partners and to lesser extent victims and offenders in the resolution of criminal justice disputes... It is not a panacea and its use should be restricted to motivated offenders who have the support of the community.¹²⁴

In New South Wales, Circle Courts are designed for more serious or repeat offenders (excluding sexual offences and family violence) and aim to achieve full community involvement in the sentencing process. It aims to broaden the

118. Marcehetti E & Daley K, 'Indigenous Courts and Justice Practices in Australia' (2004) 227 *Trends and Issues in Criminal Justice*, 4; Harris M, 'From Australian Courts to Aboriginal Courts in Australia: Bridging the Gap?' (2004) 16 *Current Issues in Criminal Justice* 26–52.

119. Marchetti & Daley, *ibid* 5.

120. *Ibid*.

121. McIntyre G, 'Aboriginal Customary Law: Can It Be Recognised?', Background Paper No 9, below pp 341–80.

122. For a full review, see Potas I, Smart J, Brignell G, Thomas B & Lawries R, *Circle Sentencing to New South Wales: A Review and Evaluation* (Sydney: Judicial Commission, 2003); Marchetti & Daley, above n 118.

123. The enabling legislation is the *Criminal Justice Interventions Act 2002* (Cth). Circle sentencing originated in Canada – the first officially recorded case was in the Yukon Territorial Court: *R v Moses* (1992). For a discussion, see Lilles, below n 124.

124. Lilles H, 'Circle Sentencing: Part of the Restorative Justice Continuum', in Morris A & Maxwell G (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart, 2001) 167.

sentencing phase so that it can fully examine the underlying issues of offending behaviour and the needs of victims of crime. The experience of Circle Courts in New South Wales reveals them to be more labour intensive than Aboriginal courts. Circle Courts require anything up to three hours to complete, plus a follow-up meeting to determine whether the plan developed in the Circle Court has been completed. Circle Courts are similar in some respects to the Family Group Conferencing process.

The focus in the process is on informality. The Circle Court, as the term implies, breaks up the hierarchical model of the court and establishes a circle which includes the presiding judicial officer, the offender and the other participants. The defence council sits with the offenders and his/her family or support people. Others participating in the sentencing are free to sit anywhere in the circle. The discussion that follows would focus on a broad range of issues, often of a nature considered irrelevant in criminal procedure, such as the role of the community in preventing further offending and the extent of similar crimes in the community. The circle is reconvened several months later and the court hears from the support group about the offender's progress. If the offender has successfully met the conditions, these may be extended or modified as probation conditions. If the offender has shown no willingness to meet the conditions then the circle may be abandoned and the offender sentenced in a regular court.¹²⁵

Koori courts in Victoria

The development of the Koori courts is an initiative of the Victorian Aboriginal Justice Agreement and was developed in collaboration with the state's Regional Aboriginal Justice Coordinating Committees.¹²⁶ The Department of Justice's Indigenous Issues Unit has responsibility for the development of the courts. The first court was established in the rural town of Shepparton in 2002 followed by metropolitan Broadmeadows in late 2003 and, most recently (January 2004) in the rural town of Warnambool.

Business is conducted at an oval table rather than from the bench. The offender sits at the table beside his or her solicitor and is permitted to have a support person. Once the charges have been read and the defence counsel has responded, the offender and the support person are invited to speak directly to the magistrate about the offender's behaviour. Others in the spectators' area may also be asked to speak. The degree of informality adopted by the court varies by jurisdiction and magistrate but, in general, considerably more time is taken for each matter than would be the case in a regular court. Importantly also, there are attempts to incorporate Indigenous symbols and ways of conducting business: through modifications to the physical layout of the court to make it less hierarchical and didactic; and through the introduction of the Aboriginal flag and Aboriginal artefacts into the court.

Indigenous justice workers and Elders

The magistrate of the Shepparton Koori Court insists that 'the Elders are the court'. Active participation by Elders is essential if the court is to be an Aboriginal Court – as opposed to simply a court with Aboriginal Elders' participation. The Koori Justice Workers (Justice Department employees) play a pivotal role in the process, acting as the link with the Koori community and giving advice to the magistrate. In many respects the Koori Justice Workers are the lynchpin of the process, bringing their local knowledge of offenders and their families to the table.

Alongside Elders, the role of the Indigenous court-worker is fundamental to the successful operation of the court – indeed, it is difficult to see how the court could operate optimally without this position as it cements together the community, Elders, the offender and the court. In Victoria the Aboriginal Justice Officer actively participates in the court process as well as in pre-court discussions.

The new initiatives deserve careful evaluation. Some preliminary monitoring of the New South Wales process suggests that it has been successful in gaining the support of many participants, the Indigenous community and relevant agencies.¹²⁷ Evidence also suggests that the process assists in breaking the cycle of recidivism, introduces more relevant and meaningful sentencing options for Aboriginal offenders, and is reducing the barriers that currently exist between the courts and Aboriginal people.¹²⁸

125. For more information, see the Aboriginal Justice Advisory Council website: <<http://www.lawlink.nsw.gov.au/ajac.nsf>>.

126. The Koori Court is enabled under the *Magistrates' Court (Koori Court) Act 2002* (Vic), which establishes a Koori Court Division of the Magistrates' Court. The legislation has the objective, at 1(b), of 'ensuring greater participation of the Aboriginal community in the sentencing process ... through the role to be played in that process by the Aboriginal elder or respected person and others.' The Act goes on to define a family member, an elder and an Aborigine for purposes of the Act, and sets out the kinds of offences that can be dealt with and those proscribed (sexual offences, family violence). The defendant must enter a guilty plea (s 4F(c)(ii)); and intends to consent to involvement in a diversionary program (s 4F(c)(ii)).

127. Potas et al, above n 122.

128. Ibid.

The initiatives demonstrate the potential for systemic reform that increases levels of Aboriginal involvement. Over time it is possible to envisage a larger role for Aboriginal people in these processes, with Elders being involved in the trial rather than just the sentencing stages – a practice to be established in Victoria in the juvenile justice area.

14. Concluding comments

There is a strong case for expanding the capacities of Aboriginal communities, in partnerships with levels of government and a diversity of justice and policing agencies, to devise and develop active local justice mechanisms to deal with issues of local concern. I have argued that establishing community justice mechanisms involves a focus on achieving sustainability, durability and resilience in structures, processes and programs; acknowledging that many Aboriginal communities operate on two laws, rather than one; being committed to nurturing the necessary governance structures; and being willing to participate in capacity building processes both in Aboriginal communities and in government agencies.

I have suggested that both the language and the practice of *community-based* services often works to ensure that power and control are retained by government agencies, perpetuating that meticulously embroidered fiction that it is possible both to 'empower' communities and not to give up any of one's own. Many forms of 'consultation' by government agencies are about manufacturing consent to ideas and practices defined in advance by those organisations.

There is a tendency for government departments across Australia to think of capacity building and governance in extremely narrow terms and equate them simply with enhanced service delivery.¹²⁹ In opposition to this, recent thinking has favoured a focus on governance structures and capacity building as opposed to simply improving service delivery. Law and justice structures and processes constitute primary links in the chain of governance and are, as such, prerequisites for the development of healthy communities.

129. Aboriginal and Torres Strait Islander Social Justice Commissioner, *2003 Report* (Sydney: Human Rights and Equal Opportunity Commission, 2004).

background paper 9

Aboriginal customary law: can it be recognised?

Greg McIntyre*

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1. Introduction

This paper focuses upon the following aspects of the terms of reference concerning Aboriginal Customary Law received by the Law Reform Commission of Western Australia from the Attorney General on 2 December 2000:

Recognising that all persons in Western Australia are subject to and protected by this State's legal system; and there may be a need to recognise the existence of, and take into account within this legal system, Aboriginal customary laws:

The Law Reform Commission of Western Australia is to enquire into and report upon Aboriginal customary laws in Western Australia other than in relation to Native Title and matters addressed under the *Aboriginal Heritage Act 1972* (WA).

Particular reference will be given to:

...

3. whether those laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis...

This paper discusses recognition of Aboriginal customary law by accommodation or incorporation of Aboriginal customary law within the state legal system on the one hand, or through acknowledgement by the state legal system, on the other. Reference is made to the option of enacting a general recognition provision in relation to Aboriginal rights and duties, as part of Western Australia's Constitution. Arguments against recognition and hurdles which appear to inhibit recognition are also outlined and discussed.

Throughout this paper, account is taken of the experience of other legal regimes in the international arena in dealing with the issue of recognition of Indigenous law, particularly other common law jurisdictions. Account is also taken of recognition of traditional law and custom by Australian courts and other common law courts in a variety of contexts. Although expressly excluded by the Commission's Terms of Reference, it is helpful to refer to Australia's native title jurisprudence because the development of the law in that field contributes substantially to understanding how other elements of Aboriginal customary law may be accommodated within the state legal system. Thus the High Court's various decisions on the subject are explored in some detail.

2. Recognition of Aboriginal customary laws

Forms of recognition

When land is colonised it is open to the colonising power to 'recognise' the existence of laws of local Indigenous groups by:

- subjecting itself to the Aboriginal laws of the place;¹
- rejecting or refusing to recognise Aboriginal law or some aspect of it;²
- incorporation of certain aspects of the Aboriginal law, at the discretion of the colonising power;³
- acknowledgement by the colonising power of a pre-existing Aboriginal legal system, which operates in its own right with immunity from the legal system imposed by the colonising power.⁴

Subjection to a pre-existing Aboriginal legal system is not an option that has been adopted in Australia and, as Brad Morse suggests, is not in the nature of colonialism.⁵

Rejection

The early history of the Australian colonies' rejection of Aboriginal customary law was rationalised on the basis that Aboriginal people had no law or that those laws that existed were too barbaric to be recognised by a 'civilised' legal system, or that they were otherwise unable to survive European contact.⁶

1. Morse BW, 'Indigenous Law and State Legal Systems: Conflict and Compatibility' in Morse BW & Woodman GR (eds), *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988) 105. McRae H, Nettheim G, Beacroft L & McNamara L, *Indigenous Legal Issues* (Sydney: LBC Information Services, 2nd ed., 1997) 123.

2. McRae et al, *ibid* 123.

3. Morse, above n 1, 102; McRae et al, *ibid*.

4. As exemplified by various restorative justice models: see Hazelhurst KM, 'Community Healing and Restorative Justice: Two Models of Recovery in Aboriginal Australia' (Paper presented at the 11th Commonwealth Law Conference, Vancouver, 27 August 1996); McRae et al, *ibid* 115–120, 123.

5. Morse, above n 1, 102; McRae et al, *ibid* 123.

6. McRae et al, *ibid* 124; *R v Murrel* (1836) 1 Legge 72; *R v Neddy Monkey* (1861) 1 W & W (L) 40; *R v Cobby* (1883) 4 LR (NSW) 355; *Tuckiar* (1934) 52 CLR 335; Reynolds H, *Aboriginal Sovereignty* (Sydney: Allen & Unwin, 1996) Ch 4.

Justice Blackburn in *Milirrpum v Nabalco* was the first to articulate the contrary view that:

[T]he social rules and customs of the plaintiffs [Aboriginal clan groups of the Gove Peninsula in the Northern Territory] cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries or personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.⁷

Aboriginal customary law may be rejected by the state legal system for a variety of reasons, including:

- an irreconcilable conflict between the two systems;
- a desire for the same law to apply to everyone in the same way;
- a conflict between Aboriginal customary law and human rights standards;
- the aim of avoiding undesirable consequences for Aboriginal people; and
- ignorance of Aboriginal customary laws.⁸

In recommending 'functional' recognition, the Australian Law Reform Commission (ALRC) sought to distinguish between areas where recognition was appropriate and those where rejection was preferable. An example of how the approach of the ALRC would operate is in the area of recognition of Indigenous promised marriages.

Conflict: promised marriage

The ALRC recommended against the general law enforcing promised marriages on the basis that it would deny the fundamental right not to be coerced into marriage.⁹ However, it did countenance recognition where, by the time the issue of recognition had arisen, the parties had consented to the relationship.¹⁰

Background Paper No 1 to the recent report of the Northern Territory Law Reform Committee (NTLRC) on Aboriginal customary law¹¹ provides a description of what is regarded as the traditional law in respect to promised marriages in that jurisdiction. It is noted there that 'such arrangements are not universal in Aboriginal communities, and many communities no longer practice such marriages'.¹² The author's experience of interacting with Aboriginal communities throughout Western Australia since 1993 and exploring with them the continuity of practice of their traditional laws and customs suggests that, while promised marriage was practised among the current adult population, it is no longer practised in many of the Aboriginal societies that exist in Western Australia.¹³

Generally the practice involves a female child being promised by her parents to an older male. Among the elements of the process, recited by the NTLRC background paper, it is stated that: 'The girl can choose not to comply with the marriage agreement at any time prior to living with the husband'.¹⁴

The ALRC's concerns regarding coercion would be considerably diluted if the element of choice, which is a part of customary law promised marriages (at least in some places), was required by state law as a necessary precondition to the enforcement of any customary law marriage contract.

The issue of promised marriages has recently arisen for judicial consideration in the criminal arena. In *Pascoe v Hales*¹⁵ a 50 year old man from West Arnhem Land in the Northern Territory was convicted of unlawful carnal knowledge of a 15 year old female, who had been the subject of a promise of marriage by her family. He was sentenced by the magistrate to 13 months' imprisonment, taking into account an element of compulsion to enter into the relationship and the duty of the law to deter Aboriginal communities from engaging in promising under-age wives. On appeal to a single judge of the Supreme Court of the Northern Territory, evidence was presented from anthropologist Geoffrey

7. (1971) 17 FLR 141, 267–68.

8. McRae et al, above n 1, 127.

9. Australian Law Reform Commission (ALRC), *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [246]–[253]. Article 16.1(b) of the Convention on the Elimination of All Forms of Discrimination against Women enjoins state parties to undertake measures to eliminate discrimination against women in relation to the right to freely choose a spouse and only enter into marriage with full consent. Rights Article 16.2 provides that: 'The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage...'. Article 23 of the International Convention on Civil and Political Rights makes similar provision.

10. ALRC, *ibid* [262]; Northern Territory Law Reform Committee (NTLRC) *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 17.

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

12. NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 26.

13. For example, the author has been informed by women and men aged 50 and over in the East Kimberley that they were the subject of promises to marry; however, in the majority of cases the promise was not carried out.

14. NTLRC, above n 12, 26.

15. *Pascoe v Hales* [2002] Unreported SCC 20112873. See also Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA Background Paper No 1, above pp 1–76, 53.

Bagshaw that it is a 'cultural ideal, sanctioned and underpinned by a complex system of customary law and practice'¹⁶ for an older man to enjoy sexual relations with a promised wife who, though post-menarche, may often be under the age of 16. Justice Gallop, after considering that evidence, said that Pascoe was exercising his conjugal rights and that the girl 'knew what was expected of her'.¹⁷ He reduced the term of imprisonment to 24 hours.

Kenneth Maddock¹⁸ commented of the *Pascoe* case that those who entered into the contract in 1986

must have known ... that the system was breaking down. They should also have known that even in earlier times promises were not always kept, that a girl might be promised to more than one man ... and that girls would sometimes resist being handed over to men, especially men a lot older than themselves.¹⁹

This analysis appears to be consistent with the suggestion in the NTLRC background paper that promised brides have some choice as to compliance. Maddock drew from the comments of the appeal judge that the possibility that 'an Australian court was ignoring what anthropologists have said about social change and, worse, was allowing itself to be persuaded not only that Aboriginal women were chattels in traditional society but that they continue to be so treated even when rebelling against it'.²⁰ Maddock's comments emphasise the necessity to preserve the element of choice and the opportunity to opt out of the traditional system where it oppresses free will in the choice of a sexual partner.

The ultimate result of the *Pascoe* case was that, on appeal to the Full Court, a two to one majority increased the sentence to 12 months, suspended after one month. In his reasons for decision Chief Justice Martin commented that:

[N]otwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of 16 from sexual intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community.²¹

So, in the circumstances of the *Pascoe* case the Northern Territory courts have concluded that there is an irreconcilable conflict between Aboriginal customary laws relating to promised marriage and the legal system applying generally in the Northern Territory. *Pascoe* could also be characterised as a case which results in avoiding an undesirable consequence for an Aboriginal person (and, as a matter of principle, exemplifying the avoidance of that consequence for Aboriginal people more generally). It may also be said to manifest a conflict between Aboriginal customary law and human rights standards, such as the right of a child to enjoy all the protections of childhood embodied in the Convention on the Rights of the Child (CROC), where an act of sexual intercourse or forming a sexual relationship with a child is regarded as the antithesis of childhood. However, it should be noted that CROC defines a 'child' as being under the age of 18, unless the relevant legal regime provides otherwise. The law in this state does provide otherwise. It deems a person under 16 years to be a child in relation to the capacity to consent to sexual relations. A statutory provision could be enacted defining a child in such a way as to allow for it to be proved that under Aboriginal customary law in the relevant Aboriginal society a young woman who is capable of child-bearing is not a child for the purpose of consenting to sexual relations.

For the Law Reform Commission of Western Australia the question remains as to whether a post-menarche female below the age of 16 should be deemed in state law to be incapable of giving consent to sexual intercourse where the customary law to which she adheres says otherwise.²² In this respect it is noted that the present state of statute law in Western Australia is the same as it is in the Northern Territory.

Incorporation

'Incorporation' of Aboriginal customary law means the recognition of certain aspects of Aboriginal customary law at the discretion of the state legal system.²³ It may take the form of incorporation at the initiative of the judiciary of aspects of Aboriginal customary law into the decisions they have power to make at common law. Alternatively, it may be in the

16. *Pascoe v Hales* [2002] Unreported SCC 20112873, 7.

17. As reported in *The Australian*, 9 October 2002, 2. A term of imprisonment was imposed because the offence was subject to the mandatory imprisonment provisions applying in the Northern Territory.

18. *The Australian*, 10 October 2002.

19. *Ibid.*

20. *Ibid.*

21. *Hales v Jamilmira* [2003] NTCA 9, [26]; Williams, above n 15, 55.

22. If, in fact, there is any practical prospect in this state of that circumstance arising.

23. Morse, above n 1, 105.

form of a statutory provision which directs judicial and administrative decision-makers of the state to be guided by aspects of Aboriginal customary law as part of their normal decision-making process.

Even without the formal recognition of Aboriginal law by Australian governments, some judges have apparently found the notion of total rejection of Aboriginal law unjust and have selected some aspects of Indigenous law for incorporation by judicial application.²⁴ The notion of recognition of Aboriginal customary law by incorporation is one which comes from the perspective of a person within a dominant legal system, in this case a state-based system, which is alien to the system which gives legitimacy to Aboriginal customary law. To pose the question of recognition raised by the Commission's Terms of Reference is to contemplate whether or not the dominant state legal system ought to extend legitimacy to Aboriginal laws within that system.

Such contemplation of recognition assumes that one system is dominant and that it is possible, necessary, appropriate or desirable for the 'dominant' system to legitimise Aboriginal customary laws by incorporation or recognition. Depending upon one's perspective, that may or may not be so in relation to some or all of the laws in contemplation. Incorporation therefore reinforces a power relationship where the dominant legal system chooses how and when to incorporate compatible portions of Indigenous laws.²⁵

The notion of the law of a sovereign state recognising Aboriginal customary law by incorporation is not one which leads to the recognition or maintenance of plural legal systems. It is directed to a single state legal system. That system is contemplating broadening its cultural base; moving from recognising norms and practices which stem from one culture to recognising norms and practices from more than one culture.²⁶ The Western Australian sovereign-based legal system has arisen from English culture. That, in turn, had Norman and Anglo-Saxon origins. What is contemplated by recognition by incorporation of Aboriginal customary law is that the state legal system becomes a degree more multicultural in its purview. The result would be to take into account the norms and practices of the Aboriginal society²⁷ or societies which existed prior to, and have continued to exist, since the colonisation by the British sovereign of the state.

To the extent that there have been, and will continue to be, laws and customs of Aboriginal societies in this state which do not have any interface with the state legal system, then there is a plural legal system operating in the state which may continue to operate and govern the lives of members of Aboriginal societies within the state. The taking of any steps towards recognising the existence of Aboriginal customary laws by incorporation, does not increase, but rather reduces, the pluralism within the state.

In this regard, Joseph Raz points out that:

[T]wo legal systems can co-exist, can both be practised by one community. If they do not contain too many conflicting norms it is possible for the population to observe both systems and the institutions set by them could all function.²⁸

Raz postulates that a legal system must be an open normative system, in the sense that it is 'characteristic of legal systems that they maintain and support other forms of social grouping'.²⁹ An open system adopts 'alien' norms which are not normally regarded as part of the legal system. Such a system must have norms which recognise and make binding within the legal system any adopted 'alien' norms. Raz notes that 'alien' norms will only be adopted by a legal system if:

- (a) they belong to another normative system for so long as it is practised;³⁰ or
- (b) they were made by or with the consent of those who are subject to them.

Taking account of Aboriginal laws and customs within the state's legal system will only be *necessary* where the Aboriginal laws and state laws directly or indirectly conflict with one another.

24. See, for example, *Muddarubba* [1976] NTJ 317.

25. Morse, above n 1, 101–02; McRae et al, above n 1, 128.

26. E Adamson Hoebel tells us that 'culture is the integrated sum total of learned behaviour patterns which are manifested and shared by the members of a society... Culture is, therefore, a distinguishing feature of human society when compared to that of lower animals': Hoebel EA, *The Law of Primitive Man* (New York: Atheneum, 1973) 7.

27. The term 'society' used throughout this paper is employed in the sense identified by Hoebel, *ibid* 6: '[S]ociety exists only among sentient beings...[I]t always involves a multitude of creatures interacting...an animal aggregation...a patterned organisation in the interrelations of the members of the animal group... [T]he group exists with a degree of separation from all other groups...a measure of differentiation but organised behaviour within the group and with sufficient centralised cohesion resulting from this organisation to maintain the group as a discrete entity. Every society exists over and against other societies. Implied in the concept of aggregation is a spatial location of each society the members of which have in the main a closer local contiguity with one another than they do with outsiders. Almost all societies are territorially rooted to an area of more or less defined limits'.

28. Raz J, *Practical Reason and Norms* (London: Hutchison, 1975) 152.

29. *Ibid* 153.

30. This analysis is echoed in the dicta of the High Court in the *Yorta Yorta* case, discussed in detail below, in relation to the recognition of native title by the common law.

The imperative of recognition by incorporation is not to eliminate any existing plurality of legal systems (or indeed recognise a plurality), but to accord a fairness of treatment before the law which the state administers and which pays due regard to the human rights and fundamental freedoms of Aboriginal persons within the broader society. It allows for treatment of Aboriginal peoples by the legal system of the state which fully respects their culture in a manner equivalent to the way it respects other cultures within the state. The achievement of that objective requires a dispassionate examination of whether or not the artifacts of the English culture which the state has inherited dominate any aspect of the operation of the state legal system which could not be justified if one were to apply a more multicultural perspective to the legal system.

One of the key issues upon which participants in any reform process will need to maintain a keen focus is the maintenance of a touchstone as to the ultimate object of recognition of Aboriginal customary law. If, as the ALRC has suggested, the object is the maintenance of the cultural identity of Aboriginal people, the question needs to be asked in relation to each element of reform being considered: does this contribute to or detract from the cultural identity of Aboriginal people?

Peter Kulchyski poetically tells us that 'Aboriginal cultures are the waters through which Aboriginal rights swim'.³¹ The object of recognition of Aboriginal customary law is to accord just so much recognition of Aboriginal rights and obligations by the state legal regime as is necessary to preserve the flow of the Aboriginal culture in which such rights and obligations are sourced, in harmony with the introduced species of English law.

Maintenance of Aboriginal cultural identity also assumes an understanding and consideration of the relevant elements of identity of the relevant Aboriginal group to whom the proposed new law will apply. Once one understands that, then it dictates a process of reform of the kind recommended by the NTLRC which is organic, incremental and involves a continuing process of dialogue with Aboriginal people, informing the state as to what is essential to the maintenance of their identity.

Of course, where there are two legal systems co-existing, questions arise as to their compatibility. As Raz points out, it is a general trait of a legal system that it claims to be comprehensive in regulating behaviour and to be supreme in that regard with respect to its subject community.³² Raz notes, that 'almost every legal system permits some normative systems to apply to its subject community, but perhaps it does not permit this if the other system is also a legal system?'.³³ He suggests that '[m]ost legal systems are at least partly compatible ... [but, a]ll legal systems ... are partly incompatible, at least to a certain extent'.³⁴ The proposal for recognition by the state of Aboriginal customary law does not contemplate recognising it as a competing legal system which is comprehensive and supreme in relation to its subject community, but rather as a normative system only. Further, it is axiomatic that only those aspects of the normative system of Aboriginal customary law that are compatible with the state legal system are capable of being incorporated into it.

The notion of recognition by incorporation is more neutral than that of recognition by the adoption of alien norms. It is a process of merely expanding the scope of the state system to accommodate Aboriginal customary law. It is the contention of this paper that the common law has the flexibility to accommodate a variety of customary rules. Among those customary rules may be included Aboriginal customary rules. The accommodation of the rules which give rise to native title rights and interests is a good example of that process. Applying the common law in *Mabo v Queensland [No 2]*³⁵ the High Court reached a conclusion as to the existence of the native title of the Meriam people based on the continuity of their adherence to traditional laws and customs.

There is good reason to acknowledge the capacity of the common law to accommodate Aboriginal custom. It is consistent with the notion of a sovereign state, which is unified and a legal system which fits the definition of a legal system by being comprehensive³⁶ in its normative impact upon its citizens as a whole. It recognises that its citizenry is multicultural in its make-up. And it rejects or avoids the notion that there are enclaves within the nation of separate societies operating under distinguishable and separate legal systems.

31. Kulchyski P, *Unjust Relations: Aboriginal Rights in Canadian Courts* (Canada: Oxford University Press, 1994) 13 as cited in Dodson M, 'From Lore to Law: Aboriginal Rights and Australian Legal Systems' (1995) 72 *Aboriginal Law Bulletin* 2, 2.

32. Raz, above n 28, 152.

33. *Ibid.*

34. *Ibid.*

35. (1992) 175 CLR 1.

36. See Raz, above n 28.

Acknowledgement

Luke McNamara suggests that acknowledgement of Aboriginal customary law differs fundamentally from recognition by incorporation. Acknowledgement is exemplified by the state legal system providing for the operation of Aboriginal customary law dispute resolution processes with immunity from interference from outside the Aboriginal customary law system.³⁷ Some might argue that this results in a plurality within the state legal system. The alternative characterisation—which this author favours—is that acknowledgement of Aboriginal customary law is another form of accommodation of Aboriginal customary law within the state legal system.

Acknowledgement usually takes the form of a procedural approach to statutory recognition of Aboriginal customary law, by providing for specialised local Aboriginal courts, operating alongside the courts of state jurisdiction. For example, the *Village Fono Act 1990* (Samoa) provides for the incorporation and application of custom centrally in the operation and jurisdiction of the Fono (village assembly or council). It places on a legislative footing pre-existing systems of community administration and governance.³⁸ Section 6 grants the Fono power to 'impose punishment in accordance with the custom and usage of its village' and deems that such power includes:

- (a) the power to impose a fine in money, fine mats, animals or food; or partly in one or partly in others of those things; and
- (b) the power to order the offender to undertake any work on village land.

Section 8 provides that:

Where punishment has been imposed by a Village Fono in respect of village misconduct by any person and that person is convicted by a Court of a crime or offence in respect of the same matter the Court shall take into account in mitigation of the sentence the punishment by the Village Fono.

To use another example, the State of Queensland, for most of its history, has maintained a parallel system of local Aboriginal and Torres Strait Islander courts established under special state legislation, with a specified limited local civil and criminal jurisdiction in relation to Aboriginal and Torres Strait Islander reserves.³⁹ The *Community Services Act 1984* (Qld)⁴⁰ provides for the creation of by-laws by the local Aboriginal Council and invests in an Aboriginal Court jurisdiction to hear and determine:

- (a) matters of complaint that are breaches of the by-laws applicable within its area;
- (b) disputes concerning any matter that –
 - (i) is a matter accepted by the community resident in its area as a matter rightly governed by the usages and customs of that community ...

and shall exercise that jurisdiction referred to in paragraph (a) in accordance with the appropriate by-law having regard to the usages and customs of the community within its area and that jurisdiction referred to in paragraph (b) in accordance with the usages and customs of the community within its area.

The current legislative regime in Queensland has evolved from a long history in that state of recognition of local Aboriginal law. For example, it was noted in *Mabo*⁴¹ that a 'system of self government' on Murray Island at some time between 1892 and 1907 provided for a native chief to deal summarily with offences. A perusal of the Murray Island court records⁴² reveals that the local leaders regularly applied local customary law in their determinations of criminal and civil matters.

The tendency in Queensland has been to integrate Aboriginal courts with the magistrates' courts and to appoint local Aboriginal leaders as Justices of the Peace. The *Community Services Act 1984* (Qld) does not specifically limit the local community by-law making power, but it provides that the Governor-in-Council may declare that a by-law ceases to have effect if 'it is necessary to protect the state interest'. That is a mechanism for identifying local laws regarded as repugnant to state law or previously recognised common law which is similar to that suggested by the NTLRC.

37. McNamara L, *Aboriginal Human Rights, the Criminal Justice System and the Search for Solutions: A Case Study for Self-Determination*, Discussion Paper No 19 (Darwin: Australian National University North Australian Research Unit: 1993) 7; McRae et al, above n 1, 130–33.

38. Newton-Cain T, 'Convergence or Clash? The Recognition of Customary Law and Practice in Sentencing Decisions of the Courts of the Pacific Island Region' (2001) 2 *Melbourne Journal of International Law* 2, 55.

39. Since the 1980s reserves have been converted to Deed of Grant in Trust areas or Aboriginal Shire areas.

40. It replaced the *Aborigines Act 1971* (Qld) and its predecessors, which also allowed for local courts. It has a companion *Community (Torres Strait Islanders) Act 1984* (Qld), which replaced the *Torres Strait Islanders Act 1971* (Qld).

41. (1992) 175 CLR 1, 23.

42. Such investigation was conducted by Bryan Keon-Cohen, Barbara Hocking and the author in preparing the Meriam people's case for trial.

In Western Australia the *Aboriginal Communities Act 1979* allows for the Council of a community to make by-laws which prescribe matters 'for the purpose of securing decency, order and good conduct on the community lands'.⁴³ The Act applies to two specified West Kimberley incorporated communities and other incorporated Aboriginal communities, to which the Governor declares it to apply. A pre-requisite to such a declaration is that 'there are provisions in the constitution or rules of the community under which the council of the community will have to consult with the members of the community and take proper account of their views before making, amending or revoking by-laws'.⁴⁴ Those provisions enable the creation of by-laws which incorporate local Aboriginal customary law, as recognised by the members of the community. The Act limits the application of the by-laws to lands within the boundaries of the community, but otherwise, they apply to all persons within those boundaries.⁴⁵ The by-laws are also declared by the Act to be subordinate to any civil or criminal liability at common law or under statute or any act pursuant to statute.⁴⁶ That approach results in a similar relationship to that which the NTLRC has recommended should exist between local customary laws and the general law of the state.

Recognition by statute

Recognition of Aboriginal customary law by statute is a form of recognition by incorporation. It will not necessarily effect a substantive change in the law. The instances where that might be achieved can be allocated to two categories. The first is where the statutory provision is merely declaratory of the common law position. The declaration has an educative effect, assisting in uniformity of practice. The second is where machinery is created to enable recognition of customary law within the legal system of the state.

By way of illustration of the above proposition, one area where suggestions of recognition of Aboriginal customary law by statute are frequently made is criminal law. Consideration could be given, for example, to introducing provisions into Western Australia's Criminal Code, which make provision for Aboriginal customary law to be taken into account in determining criminal liability. It should be recognised, however, that such provisions may be more educative than necessary. Courts in this state and elsewhere have recognised that Aboriginal customary law is properly to be taken into account in establishing defences, at least where the custom is asserted as giving rise to a native title right, in relation to regulatory offences concerning fisheries⁴⁷ and wildlife protection.⁴⁸

The *Laws of Kiribati Act 1989* (Kiribati), which takes a broad-ranging approach to statutory recognition of customary law in relation to criminal matters, provides an example of a discretionary procedural direction. It provides that:

Subject to this Act and any other enactment, customary law may be taken into account in a criminal case only for the purpose of –

- (a) ascertaining the existence or otherwise of a state of mind of a person; or
- (b) deciding the reasonableness or otherwise of an act, default or omission by a person; or
- (c) deciding the reasonableness or otherwise of an excuse;

...

or where the court thinks that by not taking the customary law into account injustice will or may be done to a person.⁴⁹

Tess Newton-Cain⁵⁰ emphasises that this provision does not make the application of customary law mandatory. It is an attempt to meld customary law with the legislative form. Adducing evidence of custom in such circumstances is problematic. Newton-Cain notes that problems may arise if customary concerns appear to be in conflict with other concerns, particularly where such concerns form part of the spirit of the law rather than the letter of the law.⁵¹ What is considered reasonable by the articulators of customary law and practice may not be considered reasonable elsewhere in the community, including in the courts.

It can be seen that a provision, of the kind in the sub-paragraphs (a), (b) and (c) of the *Laws of Kiribati Act* recited above, is not necessary to enable a court to take into account customary law in ascertaining a subjective or objective

43. *Aboriginal Communities Act 1979* (WA) s 7(k).

44. *Aboriginal Communities Act 1979* (WA) s 4(2)(a).

45. *Aboriginal Communities Act 1979* (WA) s 9(1).

46. *Aboriginal Communities Act 1979* (WA) s 13.

47. *Sutton v Derschaw* (1995) 82 A Crim R 318; *Derschaw v The Queen* (1996) 17 WAR 419; *Wilkes v Johnsen* (Unreported, Supreme Court of Western Australia, Kennedy, White and Wheeler JJ, 23 June 1999, BC9904155); *Mason v Tritton* (1994) 34 NSWLR 572 at 600.

48. *Yanner v Eaton* (1999) 166 ALR 258.

49. Schedule 1, para 3. Adapted from the *Customs Recognition Act 1962* (PNG) s 4; see also *Laws of Tuvalu Act 1987* (Tuvalu).

50. Newton-Cain, above n 38, 48–68.

51. *Ibid.*

state of mind. A subjective state of mind must always be judged after taking into account the particular circumstances of the individual, including whether that individual's state of mind is affected by the existence of a customary law. Similarly, an objective standard of reasonableness must also be applied only after taking into account any special knowledge, personal characteristics or position of the person in question,⁵² including those facts which exist only by reason of membership of an ethnic group.⁵³ That would enable the personal adherence of an individual to customary law, or the impact on an individual of customary law, to be taken into account in any particular instance where an objective standard was to be applied. There remains, however, an argument for reciting such matters in a statutory provision so as to ensure that the same is not overlooked or to ensure a degree of uniformity of application of such principles.

In relation to sentencing law, it is again generally accepted that there is power in courts of the state to consider evidence of Aboriginal customary law in mitigation of penalty.⁵⁴ The New South Wales Law Reform Commission (NTLRC),⁵⁵ after a detailed consideration of the matter, makes the point that there is ample common law precedent for a judicial discretion to recognise Aboriginal customary law in the sentencing process. However, the NTLRC nevertheless advocated statutory recognition of the fact that Aboriginal customary law is to be taken into account in sentencing in order to avoid injustice, avoid dependence on individual judicial discretion, and to promote consistency and clarity in the law.

The *Customs Recognition Act 1963* (PNG) s 4(e) provides an example where a similar approach to that suggested by the NSWLRC has been adopted. That provision directs the courts (where they deem fit) to take into account issues of custom when determining sentence, subject to the condition that custom is relevant and can be adequately proved.⁵⁶

Maintenance and modification

The discussion by the High Court of the recognition of native title rights and interests in *Yorta Yorta v Victoria*⁵⁷ (elaborated upon below) suggests an apparent necessity to establish, for the purpose of recognition by the court, the existence of a continuing Aboriginal normative society which is distinguishable from the majority society in Australia in order to provide a basis for the accommodation of native title rights and interests by the common law. There is, thus, an imperative towards the maintenance of separate viable normative societies.

It should be noted, however, that the statutory recognition by the state of certain norms of an Aboriginal society may have subtle modifying effects upon the Aboriginal society and its norms. For example, in relation to native title, the effect of a determination of native title pursuant to the *Native Title Act 1993* (Cth) (NTA) bears examination. As mentioned above, *Yorta Yorta* requires the maintenance of a viable normative Aboriginal society to reach the point of a determination of native title. Thereafter, the native title rights and interests derive their force and effect both from the normative system of the Aboriginal society and from the determination of the court. The determination of the court that native title exists precipitates a further determination under the statute which vests the native title or its management in a corporate body. Thereafter, at least in relation to dealings with non-Aboriginal persons or corporations the procedure under the NTA for the exercise of native title rights which arises from traditional laws and customs is to be carried out through the agency of

- (a) the statutory corporate structure required to hold a native title which is determined pursuant to the statute to exist⁵⁸ and
- (b) the statutorily defined procedures for decision-making set out in the NTA for the purpose of interacting with the broader Australian society.⁵⁹

One of the primary objects of the NTA⁶⁰ is to create a mechanism for native title holders to interact with the non-Aboriginal society with whom they come into contact. Perhaps this will have no impact on the maintenance of

52. See *Boughey v The Queen* (1986) 161 CLR 10; *Stingle v The Queen* (1990) 171 CLR 312 at 328-30; *Palmer v The Queen* [1985] Tas R 138; *R v Loughnan* [1981] VR 443; *In the Marriage of Holley* [1982] FLR 77,431 at 77,440; *R v Voukelatos* [1990] VR 1 at 24; Fleming JG, *The Law of Torts* (Sydney: LBC, 8th ed., 1992), 106-14.

53. *Neal v The Queen* (1982) 42 ALR 609; *Jadurin v The Queen* (1982) 44 ALR 424; *R v Minor* (1992) A Crim R 227; *R v Rictor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002).

54. *Halsbury's Laws of Australia*, Vol 1(1) (Sydney: Butterworths, 1999) [5-1890]; Williams, above n 15, 16. The *Criminal Law Act 1876* (SA) s 6A reflects the common law (see cases cited in *Halsbury's* at nn 1-5).

55. New South Wales Law Reform Commission (NSWLRC), *Sentencing: Aboriginal Offenders*, Report No 96, [3.31]-[3.89].

56. See also Banks C, 'Custom in the Courts: *Criminal Law (Compensation) Act of Papua New Guinea*' (1998) 38 *British Journal of Criminology* 299, 302.

57. [2002] HCA 58, [41]-[42].

58. *Native Title Act 1993* (Cth) ss 56 and 57.

59. *Native Title Act 1993* (Cth) s 58.

60. *Native Title Act 1993* (Cth) s 3.

traditional laws and customs of the Aboriginal society. However, one can readily see how an Aboriginal society might adapt to accommodate this 'alien' interaction within its normative system.

Reconciliation

At a national level in Australia there has been much discussion about the reconciliation of the original race of Aboriginal people of Australia and their culture with those of the colonising people who have claimed British sovereignty over the colonies formed into the Commonwealth of Australia. Various forms of documentation of the concept of reconciliation have been suggested from time to time. One of those involves the addition to the provisions of the *Constitution Act 1901* (Cth) of specific statements of the rights of Aboriginal peoples. Reconciliation has also commonly been aligned with a discussion of the appropriateness of a treaty being entered into between the Aboriginal peoples and the colonising sovereign. Between 1979 and 1983 the Commonwealth government discussed with the National Aboriginal Conference a proposed treaty, compact or 'Makarrata'.⁶¹ In September 1987 then Prime Minister, Robert Hawke suggested that a 'treaty or compact' would be worth consideration. In June 1988 the Chairmen of the Central and Northern Land Councils presented Mr Hawke with the Barunga Statement, to which the Prime Minister responded in positive terms.⁶² The Barunga Statement read:

We, the Indigenous owners and occupiers of Australia, call on the Australian government and people to recognise our rights:

- to self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development;
- to permanent control and enjoyment of our ancestral lands;
- to compensation for the loss of our lands, there having been no extinction of original title;
- to protection of and control of access to our sacred sites, sacred objects, artifacts, designs, knowledge and works of art;
- to the return of the remains of our ancestors for burial in accordance with our traditions;
- to respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our own languages and in our own culture and history;
- in accordance with the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of all forms of Racial Discrimination, rights to life, liberty, security of person, food, clothing, housing, medical care, education, and employment opportunities, necessary social services and other basic rights.

We call on the Commonwealth to pass laws providing:

- a national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs;
- a national system of land rights;
- a police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise prevent our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.

We call on the Australian government to support Aborigines in the development of our international declaration of principles for Indigenous rights leading to an international covenant. And we call on the Commonwealth Parliament to negotiate with us a treaty recognising our prior ownership, continuing occupation and sovereignty and affirming our human rights and freedoms.

The United States of America, Canada and the British and other European sovereign powers that preceded them, entered into treaties with many Indigenous groups in North America. In the United States that took place until the Indian *Appropriations Act 1871* forbade further acknowledgement or recognition of independent Indian nations, tribes or powers with whom treaties might have been contracted. In Canada negotiations are still continuing in relation to what are now described as 'comprehensive land claim settlements'.⁶³

As Reconciliation Australia sets out on its website,⁶⁴ in 1991 the:

61. Wright J, 'What Became of That Treaty?' (1988) 1 *Australian Aboriginal Studies* 40; McRae et al, above n 1, 469.

62. McRae et al, *ibid.*

63. McRae et al, *ibid.*, 148; see discussion in Bartlett RH, *Native Title in Australia* (Sydney: Butterworths, 2000) 549–561.

64. <<http://www.reconciliationaustralia.org.au/aboutus/whatis.html>> (accessed 27 August 2004).

Report of the Royal Commission into Aboriginal Deaths in Custody explained that Indigenous disadvantage was a product of the history of dispossession. The cycle of poverty, poor health and limited education trapped Aboriginal and Torres Strait Islander Australians in an existence very different from most other Australians.

For these reasons, the Royal Commission recommended that all political leaders and their parties recognise that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice to Aboriginal people are to be avoided.

Shortly afterwards [in the same year], the Commonwealth Parliament voted unanimously to establish the Council for Aboriginal Reconciliation and a formal reconciliation process. The Parliament noted that there had been no formal process of reconciliation to date, and that it was 'most desirable that there be such a reconciliation' by the year 2001, the centenary of Federation.

A Council for Aboriginal Reconciliation was established under legislation which directed the Council to consider, among other things, whether reconciliation would be advanced by 'a document or documents of reconciliation'. Such a document could be recognised and the rights and interests asserted in it protected by a state Constitution.

Submissions to the Commonwealth Government by the Council for Aboriginal Reconciliation spoke of an Indigenous Bill of Rights, possibly as part of a general Bill of Rights. However, The Council has always cautioned against proceeding in that direction without detailed Indigenous consultation as to the content of substantive provisions.⁶⁵ After ten years the Council for Aboriginal Reconciliation was dissolved pursuant to the sunset clause in its enabling legislation. Before that happened, the Council established Reconciliation Australia as a non-government, not-for-profit foundation to continue the national focus for reconciliation.

Shelley Reys and Fred Chaney, the Co-Chairs of Reconciliation Australia set out their current role as follows:

In its final report, the Council for Aboriginal Reconciliation recommended the establishment of an agreement or treaty process to negotiate the unfinished business of reconciliation. Reconciliation Australia has taken up that call. We support the Aboriginal and Torres Strait Islander Commission's decision to inform, educate and seek a mandate from Indigenous Australians on the next steps to be taken relating to a treaty. At the same time, we accept we need to promote an informed and objective debate on these issues within the wider community. The issues are varied and include matters involving consideration of the rights and status of Indigenous Australians as the first peoples of Australia, including the recognition of traditional and customary law.⁶⁶

Jon Altman and Boyd Hunter note that in 1996 the Howard Government announced that they were going to replace the 'symbolic' reconciliation of the Keating Government years with 'practical' reconciliation, focused on such issues as health, housing, education and employment.⁶⁷

Prime Minister Paul Keating's approach to reconciliation was epitomised in his 1992 'Redfern speech':

The starting point might be to recognise that the problem starts with us non-Aboriginal Australians.

It begins, I think, with the act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters, the alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion.

It was our ignorance and our prejudice and our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask: how would I feel if this were done to me?⁶⁸

In 2004 Prime Minister, John Howard emphasised what 'practical reconciliation' meant when he said:

All the theories in the world will not replace the value of employment, will not replace the value of sustainable economic opportunities and will not replace the value of the embracement of the Indigenous people as part of our

65. Council for Aboriginal Reconciliation, *Going Forward, Social Justice for the First Australians: A Submission to the Commonwealth Government* (Canberra: AGPS, 1995) 43–44; Aboriginal and Torres Strait Islander Commission, Native Title Social Justice Committee, *Review of the Native Title Representative Bodies* (Canberra: AGPS, 1995) 37–38; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice, Volume One – Strategies and Recommendations: Submissions to the Parliament of the Commonwealth of Australia on the Social Justice Package* (Sydney: Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995) 15; see also Pierluigi C & McIntyre G, *A Negotiation Process to Establish an Australian Convention of Indigenous Peoples Rights*, IOCPS Occasional Paper No 43 (June 1995); McRae et al, above n 1, 454–60.

66. Reconciliation: a theory in practice. <www.reconciliationaustralia.org/upload/ART_006.DOC> (accessed 5 July 2004).

67. Altman JC & Hunter BH, *Monitoring 'Practical' Reconciliation: Evidence from the Reconciliation Decade 1991–2001*, Discussion Paper No 254 (2003), <www.anu.edu.au/caepr/Publications/DP/2003_DP254.pdf> (accessed 30 August 2004).

68. Keating P, 'Speech at Redfern Park' (Sydney, 10 December 1992). See: <http://apology.wes.net.au/redfern.html> (accessed 30 August 2004).

economic future. And that is why my Government has placed such a great emphasis on what I call practical reconciliation, on giving all of the people of this country, irrespective of their background or their heritage, economic opportunity. And the greatest measure of that, of course, is to give people employment.⁶⁹

'Practical reconciliation' has also been promoted as a way to decrease Indigenous truancy, alcoholism, family violence and the number of people in prison.⁷⁰

Lowitja O'Donohue, a former chairwoman of the Aboriginal and Torres Strait Islander Commission, has had this to say about 'practical reconciliation':

It is with a very heavy heart that I say that the Government's reconciliation policy has failed. In this respect we lag sadly behind countries such as New Zealand, Canada and the United States. Reconciliation and native title have fallen off the Government's agenda. Instead we have what John Howard calls 'practical reconciliation' – the provision of basic resources for health, housing, education and employment.

It is a welfare model, a Band-Aid model, not one seated in a fundamental recognition of the rights and entitlements of Australia's first peoples. And what's more it has failed. If anything, the health and wellbeing of Australia's Indigenous people is getting worse.

We still have a situation where Indigenous Australians have Third World health status, where our children are dying as babies at the same rate as in the poorest countries in the world, and where Indigenous life expectancy is 20 years lower than for the non-Indigenous population.

We still have a situation where most Aboriginal people live below the poverty line. Where 60 per cent of Australian youth in care or custody or other forms of detention are Aboriginal. Where 20 per cent of adult male prisoners and a staggering 80 per cent of female prisoners are Aboriginal.

This in a society where we make up only two per cent of the population!

Family violence and child abuse are endemic in Indigenous communities. This is a huge problem. It needs to be tackled as a matter of priority.

Earlier this year, the Federal Government announced with great fanfare the formation of a working group of Indigenous leaders to advise the Government on this matter. I was a member of this group. At the time I was optimistic. When will I ever learn! Our report provided a framework for governments, in partnership with communities, to combat the tragic consequences of violence and abuse in Indigenous communities.

It went to the Council of Australian Governments on August 29. But, as you might remember, this was the conference in which state and territory leaders walked out, in protest, over health funding. They did not even consider, let alone endorse, our report. And there has been no progress since. I have this awful feeling that this will become yet another example of Indigenous concerns being placed in the too-hard basket. Or overlooked because they are not vote winners.

One of my greatest fears is that 20 years from now, nothing will have changed, despite enormous energy and goodwill from the people's movement for reconciliation.⁷¹

Patrick Dodson, former chair of the Council for Aboriginal Reconciliation, in his May 2000 Wentworth Address echoed the views of Lowitja O'Donohue, when he said:

The Government wants to drive a wedge between the concepts of rights and welfare, and between those who advocate a rights agenda and those seeking relief from appalling poverty. This is an old attempt at a new spin on a very old wicket of divide and rule. If it were merely a matter of rice bowl politics it would not be so bad but it is far more sinister than that. It is about removing the centrality of community as the life centre; it models on the individual as the essential unit of society. This is not our way. With all our social problems it is not to attack the foundations of our community by putting the individual before the community.⁷²

And, as Mick Dodson, former Aboriginal and Torres Strait Islander Social Justice Commissioner, said at Corroboree 2000:

The notion of 'practical reconciliation' is...a furphy. Although the issues of the health, housing and education of Indigenous Australians are of key concern to the nation, they are not issues that are at the heart or the very soul of

69. Howard JW, 'Address at the Launch of the Trust Exhibition' (Speech delivered at Australian Prospectors and Miners Hall of Fame, 5 February 2004). See <www.pm.gov.au> (accessed 30 August 2004).

70. Tomlinson J, 'The Inherent Flaw in the Concept of "Practical Reconciliation"' <<http://www.onlineopinion.com.au/view.asp?article=2056>> (posted 9 March 2004).

71. O'Donoghue L, edited extract from the 3rd Annual Human Rights Oration (Melbourne Town Hall, 10 December 2003): *The Age*, 11 December 2003.

72. Dodson P, 'Beyond the Mourning Gate – Dealing with Unfinished Business', Wentworth Lecture, 12 May 2000, available at <<http://www.antar.org.au/wentworth.pdf>>. See also Peter Yu to similar effect, quoted by ANTAR, *Why "practical reconciliation" is bad policy* <http://www.antar.org.au/prac_rec.html>.

reconciliation. But they are—quite simply—the entitlements every Australian should enjoy. The tragedy is that they are entitlements successive governments have denied.⁷³

On 3 December 2004, however, a meeting between the Prime Minister John Howard, Patrick Dodson, Noel Pearson and Aboriginal footballer Michael Long⁷⁴ heralded the possibility of a 'new accord' based on mutual obligation.⁷⁵ Mr Dodson said, following the meeting:

We want to reopen the dialogue with the Prime Minister. Such a dialogue would be about clarification and trying to find common ground in the social arena. The perception that some people have that we are only concerned with the symbolic issues is a misconception. The mutual obligation stuff has a lot of resonance with Aboriginal culture and within Aboriginal notions of kinship. This concept has a grounding within our culture and society. It is not just a Western concept and this how we need to see it...

We want to explore with the Prime Minister the social conditions of our people to see that they are improved. Collectively we have the foundation now for a serious search for practical solutions.

...

I am not naïve enough to think he will come over to our rights agenda. But for the remainder of his Prime Ministership that's not what we are about. What we are concerned with is the social agenda. We want to see progress here over the next three to six years.⁷⁶

Mr Pearson added:

The point is that a lot of the rights we seek cannot be secured unless we also accept the responsibilities. Progress is not made just through a political settlement. The mistake we made in the past is that we did not get the basic building blocks in place—like education and work —and we went through one cycle of welfare after another.⁷⁷

Constitutional recognition

It is with this 'reconciliation' background at the Commonwealth level in mind that one returns to a consideration of whether there is merit in a state government setting out in a constitutional document of the state a form of recognition of Aboriginal customary law.

The State of Western Australia may wish to contemplate a general statement of recognition of the status of Aboriginal peoples and their rights and interests under Aboriginal customary law, as a constitutional provision or in the form of a statutory general statement of rights. No such statements of civil or individual status, rights or interests exist in the current constitutional document of Western Australia for any of the citizens of the state, but it is something that has been raised by the current Attorney General for Western Australia in more than one public address⁷⁸ as a matter for future contemplation.

Constitutional provisions relating to Aboriginal people may have one or all of the following foci:

- (a) a general statement of reconciliation;
- (b) recognition of rights; or
- (c) recognition of Aboriginal customary law as a source of law to be incorporated into the general law of the state.

Statement of reconciliation

An example of a general constitutional statement of reconciliation is to be found in the exposure draft of a proposed amendment to the Victorian Constitution which was the subject of an announcement by the Premier of Victoria on 28 May 2004. The *Constitution (Recognition of Aboriginal People) Bill Exposure Draft* provides as follows:

1. The purpose of this Act is to amend the *Constitution Act 1975* to give recognition within that Act to Victoria's Aboriginal people and their contribution to the State of Victoria

73. Australians for Native Title and Reconciliation, 'What's wrong with "practical reconciliation"?', ANTAR News, <http://antar.dovenetq.net.au/03_news/practical.html> (accessed 30 August 2004).

74. Who had walked on a 'quixotic journey' from Melbourne to Canberra to meet the Prime Minister: Rintoul S, 'Long Walk Over But Longer Journey Ahead', *The Weekend Australian*, 4–5 December 2004, 1.

75. Kelly P, 'Black Leaders Offer New Accord', *The Weekend Australian*, 4–5 December 2004, 1 and 10.

76. *Ibid.*

77. *Ibid.*

78. Including at a Seminar at the University of Western Australia on 2 August 2003 organised by the Society of Labor Lawyers of Western Australia, which canvassed the topic of a Bill of Rights for Western Australia. The Attorney-General expressed a preference for the statutory form of Bill of Rights that has been adopted by the United Kingdom: *Human Rights Act 2000* (UK).

2.
3. After section 1 of the *Constitution Act 1975* insert –

1A. Recognition of Aboriginal People

- (1) The Parliament acknowledges that the events described in the preamble to this Act occurred without prior consultation, recognition or involvement of the Aboriginal people of Victoria.
- (2) The Parliament recognises that Victoria's Aboriginal people –
 - (a) were the original custodians of the land on which the Colony of Victoria was established;
 - (b) have a unique status as the descendents of Australia's first people;
 - (c) have a spiritual, social, cultural and economic relationship with their traditional lands in Victoria;
 - (d) have made a unique and irreplaceable contribution to the identity and wellbeing of Victoria.
- (3) The Parliament does not intend by this section –
 - (a) to create any legal right or give rise to any civil cause of action; or
 - (b) to affect in any way the interpretation of this Act or any law in force in Victoria.

It can be seen from the text of a provision of that kind that it is intended to have a symbolic value only. Proposed section 1A(3) makes it clear that it is to have no legal effect. It is, therefore, not an example of reform of the law, but a mere political statement of goodwill. A statement such as that in proposed section 1A(2) might be of some significance if enacted as a preamble, with impact on the interpretation of substantive provisions relating to the recognition of Aboriginal rights or Aboriginal customary law.

Constitutional rights recognition

The best known and perhaps most apposite example of a constitutional 'Bill of Rights' provision relating particularly to Aboriginal peoples is in the Canadian Constitution. Reference to the Canadian provision is appropriate because of the relatively close cultural and legal parallels between Canada and Australia.⁷⁹

Section 35(1) of the *Constitution Act 1982* (Canada) provides that: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'.

Chief Justice Lamer in *R v Van der Peet*⁸⁰ made the point that:

The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section:⁸¹ the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and, as second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of those purposes.⁸²

In Canada the 'aboriginal rights' recognised and affirmed by the constitutional provision have been accepted as deriving from 'historic occupation and use of ancestral lands and do not depend on any treaty, executive order or legislative enactment'.⁸³

Justice L'Heureux-Dube in *Van der Peet*⁸⁴ pointed out that:

Aboriginal rights...relate not only to aboriginal title, but also to the component elements of this larger right—such as aboriginal rights to hunt, fish or trap, and their accompanying practices, traditions and customs—as well as to other matters, not related to land, that form part of a distinctive aboriginal culture.⁸⁵

79. This has been particularly marked in the recent cross-referral between Australian and Canadian superior courts in relation to the development of the notion of native title or Aboriginal title: reflected in the cases of *Calder v Attorney-General of British Columbia*, [1973] SCR 313; *Mabo v Queensland [No 2]* (1992) 175 CLR 1; *Delgamuukw v British Columbia* (1993) 91993, 104 DLR (4th) 470; *R v Van der Peet* [1996] 2 SCR 507.

80. [1996] 2 RCS 507, 547.

81. [1996] 2 RCS 507, 538–47.

82. Lamer CJ (at 546) notes the agreement of academic commentators with the proposition that prior occupation is the foundation of s 35(1): see Elliott D, *Law and Aboriginal Peoples of Canada* (Ontario: Canada Captus Press, 2nd ed., 1994) 25; Macklem P, 'Normative Dimensions of an Aboriginal Right of Self-Government' (1995) 21 *Queen's Law Journal* 173, 180; Petney W, 'The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II – Section 35: The Substantive Guarantee' (1988) 22 *University of British Columbia Law Review* 207.

83. [1996] 2 RCS 507, 577. See also *Calder v Attorney-General (British Columbia)* [1973] SCR 313, 390; *Guerin v The Queen* [1984] 2 SCR 335, 379; *R v Sparrow* [1990] 1 SCR 1075; *Mabo v Queensland [No 2]* (1992) 175 CLR 1; Slattery B, 'The Constitutional Guarantee of Aboriginal and Treaty Rights' (1983) 8 *Queen's Law Journal* 223, 242; Hogg PW, *Constitutional Law of Canada* (Ontario: Caswell, 3rd ed., 1992) 679; Asch M & Macklem P, 'Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*' (1991) 29 *Alberta Law Review* 498; Macklem P, 'First Nations Self-Government and the Borders of the Canadian Legal Imagination' (1991) 36 *McGill Law Journal* 382; McNeil K, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

84. [1996] 2 RCS 507, 579.

85. See Binnie WIC, 'The Sparrow Doctrine: Beginning of the End or the End of the Beginning?' (1990) 15 *Queen's Law Journal* 217; Sanders D, 'The Rights of the Aboriginal Peoples of Canada' (1983) 61 *Canadian Bar Review* 314.

To adopt the language of the High Court of Australia in *Yorta Yorta*, if one were to conclude that there are Aboriginal societies connected to places in the State of Western Australia which have continued as 'viable groups' with 'normative systems', then there is a basis for recognition of Aboriginal rights that could be declared to be a subject for recognition and affirmation by the legislature.

The author's own experience across a broad range of native title claims in Western Australia over the past decade suggests that there are probably several normative societies of Aboriginal peoples in the state. The Full Court in *De Rose v South Australia*⁸⁶ accepted the evidence of the existence of a broad-based Aboriginal society across the Western Desert, which covers approximately one-sixth of the Australian continent and straddles the borders of Western Australia, South Australia and the Northern Territory. It appears, from the evidence in the various native title claims that have been heard in Western Australia, that there are probably several Aboriginal societies in Western Australia which broadly cover the South-West, Murchison-Gascoyne, Pilbara,⁸⁷ Western Desert⁸⁸ and North,⁸⁹ South, East⁹⁰ and West⁹¹ Kimberley Regions of the state. An interminable and largely barren debate could probably be pursued as to the cut-off points (if there are any) between such societies. The best approach to such matters would be to investigate, when it becomes necessary, the laws and customs of the relevant society that bind the persons affected in any particular instance, on a case-by-case basis.

If a legislative form of recognition of Aboriginal customary law is to be adopted—that could readily include a statutory form of a declaration of intent to recognise Aboriginal laws and customs and the rights and obligations which stem from the same—then a simple statement similar to that in s 35 of the Canadian Constitution may be appropriate. The Canadian Constitution only speaks of 'rights'. A more complete recognition of Aboriginal law and custom would appropriately also make reference to the duties which arise from Aboriginal laws and customs.

Constitutional incorporation of Aboriginal customary law

The Sessional Committee of the Northern Territory Legislative Assembly on Constitutional Development in its Discussion Paper No 4 on *Recognition of Aboriginal Customary Law* raised the issue whether Aboriginal customary law should be recognised in the proposed Northern Territory Constitution. The Committee reported in 1996, proposing that the Constitution recognise Aboriginal customary law as a source of law 'on a par with the common law'; the two running 'in tandem' and 'in a complementary manner as part of the one system of laws for the whole of the Northern Territory'.⁹² It further proposed that '[b]oth would be subject to any legislation' and that:

Aboriginal customary law will not be able to be implemented and enforced through the institutions and officers of government except insofar as the courts are prepared to do so or as Territory legislation so provides. For example, this would prevent the use of practices which may be harsh or unjust on international principles.⁹³

If a general statement of legislative recognition was to include recognition of duties and the enforcement of duties under traditional laws and customs, in addition to the recognition of rights,⁹⁴ then it would be appropriate for the statement to be qualified by the entitlement of individuals to assert the fundamental human rights that are recognised in international law.

A constitutional provision might also include procedural directions for the recognition of Aboriginal customary law. The *Constitution of Tuvalu* [Cap 1] (Tuvalu) s 85 provides a general, though qualified, procedural direction to the courts for the recognition of native custom and tradition:

[I]n the exercise of their jurisdiction the courts shall, to the extent that circumstances and the justice of any particular case permit, modify or adapt such [jurisdictional] rules so as to take account of Tuvalu custom and tradition.⁹⁵

By way of contrast, the *Constitution of the Republic of Vanuatu 1980* invests the following power in the legislature:

86. [2002] FCAFC 286, [31], [41], [42], [178], [229], [230].

87. See *Daniel v State of Western Australia* [2003] FCA 666, [429].

88. See *De Rose v South Australia* [2003] FCAFC 286, [271], [273], [283].

89. See *Neowarra v Western Australia* [2003] FCA 1402.

90. See *Ward v Western Australia* (1998) 159 ALR 483.

91. See *John Dudu Nangkiriny & Ors on behalf of the Karajarri People v The State of Western Australia & Ors* (WAG 6100) of 1998 and *Paul Sampi & Ors v State of Western Australia & Ors* (WAG 49/1998).

92. Northern Territory Sessional Committee on Constitutional Development, 'Foundations for a Common Future: The Report on Paragraph 1(a) of the Sessional Committee on Constitutional Development's Terms of Reference on a Final Draft Constitution for the Northern Territory', Vol 1 (November 1996) 5–6.

93. *Ibid* 6–7.

94. To which the Canadian Constitution is limited.

95. See also *The Constitution of Solomon Islands 1978* sch 3, s 75(2)(1).

Parliament may provide for the manner of the ascertainment of custom, and may in particular provide for persons knowledgeable in custom to sit with the Judges of the Supreme Court or Court of Appeal and take part in its proceedings.⁹⁶

Some legislatures have enacted legislation pursuant to such a constitutional power that directs subordinate courts as to how to apply customary law. For example the *Island Courts Act* [Cap 167] (Vanuata) s 10 provides that:

Subject to the provisions of this Act an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order.

The *Local Courts Act* [Cap 19] (Solomon Islands) s 16, based on a constitutional provision similar to that of the *Constitution of Tuvalu*, provides for the application of customary law provided that 'the same has not been modified by any Act'.

In conclusion, it is a matter for political consideration whether a constitutional statement of recognition of Aboriginal customary law would be:

- (a) subject to amendment or repeal by any legislation which might be enacted in the future (as proposed for the Northern Territory); or
- (b) entrenched as a 'constitutional' provision of the state by adding 'manner and form' provisions⁹⁷ as a fetter on the amendment or repeal of the statutory declaration.

Recognition by development of the common law

The central thesis of this paper is that Aboriginal customary law can be readily recognised by a process of development of the common law. That is principally so because the common law is itself a customary form of law that has evolved from, and may include, the recognition and enforcement of local customs. The law relating to native title provides an example of the recognition of Aboriginal customary law by means of the development of the common law. In particular, it is an example of:

- (1) the manner in which Aboriginal customary law may be recognised by the common law;
- (2) how Aboriginal customary law relates to the Aboriginal society or societies from which it arises;
- (3) the necessary focus on a normative system in identifying laws and customs;
- (4) the analytical approach to be applied to the accommodation of change; and
- (5) how Aboriginal customary law may integrate with the statute law of the state and the common law of the state, in particular.

Manner of recognition

Brennan J in *Mabo [No 2]*⁹⁸ indicated the following considerations in approaching the task of recognition of Aboriginal customary law at common law:

- (a) Recognition will be by means of 'such legal and equitable remedies as are appropriate to the particular rights and interests established by the evidence'.
- (b) A determination must be made as to the incidents of particular Aboriginal laws and customs which create the rights or obligations in question.
- (c) Recognition is only precluded 'where those laws and customs are not so repugnant to natural justice, equity and good conscience that sanctions under the new regime must be withheld'.⁹⁹
- (d) Recognition 'is not precluded by an absence of communal law to determine a point in contest.... By custom, such a point may have to be settled by community consensus or in some other manner prescribed by custom'.
- (e) 'A court may have to act on evidence which lacks specificity in determining a question' in issue.

96. *Constitution of the Republic of Vanuatu 1980*, Article 49.

97. Manner and form provisions require special procedural requirements to be complied with in order to alter constitutional provisions: see *Colonial Laws Validity Act 1865* (Imp) s 5. The *Constitution Act 1889* (WA) s 73, for example, requires the concurrence of an absolute majority of both house of the state Parliament in order to effect any change in the constitution of the Legislative Council or the Legislative Assembly.

98. (1992) 175 CLR 1, 61–63.

99. See *Idewau Inasa v Oshodi*, [1934] AC 99, 105.

Toohy J said further, in relation to the circumstances in that case, that:

It is true that the findings of Moynihan J do not allow the articulation of a precise set of rules and that they are inconclusive as to how consistently a principle was applied in local law, for example, with respect to inheritance of land, but ... the particular nature of the rules which govern the society or which describe its members' relationship with land does not determine the question of traditional land rights. Because rights and duties *inter se* cannot be determined precisely, it does not follow that traditional rights are not to be recognised by the common law.¹⁰⁰

Native title case law has addressed the relationship of the law inherited from the English legal system with Aboriginal customary law. In doing so it has adopted a broad approach in defining the concept of 'law'. That is an approach which is apposite to the consideration of what law is when contemplating the recognition of Aboriginal customary law in accordance with the terms of reference of this inquiry.

Social derivation

The High Court in *Yorta Yorta*¹⁰¹ provided a useful analysis of where to look to find the Aboriginal laws and customs which might be recognised when it said:

Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, 'socially derivative and non-autonomous'. As Professor Honoré has pointed out, it is axiomatic that 'all laws are laws of a society or group'. Or as was said earlier, in Paton's Jurisprudence, 'law is but a result of all the forces that go to make society'. Law and custom arise out of and, in important respects, go to define a particular society. In this context, 'society' is to be understood as a body of persons united in and by its acknowledgement and observance of a body of law and customs.¹⁰²

The Court also explained that:

We choose the word 'society' rather than 'community' to emphasise this close relationship between the identification of the group and the identification of the laws and customs of that group.¹⁰³

The normative society is made up of the broadest group who are so united. Within that society there may be sub-groups. Such sub-groups will, by definition, also be united in the same way, but that does not make each sub-group a separate society. Justices Brennan and Toohey in *Mabo [No 2]* said that it is not necessary to prove the 'kind of society' which existed prior to the assertion of sovereignty in order to find that there was a society which sustained rights and duties from which present laws and customs are derived.¹⁰⁴

Normative system

As mentioned previously, the High Court in *Yorta Yorta* linked native title rights and interests to the existence of a normative system of an Aboriginal society.¹⁰⁵ However, in doing so the High Court did not adopt a narrow Austinian definition of a normative system which requires that there be an expectation of some adverse consequences for abnormal behaviour.

In their joint judgment in *Yorta Yorta* Gleeson CJ and Gummow and Hayne JJ suggested a much broader notion of what might comprise a normative system when they said:

To speak of such rights and interests being possessed under, or rooted in, traditional law and traditional custom might provoke much jurisprudential debate about the difference between what HLA Hart referred to¹⁰⁶ as 'merely convergent habitual behaviour in a social group' and legal rules. The reference to traditional customs might invite debate about the difference between 'moral obligation' and legal rules.¹⁰⁷ A search for parallels between traditional law and traditional customs on the one hand and Austin's conception of a system of laws, as a body of commands or general orders backed by threats which are issued by a sovereign or subordinate in obedience to the sovereign,¹⁰⁸ may or may not be fruitful. Likewise, to search in traditional law and traditional customs for an identified, even an identifiable, rule of recognition¹⁰⁹ which would distinguish between law on the one hand, and moral obligation or mere habitual behaviour on the other, may or may not be productive.

100. (1992) 175 CLR 1, 199. See also Deane and Gaudron JJ (at 115) who adopted a similar approach.

101. [2002] HCA 58.

102. Ibid [49].

103. Ibid fn 31.

104. *Mabo [No 2]* (1992) 175 CLR 1, 61 and 187.

105. McIntyre G, 'Native Title Rights After *Yorta Yorta*' (2003) 9 *James Cook University Law Review* 268, 269.

106. Hart HLA, *The Concept of Law* (Oxford: Clarendon Press, 2nd ed., 1994) 10.

107. Ibid 13.

108. Austin J, *The Province of Jurisprudence Determined* (1832) Lecture I (Library of Ideas ed., 1968) 11; Hart, above n 106, 20–25.

109. Hart, ibid 100.

This last question may, however, be put aside when it is recalled that the *Native Title Act* refers to traditional laws acknowledged and traditional customs observed. Taken as a whole, that expression, with its use of 'and' rather than 'or', obviates any need to distinguish between what is a matter of traditional law and what is a matter of traditional custom. Nonetheless, because the subject of consideration is rights or interests, the rules which together constitute the traditional laws acknowledged and traditional customs observed, and under which the rights or interests are said to be possessed, must be rules having normative content. Without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters.¹¹⁰

Customary law and change

Leon Sheleff has said that:

A perception of custom as some formalised relic of a backward people, will lead to certain inescapable consequences, that customs can only be recognised if they are of long standing usage, and once recognised, cannot be changed; or alternatively that they are not acceptable by the standards of the dominant culture and thus must be totally eradicated; or where several such customs exist, that whole system must be rejected, without any opportunity for the customs to respond dynamically to the changing environment, including those changes which are triggered by the impact of another culture, which may also be the dominant culture.

It is clear that, in the modern world, any approach that sees custom—particularly of another culture—in static terms, dooms that culture to stagnation, and ultimately rejection, by imposing on it a rigidity which is generally by no means inherent in its nature.... It is quite possible that tribal customs that seem to be incongruous in the modern age will be gradually eased out by the members of the tribe themselves.... Custom is an important source of law for all legal systems, particularly for the common law system. An awareness of its flexible nature is essential for its vitality and for the continuing vitality of the culture.¹¹¹

The necessity to source customary law in its Aboriginal (or pre-British) origin and its continuity from that origin does not require that its content be static. Indeed, the complementary requirement, suggested by the High Court in *Yorta Yorta*, of continuing vitality suggests the inevitability of change over time. It is important that in relation to any approach to recognition of Aboriginal customary law, there is no implicit assumption that Aboriginal customary law is to be identified as some artifact of history, frozen at some particular point in time. Aboriginal customary law (and the Aboriginal societies in which it exists) is like the law of all other normative societies. As legal anthropologists have recognised, there are 'unceasing processes of change in all legal orders'.¹¹²

In *Yorta Yorta* Gleeson CJ and Gummow and Hayne JJ acknowledged the capacity of the common law to accommodate change in customary laws. They said that the laws or customs in which the rights or interests comprising native title find their origins must be laws or customs having a normative content and deriving, therefore, from a body of norms or a normative system that existed before sovereignty.¹¹³ As long as this requirement is met, the individual laws or customs do not have to be substantially the same. It is the normative system that has to have continuous existence.¹¹⁴ The key question as far as any change is concerned, is whether the law or custom can still be seen to be a traditional law and traditional custom and whether the change or adaptation is of such a kind that it can no longer be said that the rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant peoples.¹¹⁵

However, laws and customs are not required to be the same now as they were 'pre-contact' in order for them to be 'traditional'. Traditional laws and customs may change, evolve or transform without losing their 'traditional' character.¹¹⁶ Deane and Gaudron JJ, in *Mabo [No 2]* said, in relation to the traditional law and custom basis of native title, that:

The traditional law or custom is not ... frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to the land.¹¹⁷

110. *Yorta Yorta* [2002] HCA 58, [41]–[42].

111. Sheleff L, *The Future of Tradition Customary Law, Common Law and Legal Pluralism* (London: Frank Cass, 2000) 84–85.

112. Woodman Gr, *Customary Law In Common Law Systems* (University Of Birmingham, UK) <<http://www.ids.ac.uk/ids/govern/accjust/pdfs/idswoodman.pdf>> (accessed 7 June 2003) 4; Moore SF, 'Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study' (1973) *Law & Society Review* 719–46, reprinted in Moore SF, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978).

113. *Yorta Yorta* [2002] HCA 58, [38] and [46].

114. *Ibid* [47].

115. *Ibid* [83].

116. *Ibid* [35], [43], [119] and [122]–[132].

117. *Mabo [No 2]* (1992) 175 CLR 1, 110.

Traditional laws and customs may change, evolve or transform without losing their 'traditional' character.¹¹⁸ The High Court in *Yorta Yorta* said:

The rights and interests in land which the new sovereign order recognised included the rules of traditional law and custom which dealt with the transmission of those interests. Nor is it to say that account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and custom.¹¹⁹

Interweaving or umbrella

In *Mabo [No 2]* Justice Brennan explained that:

Native title, though recognised by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived. If alienation of a right or interest in land is a mere matter of the custom observed by the Aboriginal inhabitants, not provided for by law enforced by a sovereign power, there is no machinery which can enforce the rights of the alienee.... The common law can, by reference to the traditional laws and customs of an Aboriginal people, identify and protect the native title rights and interests to which they give rise... Australian law can protect the interests of members of an Aboriginal clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as is practicable to do so).¹²⁰

This passage from Brennan J's judgment suggests an interweaving of what Brennan J refers to as 'the common law' and 'the traditional laws and customs of an Aboriginal people'. The interweaving is occasioned by Brennan J treating the common law as an entity that is distinguishable from the traditional laws and customs of an Aboriginal people. Justice Brennan's interweaving is somewhat imperfect because, for some reason (which is not obvious), he would not allow the common law to recognise an alienation which is based on observed custom but not enforced by a sovereign power. Contrary to this view, the thesis of this paper is that there is no true dichotomy between the common law and the traditional laws and customs of an Aboriginal people. The better analysis is that the common law is an umbrella under which the local and general customs inherited from English legal history co-exist with the customs of the various Aboriginal societies of Australia. Australian common law is able to accommodate a multiplicity of cultures. The common law, in recognising Aboriginal customary law, is not juxtaposing itself against alien traditional laws and customs.

Obviously, prior to the colonisation of Australia, the common law which British citizens acknowledged and observed did not include any elements of Aboriginal customary law to be taken into account. Upon the colonisation of Australia, the common law applied in Australia and it accommodated the rights and interests of Aboriginal peoples that arise out of their laws and customs;¹²¹ 'provided those laws and customs are not so repugnant to natural justice, equity and good conscience that sanctions under the new regime must be withheld'.¹²²

The general analysis of law and custom in this paper also rejects the notion expressed by Brennan J that a right or interest based upon observed custom is not enforceable by the common law unless enforcement is provided for by a law enforced by a sovereign power.¹²³ It is rejected in so far as it implies the adoption of an Austinian analysis of law which requires a form of sovereign power to enforce law in order for law to exist.

Partial statutory code

Following the *Mabo [No 2]* decision the Commonwealth Parliament enacted the NTA. Among its main objects was that of providing for the 'recognition and protection of native title'.¹²⁴ It enacted a statutory definition of native title rights and interests, which it describes in the heading to the definition as 'Common law rights and interests'.¹²⁵ As the High Court has pointed out, the NTA

118. In relation to the evolution of traditional laws and customs: see *Yorta Yorta Aboriginal Community v Victoria* [2001] FCA 45 [35], [43], [119] and [122]–[132].

119. *Yorta Yorta* [2002] HCA 58, [44].

120. *Mabo [No 2]* (1992) 175 CLR 1, 59–60.

121. *Ibid* 57; *Calder v Attorney-General (British Columbia)* [1973] SCR 313, 416 (Hall J).

122. *Ibid* 61 (Brennan J); *Idewau Inasa v Oshodi*, [1934] AC 99, 105.

123. Presumably Brennan J is there referring to a sovereign power which preceded that of the colonising sovereign.

124. *Native Title Act 1994* (Cth) s 3(a).

125. *Native Title Act 1994* (Cth) s 223.

does not deal with the ascertainment or enforcement of native title rights by curial process. It provides for the establishment of native title and recognises it and protects it...in accordance with the [NTA] (s 10). If actual or claimed native title rights are sought to be enforced or protected by court order, the party seeking that protection must take proceedings in a court of competent jurisdiction.¹²⁶

In *Western Australia v Ward* the High Court also suggested that:

Paragraphs (a) and (b) of s 223(1) [of the statutory definition] indicate that it is from the *traditional* laws and customs that native title rights and interests derive, not the common law. The common law is not the source of the relevant rights and interests; the role accorded to the common law by the statutory definition is that stated in par (c) of s 223(1). That is the 'recognition' of rights and interests. To date, the case law does not purport to provide a comprehensive understanding of what is involved in the notion of 'recognition'.

There may be some laws and customs which meet the criteria in pars (a) and (b) of s 223(1), but which clash with the general objective of the common law of the preservation of and protection of the society as a whole, but the case law does not provide examples. Secondly, the statement in *Mabo [No 2]* that native title 'may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence' is yet to be developed by decisions indicating what is involved in the notion of 'appropriate' remedies.¹²⁷

It is open for the state to follow a similar approach to recognition as that taken in the NTA. The state may enact statutory criteria for recognition of Aboriginal customary law. Statutory provisions might establish mechanisms for the application of the common law and the provision of remedies in respect of the rights and duties which might be found to arise from Aboriginal laws and customs.

3. Problems and issues for recognition

Rob McLaughlin¹²⁸ points to a range of problems and issues to be confronted in approaching the recognition of Aboriginal customary law, such as:

- competing values: reciprocity and communitarianism versus possession and individualism; spiritual religious versus secular;
- separate systems of law and racial discrimination;
- lack of recognition of customary law offences;
- lack of jurisprudential study of Aboriginal law;
- regional variation of Aboriginal law;
- secrecy of some aspects of Aboriginal law; and
- unlawfulness of customary punishments under Criminal Codes and International Conventions.¹²⁹

Referring to the findings of a number of historians and anthropologists, McLaughlin¹³⁰ states that:

The clash of Indigenous and settler cultural systems was 'a fundamental clash of principle, the outward showing of the most significant moral and political struggles in Australian history. The settlers were transplanting a policy of possessive individualism, hierarchy and inequality. Aboriginal society was reciprocal and materially egalitarian... One or the other had to prevail'.¹³¹

This diametrical difference in philosophical basis is important in assessing the degree to which customary law can ever be recognized in Australia. 'Twenty three years ago', observed Kenneth Maddock in 1984 'the anthropologist WEH Stanner wrote that Aboriginal customary law conflicted in almost every respect with the root assumptions of Australian law. The two were irreconcilable in notions of tort and crime, in procedures of arrest and trial, in concepts of admissible evidence, and so on'.¹³²

Those views are necessarily an expression of generalisations. They are an assessment of how things may have stood historically in a general sense. They do not allow for the evolution of both Aboriginal society and the settler

126. *Fejo v Northern Territory* (1998) 195 CLR 96, 120-121 [22]; *Western Australia v Ward* [2002] HCA 28, [21].

127. *Western Australia v Ward*, *ibid.*, [20]–[21] (footnote omitted).

128. McLaughlin R, 'Some Problems and Issues in the Recognition of Aboriginal Customary Law' (1996) 3(82) *Aboriginal Law Bulletin* 4, 7–9.

129. Including the *International Convention on Civil and Political Rights*, the *Convention Against Torture*, and the *Convention for the Elimination of Discrimination Against Women*.

130. McLaughlin, *above n* 155, 7–8.

131. Reynolds H, *The Other Side of the Frontier* (Middlesex: Penguin, 1981) 69–70.

132. Maddock K, 'Aboriginal Customary Law' in Hanks P & Keon-Cohen B (eds), *Aborigines and the Law* (Sydney: Allen & Unwin, 1984) 232–33.

society. For example, there has been a significant shift over the past half century towards international human rights which value egalitarianism in a way which may not have been the case at the time of the colonisation of Australia.

Much of what WEH Stanner may have regarded as 'root assumptions' of state law are more accurately described as matters of procedure, which are not fundamental to a legal system and, as will be discussed in more detail below, are not such as to prohibit any reconciliation between Aboriginal customary law and a state legal system. In any event, Maddock points out that Stanner attributed the 'irreconcilable conflict' to 'a kind of sightlessness [of whites] towards the central problems of what it is to be a blackfellow in the here-and-now of Australian life'.¹³³ Maddock noted 'decisive changes...in the politico-legal environment of Aborigines' since Stanner wrote to the point where it would 'no longer be possible to write quite as Stanner did'.¹³⁴ Maddock made reference to the Commonwealth Attorney General's reference in relation to Aboriginal customary law to the Australian Law Reform Commission as 'yet another symptom of benign and encouraging interest in traditional Aboriginal culture'.¹³⁵ Another two decades of politico-legal change since Maddock expressed those views and the current reference to the Law Reform Commission of Western Australia are indicative of a continuation of that trend.

Groups versus individuals

McLaughlin says that:

[T]he need for maximum cooperation in Indigenous societies manifests itself in a 'greater emphasis on social identity, membership of a group and the obligations and responsibilities of individuals to conform to the expectations of others contrasting with the Western emphasis on individualism'.¹³⁶ It is group interests and rights, with the attendant importance of kinship law, which shape customary law.¹³⁷

McLaughlin cites this as one of the elements of 'diametrical difference in philosophical basis' which 'is important in assessing the degree to which customary law can ever be recognised in Australia'.¹³⁸

There are several problems with McLaughlin's analysis. Firstly, McLaughlin proceeds on an assumption that a problem in relation to the recognition of Aboriginal customary law lies in the limited degree to which it may be recognised or capable of recognition by a state system in Australia. However, there is no imperative to achieve a particularly high quantity of recognition of Aboriginal customary law. The goal of recognition of Aboriginal customary law is to incorporate only so much Aboriginal customary law into the state legal system as is compatible with according justice to the citizenry. That may mean that incorporation may achieve that end by the incorporation of Aboriginal customary law to a very limited degree only. It may be unnecessary for the state system and detrimental to Aboriginal culture to incorporate more than the minimum of Aboriginal customary law into the state legal system.

Secondly, group conformity is one of the underlying objectives of law, if one is to accept the analysis of those many jurists and anthropologists who count coercion as one of the defining elements of law.¹³⁹ For those who do not, such as Hans Oberdiek, it is at least a common element of laws within a legal system.¹⁴⁰ So that is not a relevant distinguishing element between law in a Western society and custom in an Aboriginal society. There is nothing to suggest that Aboriginal customary law is significantly different from state law in that respect.

Thirdly, the idea that Aboriginal customary law cannot be recognised by a legal system based in an English legal tradition because there are some inherent values which apply to Aboriginal law which clash with some inherent values of non-Aboriginal normative societies, may be somewhat exaggerated. It could be said to be a one-dimensional and naïve assessment of both Aboriginal and non-Aboriginal societies. Non-Aboriginal normative societies aspire to the common good or 'communitarianism' no less than do Aboriginal societies. The individual desire to possess things is able to be observed in Aboriginal and non-Aboriginal societies, and the assumption of a communal ethic in Aboriginal societies is not universal in all circumstances. It may be significant in some circumstances, but absent in

133. Ibid.

134. Ibid.

135. Ibid 233.

136. Berndt RM, 'Traditional Concepts of Aboriginal Land' in Berndt RM (ed), *Sites, Rights and Resource Development* (Perth: University of Western Australia Press, 1981) 1, 3–4; see also 'The Berndts: A Select Bibliography' in Tonkinson R & Howard M (eds), *Going it Alone? Prospects for Aboriginal Autonomy* (Canberra: Aboriginal Studies Press, 1990).

137. McLaughlin, above n 128, 8.

138. Ibid 7.

139. See, for instance, Bentham J, *Of Laws in General*, edited by HLA Hart (London: The Athlone Press of the University of London, 1970), 54; Austin, above n 107, 13–15; von Ihering R, *Law as a Means to an End*, translated by Husik I (Boston: The Boston Book Company, 1913) 176; Kelsen H, *General Theory of Law and State*, translated by Webert A (Cambridge: Harvard University Press, 1945) 29; Kant I, *The Metaphysical Elements of Justice*, translated by Ladd J (Indianapolis: The Bobbs-Merrill Company Inc, 1965) 36; and Raz, above n 28, 3.

140. Oberdiek H, 'The Role of Sanctions and Coercion in Understanding Law and Legal Systems' (1976) 21 *American Journal of Jurisprudence* 71, 71–72 and 75.

others. It is arguable that all societies tend to behave communally when there is an advantage to be gained from doing so. They desist when that is not the case. Within Aboriginal and non-Aboriginal societies there are individuals who conform to and desire to conform to communal aspirations. There are also those who do not. The degree of conformity, and aspiration of individuals to conform, varies over time.

Nicholas Peterson¹⁴¹ points out that, while generosity and sharing are well-established features of hunting and gathering societies, a 'performative view of kinship' focuses on the giving and taking that is involved in producing and reproducing relationships. He suggests that such behaviour is 'a great deal more contingent, strategic and pragmatic than more received views of sharing and constructs generosity as much in terms of responding to demands as of spontaneous giving'.¹⁴² He expresses the view that '[m]odernisation places pressure on sharing' and '[p]overty, discrimination and marginalisation may, in some circumstances, increase the intensity of sharing, while affluence and emerging consumer dependency ... start to reduce its frequency and nature'.¹⁴³ In other words 'communitarianism' in the form of an imperative to share is not based on an inherent characteristic of being Aboriginal. Sharing arises out of the socio-economic disadvantage which is commonly associated with being Aboriginal. It meets the needs which may arise out of that disadvantage.

Cape York Aboriginal leader and lawyer, Noel Pearson, warns against 'romantic foolishness' and 'utopian tendencies in...thinking about Indigenous people'.¹⁴⁴ He says that the 'idea that Aboriginal people desire to take themselves anywhere else than to the forefront of economic development in the global economic marketplace' is a problem; as is the 'romantic idea' that 'Aboriginal people must find a way other than "secularism, materialism and individualism"'.¹⁴⁵ This is not to deny what Pat Dodson is quoted above as saying about the 'centrality of community as the life centre' of Aboriginal societies; as against 'putting the individual before the community'. Aboriginal societies, like any organised society, may embrace a certain amount of individual benefit without discarding the importance of communal cooperation.

Beyond the issue of the sharing of material goods, there are a number of elements of the culture common to Aboriginal societies where customs oblige individuals to behave communally. Participation in traditional ceremonies, for example, is necessarily a communal activity. Custom prescribes the role of individuals within the ceremony. The rules of kinship of the particular society are generally highly significant in placing an individual in his or her role in the ceremony. An individual may also hold a particular role based on knowledge or experience in a ceremony or on a particular association with a place significant to the ceremony. While the ceremonies of Aboriginal societies are unique to the culture of those societies, the notion of communal activity, similarly reflected in ceremony, is not alien to non-Aboriginal societies. A wedding ceremony in Western culture, for example, has all the same characteristics described above which place individuals in communal roles. There is no irreconcilable philosophical difference in that regard between Aboriginal and non-Aboriginal culture.

While differences undoubtedly exist between Aboriginal cultures and the culture of those who have colonised Australia, difference is not synonymous with 'irreconcilable inconsistency'. The differences which exist between Aboriginal and non-Aboriginal societies (beyond those which might be said to be inconsistent with universal human rights) are not of a kind which ought to be regarded as inhibiting a state from accommodating the variety of culture which exists in the state within its legal system. Indeed a true legal system ought to be striving to make that accommodation to promote harmony among the cultural groups and individuals comprising the citizens of the state.

Religious vs secular

McLaughlin argues that the relationship between religion and law is fundamentally different between the Indigenous and settler cultural systems. He says that:

[W]hilst Judeo-Christian morality does impact upon Australian law, the role of the spiritual in customary law is indivisible from its application. Land is a 'spiritual resource' held 'in trust for the deities and future generations'¹⁴⁶ – a concept foreign to the legal system.¹⁴⁷

141. An anthropologist with significant Australian experience, 'From Mode of Production to Moral Economy: Sharing and Kinship in Fourth World Social Orders' (Paper delivered to the 9th International Conference on Hunting and Gathering Societies, Edinburgh, 9–13 September 2002). See <www.abdn.ac.uk/chang9/1peterson.htm>

142. Ibid.

143. Ibid.

144. Pearson N, 'A Fair Place in Our own Country: Indigenous Australians, Land Rights and the Australian Economy' (2004) 3(2) *Castan Centre for Human Rights Law Newsletter* 6.

145. Ibid.

146. Berndt, above n 136, 9.

147. McLaughlin, above n 128, 8. The majority judges in the High Court in *Western Australia v Ward* [2002] HCA 28, [14] said: 'As is well recognised, the connection which Aboriginal people have with "country" is essentially spiritual'. Further, Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 167 described the Aboriginal relationship to the land as a 'religious relationship'.

As Hoebel points out, a good many societies fervently believe that the gods and other supernatural forces are active and, often, determinative forces in their law systems. Hoebel, however, notes that it is possible to adopt the approach of the 'functional realist' and accept such beliefs as cultural realities, without needing to determine their empirical reality before recognising and applying those systems which otherwise satisfy the definition of law which has been discussed above.¹⁴⁸

In any event, the so-called 'fundamental difference' to which McLaughlin points may not be so great or fundamental a difference as makes such matters of Aboriginal culture unable to be accommodated within the state legal system. The notion of property held in perpetual trust for charitable objects, which is well known in the state legal system, is strongly analogous to the notion of land being held for deities and future generations, to which McLaughlin refers.

Further, it is not accurate to proceed on an assumption that Aboriginal law is primarily or wholly religious and non-Aboriginal law is primarily or wholly secular. It is also not accurate to assume that there is a clearly understood dividing line between what is religious and what is secular. Much of what may be described as Aboriginal religion is a form of pantheism.¹⁴⁹ The distinction between secularism and pantheism is often elusive. Likewise, much non-Aboriginal 'secular' law is festooned with ritualistic trappings which accord it a 'religious' quality. It is still the case, for example, that the majority of evidence received in courts in the Western world is dependent for its veracity upon an oath which has a religious base, in the sense that it gains its influence in the legal realm from the supernatural.¹⁵⁰

Moreover, 'religion' in its simplest form is to be found in devotion to a principle.¹⁵¹ That may well be an adequate description of much of what some would describe as 'secular' law. After all the 'rule of law' is said to be based in a focus upon principle.¹⁵² Raz notes that there exist '[c]ases of relatively stable and mutually recognised co-existence of secular and religious law in various countries [which] provide examples of different degrees of compatibility'.¹⁵³

The dichotomy of 'religious' versus 'secular' which might be posited to describe Aboriginal versus non-Aboriginal law, therefore, does not have sufficient validity or effect upon the operation of a legal system to preclude recognition of Aboriginal customary law by a state legal system in Australia.

Racial discrimination and equality within the law

It might be argued that any form of recognition of Aboriginal customary law is racially discriminatory and a breach of the principle of equality before the law. McLaughlin notes that the *Racial Discrimination Act 1957* (Cth) (RDA) s 9 makes it unlawful to

do any act involving a distinction, exclusion, restriction or preference based on race ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedoms.¹⁵⁴

Section 10 of the RDA emphasises the ideal of equality before the law and the Convention on the Elimination of All Forms of Racial Discrimination (which the RDA was enacted to implement domestically) stresses the objective of equality of rights, notably the right to 'equal treatment before tribunals and all other organs administering justice'.¹⁵⁵

Sir Anthony Mason said in *Walker v New South Wales*:

It is a basic principle of law that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle ... The presumption applies ... in the case of the criminal law, which is universal in its operation, and those aims would otherwise be frustrated.¹⁵⁶

This is a general statement which needs to be understood in the context of the case which was being decided. The Chief Justice held that, in the face of the passage of criminal law statutes of general application in the State of New

148. Hoebel, above n 26, 261.

149. The term 'pantheism' is here used to refer to a belief system which holds that the ultimate reality is to be found in the universe (of which nature forms part) and that the living and dead are inseparable parts of the perceived universe.

150. See Hoebel, above n 26, 261.

151. Shorter Oxford Dictionary.

152. Walker G de Q, *The Rule of Law* (Melbourne: Melbourne University Press, 1988) 21, quoting Joseph Raz.

153. Raz, above n 28, 152.

154. McLaughlin, above n 128, 8.

155. Articles 2, 4 and 5; cited by McLaughlin, *ibid*.

156. (1994) 182 CLR 45, 49; (1994) 64 ALJR 111; (1994) 126 ALR 321, 323 (footnote omitted).

South Wales in exercise of its constitutional power, Aboriginal customary law of the Banjalung 'nation' of Aboriginal people could not exist as a separate legal system in relation to matters of criminal law, invalidating the common law in relation to Aboriginal people unless they accepted it. In those circumstances, the apparently absolute terms in which the statement of the Chief Justice might appear to suggest that the principle of equality before the law requires complete formal equality of sanctions is able to be understood as general statement which is open to explication in the nature of the following discussion.

Substantive equality

It is a common error of analysis to confuse formal equality with an absence of discrimination. As John Chesterman has pointed out:

The principle of non-discrimination ... has never actually required identical treatment, something which has for many years worked to the detriment of Indigenous people ... [T]he RDA has never required that people of all races be treated equally. It has only required (section 9) that in certain strictly limited situations, racial grounds are not used as the basis for denying a person the enjoyment of a 'human right or fundamental freedom'.¹⁵⁷

Chesterman argues that a recognition of the Aboriginal customary law which sanctions spearing, for example, does not challenge the tenet that the law is to be applied equally to all persons. Equality of treatment does not require that all persons, regardless of circumstances should receive exactly the same punishment for the same breach. He notes that one of the fundamental aspects of sentencing philosophy is the discretion to consider the particular circumstances of the offender. He suggests that the failure to take into account customary law in sentencing would provide a greater challenge to the rule of law, because it may result in Aboriginal persons being punished twice or more severely than a non-Aboriginal person for the same breach.¹⁵⁸

Further, as the Race Discrimination Commissioner has said: 'Equality does not mean identical treatment without regard to concrete circumstances'.¹⁵⁹

In its recent inquiry into Aboriginal customary law the NTLRC suggested that both the general law and Aboriginal customary law, in order to be recognised by the state, must be 'consistent with universally recognised human rights and fundamental freedoms'.¹⁶⁰

As the ALRC¹⁶¹ and NTLRC¹⁶² have both noted, it is the notion of non-discrimination and the fundamental right to equality which drives and supports recognition of the customs and traditional laws of Aboriginal people which provide them with their cultural identity.

Chesterman has argued that:

[T]here are two broad concepts within the internationally recognised principle of non-discrimination that enable recognition of traditional rights, and that otherwise protect racially discriminatory programs that have been designed to improve the position of oppressed minorities.

The first is the international law concept of 'differential treatment'. This holds that some differing treatment of individuals on racial grounds will not constitute illegal discrimination where that discriminatory treatment is not 'invidious'. The 'reasonable differentiation' principle holds that the treatment of one racial group will not be discriminatory just because that treatment is different from the treatment received by another racial group ...

The second concept is the special measures exemption, according to which positive acts of discrimination are allowable where the purpose is intended to raise the status of an oppressed group.¹⁶³

The Committee on the Elimination of Racial Discrimination under the Convention on the Elimination of all Forms of Racial Discrimination, in General Recommendation XIV on Article 1(1) of that Convention said that:

157. Chesterman J, 'Balancing Civil Rights and Indigenous Rights: Is There a Problem?' (2002) 8(2) *Australian Journal of Human Rights* 125, 134.

158. Ibid 142.

159. Race Discrimination Commissioner, *The CDEP Scheme and Racial Discrimination* (Sydney: Human Rights and Equal Opportunity Commission, 1997); Chesterman, above n 179, 135.

160. NTLRC, above n 11, [6.1], in response to a prerequisite for recognition of Aboriginal Customary law set by the terms of reference to its inquiry.

161. ALRC, above n 9, Summary Report, [37].

162. NTLRC, above n 11, [6.17].

163. Chesterman, above n 157, 134–35.

A differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention are legitimate or fall within the scope of Article 1, para. 4 of the Convention...In seeking to determine whether an action has an effect contrary to the Convention it will look to see whether that action has an unjustifiably disparate impact upon a group distinguished by race, descent, or national or ethnic origin.

Similarly, Judge Tanaka in the *South West Africa Cases* said that:

[T]he principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means relative equality, namely the principle to treat equally what are equal and unequally what are unequal.¹⁶⁴

A form of racial discrimination that is unlawful is where there is a lack of substantive equality. If a group does not have the opportunity to participate in the fundamental aspects of the society then it may be discriminated against unlawfully. But if, for example, different groups have different forms of property rights then one group is not being discriminated against in relation to the other by according recognition to each of those different forms of right. They are each participating in the universal right to own property. It is only if one group was to be arbitrarily deprived of the form of property to which they have been entitled that racial discrimination may occur which is inconsistent with international and domestic law.¹⁶⁵

The existence of separate identifiable rights and interests held by one group of people or recognition of laws creating obligations among the members of an Aboriginal group is not the same thing as detrimental discrimination against the balance of the population who do not have those identified rights, interests or obligations.

Beneficial discrimination

McLaughlin suggests that it is arguable that s 8 of the RDA, which provides the 'special measures' exception to acts which would otherwise contravene the RDA and the Convention, may not apply in relation to customary law. McLaughlin argues that:

The maintenance of a separate system of law for Aborigines would therefore be in breach of the RDA; and even if customary law's jurisdiction were made voluntary, it may be discriminatory in that only Indigenous Australians could apply to come under its terms.¹⁶⁶

This poses the issue as to whether special consideration being given to a particular group within society is compatible with the rule of law or equal protection before the law. Can affirmative action benefit a formerly deprived group to redress past wrongs without inflicting new wrongs on others? Darlene Johnston says:

Reaction to the idea of collective rights is strongly negative in some quarters. Collective rights are seen as inherently dangerous and oppressive. This reaction stems from a perceived clash between individual rights and group rights. Collective and individual interests, however, are not inevitably antagonistic. The supposed antithesis seems to be based on a particular and intolerant conception of group rights.¹⁶⁷

Section 8 of the RDA exempts from the proscriptions of that Act 'special measures' to which Article 1, paragraph 4 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination applies. That paragraph of the Convention declares that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.

So that, Aboriginal customary law recognition which results in 'positive discrimination' in favour of the rights of an individual as part of a racial group, is exempted from proscription in international law (adopted into Australian domestic law by the RDA). Section 8 may also operate to discriminate against and limit the exercise of rights by persons not part of the group favoured by the 'special measures'. For example, in *Gerhardy v Brown*¹⁶⁸ the High Court suggested that

164. (Second Phase) ICJ Rep. 1966, 219.

165. *Mabo v Queensland [No 1]* (1988) 166 CLR 186.

166. McLaughlin, above n 128, 8.

167. Johnston D, 'Native Rights as Collective Rights: A Question of Group Self-preservation' (1989) 2 *Canadian Journal of Law and Jurisprudence* 19.

168. (1984) 159 CLR 70.

it may validate a provision which interfered with the right of others to exercise freedom of access to land. In that case an Aboriginal group, Anangu Pitjantjatjara, had been granted a statutory title to their traditional lands which comprised a substantial part of the northern region of South Australia. The title carried with it a statutory right to exclude any person who was not Anangu Pitjantjatjara. The Court upheld the exercise of that right as a 'special measure' within the meaning of the RDA.

Repugnancy

Sir Edward Grey, in his 1840 report on customary law, said: 'English law should supersede customary law in order to protect an Aborigine from the violence of his fellows'.¹⁶⁹

An issue to which the ALRC and the NTLRC have each drawn attention is the potential danger of recognition of traditional law within Aboriginal communities resulting in an imposition upon individual Aboriginal persons of rules arising out of Aboriginal law which infringe rights that are available to an individual within the general law of Australia or would be regarded as a fundamental human right in international law. The ALRC suggested that recognition would not be racially discriminatory if:

- (a) it is a reasonable response to special needs of Aboriginal people affected,
- (b) is generally accepted, and
- (c) it does not infringe basic human and legal rights.¹⁷⁰

But what of an individual detrimentally affected by the application of recognised Aboriginal customary law who is a member of the racial group whose law it comprises? Chesterman asks the question:

At what stage would a customary law punishment be seen as so serious a denial of the punished person's rights that intervention by the state would be justified? Or, to put it more generally, when do civil rights yield to Indigenous rights and vice versa?¹⁷¹

The NTLRC¹⁷² discussed the notion of maintaining the principle of equality within the law, while allowing recognition of Aboriginal customary law within Aboriginal communities. It noted that it was considering enforcement of local laws which may be an aberration from the general common law and statute law and which may result in a detriment to an individual. It suggested that the key condition of recognition be that participation in the local legal system be voluntary. It recommended that an unwilling participant be entitled to opt out of, or be liable to expulsion from the community of those who do wish to be bound by local Aboriginal customary laws. So the NTLRC's answer to Chesterman's question is that an individual has the civil right to choose not to participate in a local Aboriginal society.

In parts of Africa colonised by the British there has been a pattern of legislation and proclamation 'that accorded recognition to tribal customs subject to the qualification that the custom was not "repugnant" to certain standards considered to be widely, if not universally, valid and applicable... The standards by which the customs were to be judged were of their compatibility with public policy, natural justice, equity, morality and good conscience' as those things were valued by Western culture.¹⁷³ Sheleff describes the repugnancy test as 'the acme of connection between law and morality'.¹⁷⁴ TO Elias notes that in applying the repugnancy test 'a constant dilemma is to strike a nice balance between what is reasonably tolerable and what is essentially below the minimum standards of civilised values in the contemporary world'.¹⁷⁵ Akintunde Olusegun Obilade is of the view that the dilemma has never been satisfactorily resolved.¹⁷⁶ While WB Harvey¹⁷⁷ suggests that the very idea of a repugnancy rule is incongruent in an independent country, for though the repugnancy rule was couched in general and universal terms, there can be little doubt that it was a reflection and an expression of a dominant culture imposing its rule, will and values over a subjugated people whose culture was forcibly made subordinate.¹⁷⁸

169. ALRC, above n 9, 38; as cited by McLaughlin, above n 128, 8.

170. NTLRC, above n 10, 7.

171. Chesterman, above n 157, 131.

172. NTLRC, above n 11, [6.8].

173. Sheleff, above n 111, 122.

174. Ibid 123.

175. Elias TO, *The nature of African Customary Law* (Manchester: Manchester University Press, 1956) 174; Sheleff, above n 111, 127.

176. Akintunde Olusegun Obilade, *The Nigerian Legal System* (London: Sweet & Maxwell, 1979); Sheleff, above n 111, 127.

177. Harvey WB, *Law and Social Change in Ghana* (Princeton: Princeton University Press, 1968).

178. Sheleff, above n 111, 131.

The observation of the application of the repugnancy test in British African colonies should serve as a warning to current state legal regimes against the danger of adopting a narrow ethnocentric view in condemning as morally repugnant customary punishments on any other basis than a contravention of universally held human rights standards. The ALRC points out that 'the impact of human rights standards cannot be discussed in the abstract';¹⁷⁹ so, it is necessary to examine particular forms of customary punishments before condemning them as repugnant or otherwise inappropriate for recognition. The discussion below indicates that there are some customary punishments which may be contrary to universal human rights standards and others which are not, but are contrary to current state law.

Customary punishments

Kayleen Hazelhurst asserts that 'Western Law has yet to come to grips with the reality that Aboriginals may face a second punishment from their own people on their release from prison'.¹⁸⁰ This is a reality which was consistently reported to the Commission during its consultations in the course of this reference. It was also a matter reported on by the ALRC.¹⁸¹ Justice Mildren in *R v Minor*¹⁸² made reference to the ALRC report when he took traditional punishment into account in sentencing the offender (although he did not condone such punishment).¹⁸³ In her Background Paper to the current reference, Victoria Williams¹⁸⁴ catalogues 13 cases in Western Australia and the Northern Territory where courts have taken traditional punishment into account in sentencing. In six of those cases the punishment had already taken place. In the balance of cases the court considered the possibility of a future punishment.

McLaughlin¹⁸⁵ suggests that '[p]enalties under customary law range between death, wounding, fear of sorcery, corporal punishment, and abuse or ridicule'.¹⁸⁶ Williams¹⁸⁷ summarises cases of traditional punishment that have become before Australian state and territory courts with penalties that include:

- spearing;
- physical beating;
- banishment;
- public meetings where the offender and victim agree to accept mutual responsibilities to each other and not breach the peace in the future;
- punishment of family members in lieu of the offender;
- punishment of family members in addition to the offender; and
- reprimand of an offender by a traditional elder.

There can be no moral objection to those forms of traditional punishment mentioned above which comprise a reprimand or an agreement as to mutual responsibilities. The other forms of penalty require more detailed consideration.

Death penalty

While McLaughlin suggests that the death penalty is among the range of customary law penalties, Williams' summary of what has come before the courts reflects the present author's observation over the past three decades in various parts of Australia; that is, while the death penalty is spoken of as a penalty administered by past generations for a variety of transgressions of Aboriginal traditional law,¹⁸⁸ it is universally reported that such a sanction is no longer employed. It is, therefore, no longer an authorised or practiced penalty in any Aboriginal society in Australia.¹⁸⁹

The apparent abandonment of the death penalty by Aboriginal societies is an instance of Aboriginal traditional law modifying to accord with international standards and the common law. As the court concluded in *Eleko v Government*

179. ALRC, above n 9, 141.

180. Hazelhurst KM, 'Australian Aboriginal Experiences of Community Justice' (1996) 6 *Law and Anthropology* 46; Sheleff, above n 111, 195.

181. ALRC, above n 9.

182. (1992) 59 A Crim R 227, 238.

183. See discussion of this case and issue by Williams, above n 15, 16–17.

184. Ibid 17.

185. McLaughlin, above n 128, 8.

186. Cox et al, 'Two Laws, One Land' in Bourke et al (eds), *Aboriginal Australia* (Brisbane: University of Queensland Press, 1994) 51.

187. Williams, above n 15, 18–20.

188. See Maddock, above n 132, 224–26, who recorded historical events of 'tribal execution' reported to him by Strehlow from the middle of the 19th century, 'within living memory' and in 1935 (a killing which was the subject of a trial in the Supreme Court at Alice Springs).

189. A possible exception is the unreported case of *R v Felton & Ors*, a 1976–77 Kalgoorlie case, in which the author represented nine Aboriginal men from Cundeelee Mission accused of murdering two other Aboriginal men. The linguist Wilf Douglas, in connection with a bail application for the accused, expressed the opinion that the killings may have been carried out in accordance with Aboriginal traditional law in response to breaches of law, such as revealing gender-restricted traditional law to women. The Crown ultimately withdrew the indictments in the course of the first trial due to a lack of reliable evidence and so Douglas' supposition was never tested and the accused never volunteered anything to that effect.

of Nigeria,¹⁹⁰ while a 'barbarous' custom like the killing of a deposed chief cannot be applied, if the custom is modified to a form of banishment, then it can be applied. Customs are not assumed to be frozen in time. They can change, and be recognised in their changed form, as long as they retain their essential character.¹⁹¹

It is unlikely, therefore, that it will be contended in any case in the future that a killing has been carried out in accordance with Aboriginal customary law. If there were such a contention in a regime that recognised Aboriginal customary law, the court would first be obliged to consider whether it did represent the current state of customary law of the relevant society. In view of the evidence referred to above, any justification based on such a contention would ultimately be rejected. Consistent with international human rights standards,¹⁹² Western Australia's Criminal Code has placed the right to life above capital punishment, as a legitimate sanction.¹⁹³ There is thus an irreconcilable conflict with any customary law that asserts the contrary.

Corporal punishment

When Aboriginal customary law dictates that a person be punished by a form of application of force, in order for the application of that customary law to be consistent with the common law and international law the person subject to punishment must voluntarily accept that form of punishment. As discussed below, that is a necessary pre-requisite, suggested by the ALRC, for recognition by the common law of such an Aboriginal customary law.

Basil Sansom describes a form of consensual punishment which he observed in the Northern Territory and which is consistent with what the present author has observed in the Eastern Goldfields/Western Desert of Western Australia:

The infliction of moral violence ... is a standard form for expressive activity ... the essence of moral violence is in the victim's passivity ... For the infliction to occur, the victim must be totally awed into passivity. Not attempting to escape, not retaliating, not protesting with words, not assuming a posture that protects the body, the victim by comportment answers the demand that he consents to the infliction.

[A]cts of moral violence have a judicial character. They are due punishments, executed with due attention to formal witnessing ... Because the moral violence can be promised, potential victims can be made to suffer the dread of anticipation ... made part of the awesome drama of due and publicly condoned inflictions ... [It is] moral violence precisely because it is the opposite of ... culpable causeless violence. When moral violence is inflicted, there are reasons and they are most heartily proclaimed. The blows are all backed by prior assertions ... During the performance, the intensity of each inflictive phase is tuned to public consent ... The violence in moral violence stops when witnesses communicate that further punishment will, for them, transform the act to make the sum of the inflictions not punishment, but 'damage' and a wrong. Shared responsibility takes these inflictions out of the category of inter-personal assault.¹⁹⁴

Those punishments which involve consent to the application of force would generally have the consequence that the act of applying the force would not constitute an offence of assault.¹⁹⁵ An act that resulted in a wounding or bodily harm, however, even though consented to, would constitute an offence under the *Criminal Code* (WA). In relation to such offences the element of consent is irrelevant.¹⁹⁶ Although a person who consented to the same would be unlikely to make a complaint to the authorities, it would be open to a police officer to charge a person who wounded a consenting person in execution of customary law.

The position under the Criminal Code, which is reflective of the common law, is one which could be altered by statute to better accommodate Aboriginal customary law. A statutory provision could be enacted to provide a defence to a person administering traditional punishment. Appropriate pre-conditions for the application of such a defence would be:

- (a) that the punishment was voluntarily accepted;
- (b) that it was administered in accordance with Aboriginal customary law; and
- (c) that the punishment and the method of its administration did not contravene international law standards.

190. [1931] AC 662, 673.

191. NTLRC, *The Recognition of Aboriginal Customary Law as Law*, Background Paper No 2 (2003) 18.

192. The International Convention on Civil and Political Rights ('ICCPR'), Article 6.1 provides that: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

193. Article 6.2 of the ICCPR provides that: 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court'.

194. Sansom B, *The Camp at Wallaby Cross: Aboriginal Fringe Dwellers in Darwin* (Canberra: Australian Institute of Aboriginal Studies, 1980) 92–95, 97. See also Maddock, above n 132, 226–7.

195. *Criminal Code* (WA) s 222.

196. *R v Watson* (1986) 69 ALR 145, 148 (McPherson J).

One aspect of administration in accordance with Aboriginal customary law highlighted in *R v Minor*¹⁹⁷ was that it ought to be shown that the punishment had a positive benefit to the peace and welfare of the relevant community in order to distinguish it from a revenge attack.¹⁹⁸

As mentioned above, Australian courts have so far generally adopted the approach of taking into account corporal punishment in accordance with Aboriginal customary law in sentencing and bail decisions, without condoning or sanctioning it.¹⁹⁹ One justification expressed by the ALRC for taking customary punishment into account is so as to avoid double punishment for the same offence.²⁰⁰ The Law Reform Commission of Western Australia's consultations for the present reference suggest that it is a strongly held view of Aboriginal people in Western Australia that the courts should recognise the prospect of double punishment if they do not take account of the circumstances where Aboriginal customary law will take its course and punish either the offender or, in place of the offender, family members.

However, there may be a difficulty for a court in directly recognising the future administration of corporal punishment where the court has no control over the process of its administration. However, in *R v Wilson Jagamara Walker*²⁰¹ the court was prepared to involve itself indirectly in the supervision of the administration of the punishment by making it a condition of a sentence that the offender return to the community where the evidence suggested the punishment would be imposed and requiring that it be reported whether or not the punishment was administered.

In cases involving applications for bail where there was a prospect of corporal punishment in accordance with Aboriginal customary law, the Northern Territory courts have taken into account an added obligation declared under the *Bail Act 1982* (NT)—which similarly must be taken into account under the *Bail Act 1982* (WA)²⁰²—to protect the defendant from harm if released. The courts have generally only released a defendant on bail for the purpose of undergoing traditional punishment where the evidence does not suggest that the punishment would amount to a criminal act. That would generally arise because the recipient is legally able to consent to the punishment, which will not give rise to a wounding or bodily harm.²⁰³ One would have thought that such circumstances would be rare, and that all cases involving the possibility of spearing would be excluded on that basis.

Even where the evidence suggested that wounding or bodily harm was not anticipated, a court would be expected to be cautious about giving its imprimatur to prospective corporal punishment. There have been instances of corporal punishment being administered in accordance with Aboriginal customary law where the consequences have exceeded what may have been permissible or intended, such as a thigh wound severing an artery, resulting in the death of the perpetrator of the original offence.²⁰⁴

The NTLRC recommended that the general law continue to apply 'overall' to the recognition of traditional punishments. This notion was elaborated upon by Justice Brennan in *Mabo* [No 2] when he said laws and customs would be recognised by the common law 'provided those laws and customs are not so repugnant to natural justice, equity and good conscience that sanctions under the new regime must be withheld'²⁰⁵ and that recognition by the common law would be precluded if 'the recognition were to fracture a skeletal principle of our legal system'.²⁰⁶ He also noted that:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.²⁰⁷

Given the concerns expressed by courts about authorising unlawful acts or failing in the duty of protection under the *Bail Act 1982* (WA), if the state does intend to respond favourably to the view of Aboriginal people that their customary laws which allow corporal punishment should be recognised so as to avoid double punishment, then a specific statutory authorisation to the courts to accommodate such punishments must be enacted.

197. (1992) 59 A Crim R 227, 228 (Asche CJ).

198. As reported in Williams, above n 15, 21, along with other cases in the Northern Territory in which that factor was relevant.

199. *R v Jungarai* (1981) 9 NTR 30; *R v Minor* (1992) 59 A Crim R 227 and other Northern Territory and Western Australian authorities referred to by Williams, *ibid* 16.

200. See ALRC, above n 9; Williams, *ibid* 16.

201. (1994) 68 (3) *Aboriginal Law Bulletin* 26; Williams, *ibid*, 21.

202. Schedule 1, Part C, cl 1(iv)(b).

203. Williams, above n 15, 5.

204. For example, the author can recall an incident at Blackstone in the Western Desert in 1979, where corporal punishment was administered by stabbing the perpetrator in the thigh and resulted in him bleeding to death. The person who administered the punishment was subsequently charged with manslaughter. It may have been that the traditional process was fatally adulterated in that instance by the use of a knife rather than the usual traditional implement, a spear (which may not have caused a fatal injury), and the ingestion of alcohol.

205. *Mabo* [No 2] (1992) 175 CLR 1, 61.

206. *Ibid* 43.

207. *Ibid* 42.

The defence proposed in relation to a wounding or bodily harm carried out in conformity with Aboriginal customary law ought to be qualified so as to comply with international standards and thus with the common law. It might be qualified so as not to authorise 'cruel, inhuman or degrading treatment', contrary to the International Convention on Civil and Political Rights, Article 7. The manner of its administration is likely to determine whether or not the punishment would infringe such a qualification. The voluntary subjection of the person receiving the punishment to the form of punishment would go a long way toward negating any cruel, inhuman or degrading elements of the act. The NTLRC suggested that what is cruel, inhuman or degrading is to be determined 'solely by cultural perspectives'.²⁰⁸

The *Bail Act 1982* (WA) would also need to be amended in a similar way to qualify the duty of protection of the defendant as subject to a power to allow bail where it may result in corporal punishment in accordance with Aboriginal customary law which was voluntarily accepted and did not constitute cruel, inhuman or degrading treatment.

Social ostracism

It is a common suggestion, where Aboriginal communities have a degree of isolation from the broader non-Aboriginal community and Aboriginal community members have some say over the punishment of offenders within the community, that the form of punishment should be to banish the offender from the community. Often the suggestion will be that the offender be banished to a more remote outstation from the main community.²⁰⁹ The obvious immediate effects are to remove the offender from contact with the community which has been offended by the conduct and to deprive the individual of the social supports and creature comforts of being part of the communal group. Usually the outstation will be supervised by a senior member of the community, who may put the offender to work or teach the offender the necessity of conformity to society's rules. That necessity is brought into sharp relief when one is stripped of one's accustomed social supports and creature comforts.

This approach mirrors the teaching process which typically is applied in Aboriginal societies where young men undergo a ceremonial initiation into adulthood. Young initiates are typically isolated from their families in an initiates' camp, established away from the general community. In those camps they are physically tested and taught the laws of proper behaviour and religious observance, as part of the process of becoming responsible adults within their society.²¹⁰

McLaughlin has argued that 'exile cannot be countenanced due to the Convention on Civil and Political Rights';²¹¹ however, he does not elaborate further. He may have had in mind Article 12.1 of that Covenant, which provides that: 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.'

If an Aboriginal society was to sanction breaches of customary law by exiling an individual from their society that would not ordinarily result in the person being exiled from the state.²¹² It may, however, restrict how the individual would otherwise exercise a right to liberty of movement and choice of residence within the state; and thus, comprise a deprivation of that liberty. However, that right is not absolute, as indicated by Article 19.1 which provides that: 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

So that if state law recognised grounds and a procedure for an Aboriginal society to exile a member from that society, then any deprivation of liberty which might follow would fall within a recognised exception to the general rights declared by the Covenant.

Exile from an Aboriginal society is really just a variation on the deprivation of liberty which is manifest in the concept of imprisonment; a common sanction of the English legal system. It comprises a particular form of exile or social

208. NTLRC, *International Law, Human Rights and Aboriginal Customary Law*, Background Paper No 4 (2003) 34.

209. An example of this was referred to during consultations with Aboriginal people: Law Reform Commission of Western Australia, *Thematic Summaries of Consultation – Pilbara*, 6–11 April 2003.

210. The present author's first observation of a court recognising such an approach in sentencing was as counsel appearing for an Aboriginal juvenile before Stipendiary Magistrate David McCann in the Kimberley in 1978. Evidence was given in the Children's Court at Halls Creek which convinced the magistrate to travel many miles South to Aboriginal-owned Bililuna Station to confer with senior lawmen (bedecked in traditional ochre and ceremonial costumes) who assured him that if that the young offender was compelled to reside at Bililuna they would put him through 'hard law'. The magistrate made an order to that effect.

211. McLaughlin, above n 128, 8.

212. The Convention is referring to a national 'state', but for the purposes of a consideration of the State of Western Australia's jurisdiction, the state referred to here is the State of Western Australia, as one of the federal components of the international sovereign state comprising the Commonwealth of Australia.

ostracism. In *R v Miyatawuy*²¹³ the Court took into account the fact that the offender was banished by her local community to an outstation as a mitigating factor, and described it as akin to a supervised good behaviour bond.²¹⁴

The NTLRC also regards social ostracism as a non-legal form of sanction, and apparently regards that as comprising a distinction between 'custom' and 'law'.²¹⁵ In the author's view the form of sanction is not a sufficient basis for that distinction to be drawn. The jurist Oberdiek, for example, notes that ostracism may be a highly effective sanction. He does not distinguish between that form of sanction and any other as creating a dividing line between what is law and what is not law.²¹⁶

Shame

Sheleff has observed that anthropologists, psychologists, penologists and criminologists have developed the thesis of a dichotomy between two different kinds of culture:

- 'guilt-cultures', where the individual is aware from within of aberrant behaviour irrespective of any conviction; and
- 'shame-cultures', oriented to the exposure of the wrong-doer to the opprobrium of the community, particularly the victim, resulting in a sense of wrongdoing.²¹⁷

Newton-Cain points out that in the Pacific Island region a prominent method of sanction for criminal offenders is community shaming.²¹⁸ Community shaming involves the community in the process. The offender's family, as a subgroup of the community, may take collective responsibility for the harm caused by an individual member of the family and for the rehabilitation of that individual.

Community shaming is a common form of sanction in Australian Aboriginal societies. It has been recorded as part of the normative system of the society of the 'Western Desert bloc',²¹⁹ which occupies the central desert areas of Australia²²⁰ including a substantial part of Western Australia. The practice of shaming was also widely reported in the consultations carried out by the Commission in investigating this reference in many parts of Western Australia.²²¹

Relying on the work of Nancy Williams, Sheleff suggests that corporal punishment, in the form of spearing, may be part of a process of re-integrative shaming in Australian Aboriginal communities.²²² The reports of consultations carried out by the Commission under this reference indicate a widespread practice in Western Australian Aboriginal societies of spearing and other forms of corporal punishment of individuals who may have killed another community member. In the absence of the individual perpetrator it is widely understood that members of the family of that person may be subjected to the corporal punishment. The fact that the corporal punishment is obviously not directly proportionate to the offence of unlawful killing and that it may be meted out to family members suggests that it is a form of 're-integrative shaming'. Another description would be the purging of family responsibility, resulting in reconciliation of the community or society. In *R v Corbett*, for instance, the court heard evidence that 'payback' was a practice of healing with the purpose in that case of restoring the relationship between the offender and the victim.²²³

The common law, on the other hand, tends to isolate the offender from the community and is said by Mark Findlay to require the individual to restore the social balance through individual guilt and shame.²²⁴ However, in *State of Western Australia v JJS' (A Child)*²²⁵ the Supreme Court of Western Australia confirmed the power under s 56 of the *Young Offenders Act 1994* (WA) to order that the parents of juveniles pay compensation – in that case for acts of arson which destroyed the homes of other families within a rural community. This suggests that the tendency of the common law of which Findlay speaks is not a necessary limitation upon state law.

213. (1996) 135 FLR 173.

214. Williams summarises this and other cases in which community banishment has been taken into account in sentencing: see Williams, above n 15, 19.

215. The author reiterates the argument above which rejects any distinction between 'custom' and 'law' of the kind which is made by the NTLRC.

216. Oberdiek, above n 140, 76.

217. Sheleff, above n 111, 305.

218. Newton-Cain, above n 38, 48–68.

219. From a supplementary report provided to the court in *Wongatha People v Western Australia* (Federal Court No WAG 6005 of 1998). Document on file with author.

220. Berndt R, 'The Concept of "The Tribe" in the Western Desert of Australia' (1959) *Oceania* 81, 84–106; Tonkinson R, *The Mardudjara Aborigines: Living the Dream in Australia's Desert* (New York: Holt, Rinehart & Winston, 1978) 27–28.

221. The same was also noted by Moynihan J in relation to the Meriam society of the Torres Strait.

222. Sheleff, above n 111, 311; Williams N, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Canberra: Australian Institute of Aboriginal Studies, 1987).

223. Williams N, *ibid* 21.

224. Findlay M, 'Crime, Community Penalty and Integration with Legal Formalism in the South Pacific' (1997) *Journal of Pacific Studies* 145, 148–49.

225. [2004] WASCA 81 (22 April 2004).

The notion that the 'Western' or English legal system which Australia has inherited is distinguishable from the system of Aboriginal customary law because one is based on a 'guilt culture' and the other is based on a 'shame culture' does not appear to the author to be supported by modern day experience or anything inherent in the legal systems in question. The secular state legal system appears to the author to be strongly based on the exposure of the wrongdoer to public opprobrium. Although the word 'guilt' is used in criminal proceedings, and is applied to the individual wrongdoer, it does not signify any necessary individual awareness of aberrant behaviour. It is applied to the public declaration by the authorities of wrongdoing by an individual. There is very limited significance attached to whether the individual has a personal sense of guilt. An individual may marginally mitigate a penalty by indicating remorse, but that is not a sense of guilt which is independent of a conviction. In that sense the state legal system is predominantly indicative of a 'shame culture'. Christian religions, by way of contrast, have a significant 'guilt' ethic, manifested in self-identification and confession of aberrant behaviour. That notion is not manifest in the state legal systems of societies which have a predominant Christian membership; at least not to the extent that it has any obvious impact on the legal system. One would have thought that a 'guilt culture' is the antithesis of a criminal legal system which proclaims that a person is innocent until proven 'guilty'.

Non-recognition of customary law offences and remedies

Not everything which is regarded as an offence under Aboriginal customary law has an equivalent provision in the Criminal law of the state which would outlaw the same behaviour or subject it to a criminal sanction. Based on different cultural values, Aboriginal customary law may draw the line differently from the current content of state law when identifying:

- (a) behaviour which may be tolerated by the society but for which no sanction will be imposed (though it may be deserving of some rebuke as being in poor taste or bad manners); and
- (b) behaviour which is deserving of a society-imposed sanction.

Likewise, not every method of social control which exists in one culture or society will exist in every other culture or society. Sorcery, for example, is still an important part of the social control system of most viable Aboriginal societies in the state. Twenty-first century Western societies, on the other hand, do not generally expect persons they recognise as having the mystical skills of a sorcerer to effect social control within the society. The modern mainstream Western society equivalent is more likely to be described as a judge or religious leader.

McLaughlin²²⁶ puts the view that customary law offences such as 'failure to share food, to avoid particular relations, [or] perform rituals',²²⁷ as 'sins of omission', are 'unsustainable under even the most generous approach to Australian law'.²²⁸ McLaughlin²²⁹ also suggests that the fact that Aboriginal customary law includes a belief in malevolent sorcery and a use of counter-sorcery²³⁰ 'complicate any recognition of customary law under general law'.

Firstly, there is no need to assume, as McLaughlin seems to, that recognition of Aboriginal customary law requires recognition of all aspects of Aboriginal custom or enforcement of all aspects of Aboriginal custom by a state legal system. For example, it is unlikely that there is any need or inclination towards state law recognising sorcery. For those who believe in its effects, it will continue to be part of their lives, regardless of anything that a state legal system may have to say about it, either positive or negative.

Secondly, in order for a state legal system to adopt a principle of recognition of Aboriginal customary law, the state legal system need only have in place a capacity to recognise such Aboriginal customary laws as impact upon litigation before the court. Day-to-day matters of personal behaviour in accordance with a society's customs (as in all societies) are not all likely to come before the courts. It is only when they do that the court will need to investigate, on the basis of the evidence before it, what the relevant custom is and what action (if any) it should take to recognise it. It would generally do so applying, where appropriate, the repugnancy test discussed above.

For example, to use a custom cited by McLaughlin, it may be that, in a trial for assault, a person alleges provocation by the failure of a relation to comply with an obligation to provide food. An assessment of whether such a response

226. McLaughlin, above n 128, 8.

227. Cox, above n 186, 50–51.

228. McLaughlin, above n 128, 9.

229. Ibid.

230. Reynolds, above n 6, 72; Maddock, above n 132, 219.

satisfies the *Criminal Code* (WA) test of provocation²³¹ may involve reaching a conclusion, on the basis of evidence, as to whether such a custom exists. A recognition that it does would then provide a basis for coming to a view as to whether the conduct was of such a nature as to deprive an ordinary person, who adheres to such a custom, of the power of self control.

Regional variation

McLaughlin²³² cites as a hurdle to the recognition of customary law the lack of any systematic study of Aboriginal legal codes. Recognition of Aboriginal law does not require an immediate familiarity with all aspects of Aboriginal law or a body of jurisprudential writing on the subject. That is particularly so because customary law can be expected to vary between local areas and social groups. Recognition may therefore reflect customs which are specific to a local group.²³³

As Woodman points out, 'if a customary legal order is defined as the totality of customary norms which are observed by a population, it is unusual to find a customary law for which the population amounts to as many as a thousand'.²³⁴ That is broadly consistent with this author's observations of the normative social groups which are emerging from the presentation of evidence in support of native title claims in Australia over the past decade. As Mantziaris and Martin have said:

Indigenous societies are typically characterised by an intense 'localism', in which social, economic and political allegiances are constructed around locally based and small-scale forms and institutions, rather than in large all-encompassing institutions based on larger socio-economic units. Consequently, Aboriginal authority operates in contexts and domains, which rarely extend beyond relatively small-scale groupings. Who has authority, over which matters, and in which contexts, may itself be contested, particularly for those groups with a long history of contact with non-Aboriginal society.²³⁵

The appropriate approach in the process of recognition of Aboriginal customary law, therefore, is much the same as for the development of the law generally. The principal ingredient in a legal system is a dispute resolution process. Where a dispute arises in relation to a particular matter, the legal authority charged with the resolution of the dispute must ascertain the relevant customary law and apply it to the resolution of the dispute. As Brennan J suggested in *Mabo [No 2]*, where Aboriginal customary law is recognised by the common law, rights and interests under that law

may be protected by such legal and equitable remedies as are appropriate to the particular rights and interests established by the evidence [as] determined by the laws and customs of the Aboriginal inhabitants.²³⁶

He further suggested that:

The recognition of the rights and interests ... is not precluded by an absence of communal law to determine a point in contest between rival claimants. By custom, such a point may have to be settled by community consensus or in some other manner prescribed by custom. A court may have to act on evidence which lacks specificity in determining a question of that kind.²³⁷

Variety or uniformity

Woodman suggests that the recognition of Aboriginal customary laws:

- means that state laws treat the institutions or norms of customary law as if they were institutions or norms of state law and are enforced by the state's institutions;
- may empower people to control events in their localities; and
- may provide for the resolution of disputes between community members in accordance with a customary procedure.²³⁸

231. *Criminal Code* (WA) s 245.

232. McLaughlin, above n 128, 9.

233. *Ward v Western Australia* (1998) 159 ALR 483.

234. Woodman, above n 112, 10.

235. Mantziaris C & Martin D, *Native Title Corporations: a Legal and Anthropological Analysis* (Sydney: Federation Press, 2000) 40. Contention over authority and rights is not peculiar to Aboriginal societies with a long history of contact with non-Aboriginal society. The Meriam people were found by Justice Moynihan in his determination of facts on remitter from the High Court in *Mabo v Queensland* (unreported, 16 November 1989) to be a highly contentious society, despite its relative isolation from non-Aboriginal society.

236. *Mabo [No 2]* (1992) 175 CLR 1, 61–63.

237. *Ibid.*

238. Woodman, above n 112.

However, he acknowledges that Aboriginal customary laws exist as law outside of, and prior to, state law, are not a creation of the state and do not trace their origins to colonisation. He also rejects the centralist claim that law is, and should be the law of the state, uniform for all persons, exclusive of all other law and administered by a single set of state institutions.²³⁹ As Raz points out, while a legal system espouses the ideal of being comprehensive in its impact within the society in which it operates, there remains room for co-existing normative systems which are not in conflict.²⁴⁰

Woodman appears to suggest that while 'recognition' institutionalises Aboriginal law as a part of state law it may still accord the possibility of local variation. The notion of local variation is not at all foreign to the common law, as is suggested above, in relation to the local customs of English law which have been recognised by the common law. The various forms of recognition discussed above, such as incorporation of some laws, acknowledgement of other laws, as well as the co-existence of laws which are not in conflict in continuing plural systems, allow for a balance between uniformity and variety in the process of recognition of Aboriginal customary law.

Proof of custom

It is a commonly held view that the fact that Aboriginal culture is largely orally transmitted by its adherents impedes recognition of Aboriginal customary law.²⁴¹ However, much customary law has its origins in non-written forms. The laws of evidence in English legal tradition have risen to the occasion for much of its history in finding techniques to allow for the proof of custom. Thus, history shows that custom may be proved by evidence which is direct, circumstantial or hearsay.²⁴²

Direct evidence may be based on particular instances of the exercise of the custom or on the observation of many instances of the exercise of the custom. Evidence of a comparable custom to the one in question is circumstantial evidence supporting the existence of the custom. As to hearsay evidence of custom, Moynihan J in the *Mabo*²⁴³ determination and Blackburn J in *Milirrpum v Nabalco*²⁴⁴ accepted as an exception to the general rule against hearsay, evidence of the declarations of deceased persons concerning public or general rights. It was on that basis that evidence of native title claimants was held to be admissible in those cases to prove the laws and customs upon which their rights were based. Further, both customary rights and customary liabilities may be proved by reputation evidence of local matters of generally ancient origin in which the community are interested.²⁴⁵

Once a custom has been proved with sufficient frequency in other cases the courts are entitled to take judicial notice of it.²⁴⁶ However, it is not always easy to say when a custom has been recognised with sufficient frequency to become the subject of judicial notice.²⁴⁷ In relation to Aboriginal customary law, great care would need to be exercised in ensuring that, in taking notice of previous determinations of custom, for the purposes of a current matter, the court, in each instance, is dealing with the same Aboriginal society and the same normative system.

That position is declared by statute in Nigeria where the *Evidence Act* provides that –

- (1) A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall lie upon the person alleging its existence.
- (2) A custom may be judicially noticed by the court if it has been acted on by a court of superior or co-ordinate jurisdiction in the same area, to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.²⁴⁸

The Nigerian legislation then declares that the evidence of custom may come from Chiefs and others with special knowledge of local customs or authoritative books. Such declaratory legislation does not advance the current position in law, but may be educative for those who have not previously thought of such matters.

239. Griffiths J, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1.

240. Raz, above n 28.

241. McLaughlin, above n 128, 9.

242. Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996), [41120].

243. *Mabo v Queensland* [1989] QR73.

244. (1971) 17 FLR 141.

245. Lord Campbell in *R v Bedfordshire (Inhabitants)* (1855) 119 ER 196, 198 (QB).

246. Heydon, above n 242, [3050]. See also the comments of the Privy Council in *Angu v Attah* (1874–1928) P 43.

247. *Ibid.* See also *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48, 54–60.

248. *Evidence Law* (Lagos Laws, 1973, cap. 39) 14(1) and (92); *Evidence Law* (NN Laws 1963, Cap 40); *Evidence Law* (EN Laws, 1963, Cap 49); and see Sheleff, above n 111, 380.

Encoding rules of evidence

Within the jurisdiction of Western Australian courts the rules of evidence are largely determined by the common law. The *Evidence Act 1906* (WA) deals with a miscellany of topics that supplement the basic common law precepts of the law of evidence. However, it does not deal specifically with custom or with the rules of hearsay other than in relation to the proof of documents, in particular business records. It contrasts with the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW) and *Evidence Act 2001* (Tas) which are more akin to an encoding of the laws of evidence. The Commonwealth, NSW and Tasmanian Acts adopt and modify the common law rules in relation to evidence. For example, s 74 of each of those Acts provides that hearsay does not apply to evidence of reputation concerning the existence, nature or extent of public or general rights.

The State of Western Australia would do well to consider enacting an encoding *Evidence Act* with a similar content to that of the Commonwealth and the States of New South Wales and Tasmania. In the absence of such an approach, provisions that are particularly relevant to the proof of customary law might be appropriately inserted in legislation dealing specifically with the recognition of Aboriginal customary law.

Opinion evidence

In its report on the recognition of Aboriginal customary law, the ALRC observed that evidence of Aboriginal customary law is normally given in the form of opinion evidence.²⁴⁹ Under the common law, opinion evidence can only be given by a suitably qualified expert. In *Milirrpum v Nabalco*,²⁵⁰ for example, evidence was given by highly qualified anthropologists expressing opinions as to the social organisation of Aboriginal clan groups, based in part on statements by members of the groups.

Opinion evidence must be based on proven fact.²⁵¹ The *Evidence Act 1995* (NSW) s 76 and *Evidence Act 1995* (Cth) s 76(1) reflect the common law in disallowing evidence of an opinion to prove the existence of a fact (the opinion rule), but ss 78 and 79 respectively of each Act provide that:

If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is substantially or wholly based on that knowledge.

In *Harrington-Smith on behalf of the Wongatha People v State of Western Australia [No 7]*,²⁵² *Daniel v State of Western Australia*²⁵³ and *Lardil, Kaidalt, Yangkaal, Gangalidda Peoples v State of Queensland*²⁵⁴ the Federal Court applied the *Evidence Act 1995* (Cth) to questions of the admissibility of hearsay evidence and expert anthropological evidence tendered to prove the existence of native title in accordance with traditional laws and customs. The statutory provisions proved to be an adequate mechanism to that task, taking the place of application of the common law rules.²⁵⁵

Dispensation from the rules of evidence

When the NTA was being enacted into law in 1993 the late AR (Ron) Castan QC, who had been senior counsel for the plaintiffs in the Mabo case, impressed upon the then Attorney General, Senator Gareth Evans, the difficulty which the plaintiffs in that case faced in presenting evidence of custom. In the vicinity of 300 objections were made to the evidence given by Eddie Mabo of what his grandfather had told him about the laws and customs of the Meriam people and the rights and interests he had under the same, on the grounds that it was hearsay. Detailed argument had to be mounted as to the various exceptions to the hearsay rule at common law which justified admission of the evidence.²⁵⁶ The Commonwealth Parliament took Castan's concerns into account in enacting s 82 of the NTA. That section provided that, in conducting proceedings for the determination of applications for native title:

(1) The Federal Court must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt.

^{249.} ALRC, above n 9, [628]–[632].

^{250.} (1971) 17 FLR 141.

^{251.} Odgers S, *Uniform Evidence Law* (Sydney: LBC Information Services, 4th ed., 2000), [79.6]; *Ramsay v Watson* (1961) 108 CLR 642.

^{252.} [2003] FCA 893.

^{253.} (2000) 178 ALR 542.

^{254.} [2000] FCA 1548.

^{255.} *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 161; McIntyre G, 'Proving Native Title' in Bartlett R & Myers G (eds), *Native Title Legislation in Australia* (Perth: Centre for Commercial and Resources Law, 1994) 121.

^{256.} See McIntyre, *ibid*; Keon-Cohen B, 'Some Problems of Proof: The Admissibility of Traditional Evidence' in Stephenson MA & Ratnapala S (eds), *Mabo: The Native Title Legislation* (St Lucia: University of Queensland Press, 1993) 84–103.

- (2) The Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginals and Torres Strait Islanders.
- (3) The Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence.²⁵⁷

However, this provision was amended in 1998 by the repeal of sub-s (3) and the replacement of sub-s (1) with that the following:

The Federal Court is bound by the rules of evidence, except to the extent that the Court rules otherwise;

As well, the following proviso was added to sub-s (2):

but not so as to prejudice unduly any other party to the proceedings.

Such a provision as that which appeared in the original s 82 of the NTA is not necessary in order to prove custom. Custom can be proven in accordance with the common law, in particular by resort to the exceptions to the rule against hearsay which allow evidence of reputation in relation to public or general rights, evidence of pedigree and expert opinion evidence. The real question is whether it is desirable in the interests of the administration of justice that there be a special provision which facilitates the proof of custom by means which are less constrained than the technical requirements of the common law in relation to the proof of custom.

The *Sentencing Act 1995* (WA) s 15 provides that 'a court sentencing an offender may inform itself in any way it thinks fit'. In sentencing decisions, therefore, courts in Western Australia are not bound by the common law rules of evidence.²⁵⁸ The effect of this provision is reflected in the variety of ways in which the courts have received information of Aboriginal customary law in the course of making sentencing decisions. In her Background Paper to this reference, Victoria Williams notes examples in the following categories:

- Evidence of elders during the sentencing process;
- Evidence of an anthropologist and an elder;
- A written statement;
- Evidence at trial of the observations of a police officer;
- Information from defence counsel accepted by counsel for the Crown; and
- Submissions by defence counsel.²⁵⁹

Justice Wheeler suggested in *R v Gordon*²⁶⁰ that in order to take into account traditional punishment, for sentencing purposes evidence about the nature of the punishment would generally be required.

An appropriate general statutory relaxation of the complex common law requirements for the proof of Aboriginal customary law may be an amalgam of the provisions in the NTA, such as a section providing that:

A court, in determining matters of Aboriginal customary law, is not bound by the rules of evidence, except when a failure to abide by the rules of evidence would unduly prejudice a party to the proceedings.

Where the state is a party to the proceedings, as in criminal matters, then the interest it represents is the public interest. A provision of the kind suggested would allow for the balancing of the interest of a person seeking to prove Aboriginal customary law with any public interest in requiring that the rules of evidence be applied. The role of the state in criminal proceedings, as representative of the public interest, is probably sufficient to ensure that no injustice arises from the variety of methods which are open to the court under the *Sentencing Act 1995* (WA) of informing itself as to matters of Aboriginal customary law.

Administrative tribunals, which are not bound by the rules of evidence, are governed by the common law rules of procedural fairness in the manner in which they receive evidence. The primary focus is usually upon the weight to be accorded to evidence, rather than its form. Under the *Aboriginal Land Rights (Northern Territory) Act 1975* (NT), for instance, the Aboriginal Land Commissioner, who is not bound to apply the rules of evidence, makes findings of fact, based on the weight of the evidence, in relation to Aboriginal customary law concepts set out in the Act, including the persons who comprise 'local descent groups', based on 'spiritual affiliation' and 'spiritual responsibility' to sites and

257. Similar provisions are a common feature of legislation governing the conduct of administrative tribunals. See the discussion on this subject below.

258. The provision has a similar effect to the original NTA s 82 provision.

259. Williams, above n 15, 11–13.

260. [2000] WASCA 401, [22]; Williams, *ibid* 9–10.

land, and rights to forage under Aboriginal tradition. Aboriginal people give evidence orally and in the form of song, dance and other ritual performance. A claim book is prepared, usually by an expert anthropologist, which sets out an anthropological analysis applying the statutory concepts to the facts of the particular case.²⁶¹ The practice of the Northern Territory Aboriginal Land Commissioner could be modified for application to the exercise of the sentencing power under s 15 of the *Sentencing Act 1995* (WA) or if a general dispensation from the rules of evidence applied to the presentation of evidence of Aboriginal customary law.

A general dispensation provision of the kind suggested above is similar to the effect of s 136 of the *Evidence Act 1995* (Cth) which provides that the court 'may limit the use of the evidence if there is a danger that the particular use of the evidence might ... be unfairly prejudicial to a party'. Serious consideration should be given to adopting a statutory provision of that kind in dealing with proof of Aboriginal customary law in the State of Western Australia.

Secret/gender restricted information

The notion of secrecy associated with some aspects of Aboriginal law has been perceived by some as an irreconcilable problem when contemplating the recognition of Aboriginal law by a legal system which has, as one of its basic tenets, that its administration is *prima facie* to be conducted in public, as a guarantee of fairness. The anthropologist Debra Bird-Rose wrote that:

[T]here is a fundamental dysfunction between the different systems of law. On the one hand, the Australian legal system requires an open and impartial inquiry. This is the heart and soul of natural justice: that opposing parties be treated equally, and that the proceedings be open so that equity can be ensured. On the other hand, in Aboriginal systems of law ... knowledge is organised as intellectual property which is not freely available to all.²⁶²

Gender-based secrecy within the religious domain is an integral feature of most Australian Aboriginal societies. Notwithstanding some occasional and limited instances of what may be termed cross-gender 'overlap', such culturally sanctioned secrecy typically pertains to esoteric knowledge which is deemed to be the exclusive preserve of adult members of a particular gender. In the case of males, access to knowledge of this kind is almost invariably confined to physically initiated men. The content and associated referents of such esoteric knowledge may variously include myths, names, designs, objects, songs and sites.²⁶³

The issue of accommodating the Aboriginal custom of gender-based secrecy has been prominent in the conduct of native title litigation in Australia in recent years, and the courts have found a resolution which accommodates the competing interests of Aboriginal law and Australian law. It is possible for legal proceedings to be conducted according to all the rules of procedural fairness while being subject to customary requirements of confidentiality.²⁶⁴

In *State of Western Australia v Ward (on behalf of the Miriuwung Gajerrong Peoples)*²⁶⁵ the court concluded that s 17(4) of the *Federal Court Act 1976* (Cth) permitted the exclusion of certain persons from the proceedings²⁶⁶ if it would be in the interests of justice to do so. The court concluded that the interests of justice require the weighing of competing interests, including the interests:

- (a) in the open administration of justice;
- (b) of the parties knowing all of the evidence actually or potentially adverse to their interests;
- (c) of the parties being able to test all evidence actually or potentially adverse to their interests;
- (d) of the parties respectively being able to be represented as to all aspects of the case by the one representative or team of representatives;
- (e) of the parties being able to freely choose their own legal or other representatives;
- (f) of ensuring that the parties are equally able to give, and lead from others, the evidence relevant to their respective cases;

261. See Toohey JL, 'Seven Years On: Report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs on the *Aboriginal Land Rights (Northern Territory) Act 1976* and Related Matters' (Canberra: AGPS, 1984) xviii; 'Claim by the Warlpiri and Kartangaruru-Kurintji: Report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs and to the Minister for the Northern Territory' (Canberra: AGPS, 1978); 'Warlmanpa, Warlpiri, Mudbura and Warumungu Land Claim: Report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory' (Canberra: AGPS, 1982); McRae et al, above n 1, 176–8.

262. Bird-Rose D, 'Whose Confidentiality? Whose Intellectual Property?' in Edmunds M (ed), *Claims to Knowledge, Claims to Country* (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, 1994) 1.

263. McIntyre G & Bagshaw G, 'Preserving Culture in Court Proceedings: Gender Restrictions and Anthropological Experts' in Weir J (ed) *Land, Rights, Laws: Issues of Native Title*, Issues Paper No 15, Vol. 2 (Canberra: Native Title Research Unit, AIATSIS, May 2002).

264. *State of Western Australia v Ward (on behalf of the Miriuwung Gajerrong Peoples)* (1997) 145 ALR 512.

265. Ibid.

266. In that case all females. In *John Duda Nangkiriny & ors on behalf of the Karajarri People v The State of Western Australia & Ors* (WAG 6100 of 1998); *Paul Sampi & Ors v State of Western Australia & Ors* (WAG 49/1998) it was all persons other than the group of males who attended the presentation of evidence to the court on country. For a discussion of those cases, see McIntyre & Bagshaw, above n 263.

- (g) of the court showing respect for legitimate cultural and other differences between persons involved in the legal proceedings; and
- (h) of advancing, rather than detracting from, the purposes of the relevant legislation.²⁶⁷

The court indicated that before making an order allowing evidence to be presented in gender restricted circumstances, a court would need to be

satisfied, usually following the receipt of evidence of the existence of the asserted legal or cultural rule or norm, of the extent to which (if at all) such rule or norm admits of flexibility in its application, of the importance of the relevant evidence to the case of the party seeking to call it, of the degree of likelihood that if the requested restrictions are not imposed on the publication of such evidence the evidence will not be given, and of the proportion of the total evidence to be called by the applying party in respect of which orders restricting its publication are likely to be sought.²⁶⁸

It has been noted that courts, in some cases, have taken 'constructive and creative steps' to protect cultural confidences.²⁶⁹ For instance, in the *Sydney Williams* case²⁷⁰ an all-male jury was empanelled as a measure to protect the custom of gender-based secrecy. Further, in *Foster v Mountford*²⁷¹ the court granted an interlocutory injunction to prevent the publication of information that anthropologist Charles Mountford had a duty to keep confidential. In that case, Muirhead J²⁷² recognised a jurisdiction to restrain the publication of confidential information based on a 'duty to be of good faith' towards the persons who are entitled to have the confidence respected. Another example is found in the case *Pitjantjatjara Council v Lowe*²⁷³ where an injunction was granted to prevent the display and sale of photographic slides showing secret ceremonies from the collection of the late Dr Mountford, based upon that same duty of confidentiality. However, it is clear that no such remedy is available where that relationship of confidentiality has not been established.

In *Attorney General (NT) v Maurice*²⁷⁴ confidential information about the location of sacred sites, revealed to an anthropologist gathering evidence for a land claim, was protected from revelation by legal professional privilege. In *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs*²⁷⁵ a significant element of the evidence related to the highly secret gender-restricted issue of men's initiation ceremonies, which were being conducted in the vicinity of an area proposed as a crocodile farm near Broome. The legal team for the State of Western Australia was a solely female group. Justice Carr held that the male-only information could be made available to one only of the female members of the state legal team as the best way of balancing the public interests in maintaining cultural confidentiality and administering the law.

On the other hand, in *Norvill v Chapman*²⁷⁶ the court found that the Minister for Aboriginal Affairs was obliged to personally read material, which Aboriginal customary law dictated should be revealed only to women, in order to exercise his discretion under the *Aboriginal and Torres Strait Islanders Heritage Protection Act 1984* (Cth). The court found that his strategy of delegating his task to a female staffer who reported to him was not in compliance with the Act. An alternative approach may have been for the government to make an ad hoc appointment of a female Minister to perform the task under the Act in relation to the particular matter in issue.

It has been suggested that the protection, in equity, of confidentiality may apply to the secret, sacred content of designs.²⁷⁷ In addition, an Aboriginal artist may have a fiduciary duty to the owners, in accordance with Aboriginal customary law, of a design under customary law to protect the design from exploitation. In *Bulun Bulun v The Queen & T Textiles Pty Ltd*²⁷⁸ Von Doussa J suggested that cultural knowledge might be the property of a cultural group and an individual from within that group might have a fiduciary duty to the group not to misuse that knowledge. If such a fiduciary duty exists then the person with that duty is obliged not to misuse knowledge for personal gain or act in a way

267. *State of Western Australia v Ward (on behalf of the Miriung Gajerrong Peoples)* (1997) 145 ALR 512, 529–30 (Branson J).

268. *Ibid* 530.

269. McRae et al, above n 1, 133.

270. Unreported, Supreme Court of South Australia, 14 May 1976; Wells J, 'The Sydney Williams Case' (1976) 50 *Australian Law Journal* 386.

271. (1976) 29 FLR 233.

272. *Ibid* 237–8.

273. (1982) 4 *Aboriginal Law Bulletin* 11.

274. (1986) 161 CLR 475; see also *Daniel v Western Australia* (1999) 94 FCR 537, [56]–[62].

275. Unreported, Federal Court, 29 July 1994 (Carr J).

276. (1995) 133 ALR 226.

277. Sims C, *Aboriginal Intellectual Property Rights – A Culture Needing Protection* (unpublished Masters dissertation, Murdoch University, 1997); Gray S, 'Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet the Demand?' (1991) 9(4) *Copyright Reporter* 8; *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41; *Foster v Mountford* (1976) 14 ALR 71.

278. (1998) 86 FCR 244.

which conflicts with that person's duty to respect or keep confidential such information. It may also be possible to argue that communal ritual knowledge is embodied in the minds of members of the Aboriginal community and when artwork by an individual was authorised by the communal group the artwork comprised the anticipated materialisation of the work.²⁷⁹ However, that does not provide a remedy for the Aboriginal customary law owners as against any third party who may expropriate the Aboriginal communal knowledge by purchasing it from the artist or otherwise.

These threads of common law and equity approaches to dealing with confidential aspects of Aboriginal customary law are matters which it would be appropriate for the state to consider drawing together in an encoding statute.

4. Conclusions

The real issue that arises in contemplating recognition of Aboriginal customary law is the degree to which the state legal system is able to incorporate Aboriginal customary law or acknowledge its existence; as against the degree to which it regards it as irreconcilably inconsistent with state law. A proper appreciation of the state's obligations to treat all its citizens in accordance with universal human rights standards suggests that it should do all that it can, consistently with those standards, to incorporate or acknowledge Aboriginal customary law in ways which preserve the unique culture of Aboriginal societies in the state. The conclusion which can be drawn from this paper is that, upon careful analysis, there are only very limited circumstances of any practical significance where Aboriginal customary law might be found to be in irreconcilable conflict with universal standards of human rights; thereby precluding incorporation or acknowledgement.

Aboriginal customary law can be incorporated into the common law by the usual process of development of the common law by cases being decided as they come before the courts. However, there are advantages of education and uniformity of approach which flow from legislation that is declaratory or creates procedures which acknowledge and facilitate the existing capacity of the common law to incorporate Aboriginal customary law. Where the choice is made by the state to acknowledge or encourage the continuing practice of Aboriginal customary law, then legislation which declares and facilitates that would be appropriate.

A plurality of law may be said to follow from:

- (a) acknowledgement of aspects of Aboriginal customary law which interface with state law; and
- (b) continuation of some aspects of Aboriginal custom and Aboriginal norms which do not require any incorporation or acknowledgement by the state in order for them to co-exist comfortably with the state legal system.

However, that is not a reason to fail to address recognition of Aboriginal customary law by:

- (a) incorporation of certain aspects of it into state law; and
- (b) acknowledgement of other aspects of it by legislation.

There is merit in the state setting out in its constitutional document a declaration of recognition of the Aboriginal societies in Western Australia. The declaration ought to be to the effect that such societies have laws and customs which the state recognises as giving the members of those societies certain rights, duties and interests. The declaration ought to note the role of the state legal system in enforcing such rights; subject to compliance with universal human rights standards.

There are limitations upon what may be recognised as Aboriginal customary law. From the experience with native title we have learned that it must be sourced in a normative system that pre-dates the assertion of British sovereignty and has a continuing vitality. The laws of that system are not frozen and may evolve over time. However, it must be the case that there is a continuity of acknowledgement and observance of them by an Aboriginal society, without substantial interruption, in order for those laws to be capable of recognition today.

While there are differences of emphases between Aboriginal societies and Western societies on matters such as group conformity and religion, those differences are not such as to result in fundamentally irreconcilable conflicts in the operation of the legal systems of such societies. Suggested differences between Western and Aboriginal societies based on the notion that one is a 'guilt culture' and the other is a 'shame culture' do not stand up to close scrutiny.

279. *Sega Enterprises Ltd and Anor v Galaxy Electronics Pty Ltd* (1996) 35 IPR 161; *Sega Enterprises Ltd and Anor v Galaxy Electronics Pty Ltd* (1997) 37 IPR 462.



Recognition of Aboriginal customary law by a state legal system does not contravene the principle of equality before the law. Substantive equality requires the recognition of the right of Aboriginal people to have their laws applied to them. The fact that persons who are not Aboriginal do not have those laws applied to them does not effect any substantive discrimination against non-Aboriginal persons.

Aboriginal customary law is able to be enforced against individual Aboriginal persons without compromising the principle of equality before the law; so long as the individual is a voluntary member of the Aboriginal society from which the law stems. Certain forms of punishment, such as the death penalty, cannot be recognised by state law because they contravene universal human rights standards. Where an individual consents to a form of corporal punishment, administered in accordance with Aboriginal customary law, which is not cruel, inhuman or degrading (as judged from the perspective of the culture within which it is being administered), then state law relating to bodily harm and wounding offences should be amended to recognise that.

If the state is to proceed to a process of statutory recognition of Aboriginal customary law, then it should consider encoding rules for proof of Aboriginal customary law and dispensing with the rules of evidence except where undue prejudice would result. It should also consider encoding measures for the protection of cultural information which is confidential under Aboriginal customary law.

background paper 10

International human rights law and the recognition of Aboriginal customary law

Megan Davis* and Hannah McGlade**

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1. Introduction

The conundrum of how Aboriginal law intersects with the Australian legal system has been a preoccupation of law reform in Australia for decades.¹ To date, recognition of Aboriginal law in the legal system and its processes has been piecemeal and haphazard and most Australian legislatures have been reluctant to formally recognise Aboriginal law. This is despite the fact that Aboriginal law is already taken into account in varying contexts throughout the Australian legal system and despite the commonly held belief of many Indigenous Australians that the recognition of Aboriginal law would benefit Aboriginal people. The benefits of recognition may be that it would contribute to social and economic development in Aboriginal communities and remedy alienation within the criminal justice system.² It may also prevent the derogation of Aboriginal women's rights before the courts that is the consequence of an adversarial legal system. Many Elders, such as those Elders from the Kimberley region of Western Australia, believe that recognition may assist in the transferral of Aboriginal lore to their youth and significantly address the dislocation of Aboriginal youth from their culture.³ The benefits of the recognition of Aboriginal law for Aboriginal youth is supported by the United Nations Committee on the Rights of the Child who recommended that 'states respect methods customarily practised by Indigenous peoples for dealing with criminal offences committed by children when it is in the best interests of the child.'⁴ Lowitja O'Donoghue, addressing a forum on the recognition of Aboriginal law, endorsed sentiments about the value of Aboriginal law to the community:

[T]he long standing absence of meaningful official recognition of Aboriginal customary law has had a detrimental effect on all facets of Aboriginal community development and ... has substantially contributed to many of the social problems and varying degrees of lawlessness present today ... The failure of successive governments to recognise customary law has resulted in the erosion of Aboriginal cultures.⁵

Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner observed that:

[T]here is currently a crisis in Indigenous communities. It is reflected in all too familiar statistics about the over-representation of Indigenous men, women and children in criminal justice processes and the care and protection system; as well as in health statistics and rates of violence. Ultimately, one thing that these statistics reflect is the breakdown of Indigenous community and family structures. They indicate the deterioration of traditional, customary law processes for regulating the behaviour in communities. This is due in part to the interventions of the formal legal system through removal from country, historical lack of recognition of ... customary law processes as an integral component of the operation of Aboriginal families and societies in the Northern Territory.⁶

These perennial sentiments about the detrimental impact of institutional inertia upon Aboriginal culture have been echoed internationally. A recent meeting of experts at a United Nations Seminar on Indigenous Peoples and the Administration of Justice found a number of problems contributing to Indigenous peoples' ongoing marginalisation. These problems included the lack of official recognition for Indigenous law and jurisdiction including Indigenous customary law; the subordination of Indigenous law and jurisdiction to national or federal jurisdiction; and 'the failure to introduce adequate mechanisms and procedures that would allow Indigenous legal systems to be recognised and to complement national systems of justice'.⁷

The reluctance of Australian governments to recognise Aboriginal law and the potential benefit of recognition to marginalised Aboriginal communities are explored in this Paper. It examines international human rights law in the context of the Law Reform Commission of Western Australia's Aboriginal Customary Laws Reference. This paper also considers the intersection of Aboriginal law with the Australian legal system and Australia's international obligations to protect the human rights of individuals balanced with the obligation to protect Aboriginal culture.

1. See Australian Law Reform Commission, *Report into the Recognition of Aboriginal Customary Laws*, Report No 31 (1986); Northern Territory Law Reform Committee (NTLRC), *Towards Mutual Benefit: Report of the Committee of Inquiry into Aboriginal Customary Law* (2003); Senate Legal and Constitutional References Committee, Parliament of Australia, *Reconciliation: Off Track* (2003). See also ABC Radio National, 'Customary Law and Anglo-Australian Law: Can They Mix?', *The Law Report*, 29 July 2003.

2. See generally Eames GM 'Aboriginal Homicide: Customary Law Defences or Customary Lawyers' Defences?' in Strang H & Gerull S(eds) *Homicide: Patterns, Prevention and Control* (Canberra: Australian Institute of Criminology, 1993).

3. ABC Television, 'Customary Law', *Messagestick*, 2 April 2004.

4. United Nations Committee on the Rights of the Child, 34th Session (15 September–3 October 2003), Day of General Discussion on the Rights of Indigenous Children.

5. O'Donoghue L, 'Customary Law as a Vehicle for Community Empowerment' (Paper presented at the Forum on Indigenous Customary Law, Canberra, 18 October 1995) 3.

6. Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission to the NTLRC Inquiry into Aboriginal Customary Law in the Northern Territory (14 May 2003).

7. Office of the United Nations High Commissioner for Human Rights *Report on the Expert Seminar on Indigenous Peoples and the Administration of Justice* E/CN.4/Sub.2/AC.4/2004/6 (Madrid, 12–14 November 2003).

In recent decades Australia has become increasingly engaged with international human rights law.⁸ Australia is a party to a number of international human rights instruments, some of which have legal force in domestic law. The judiciary increasingly employs international human rights law in legal reasoning or judicial discretion⁹ and Australian citizens are regularly using the United Nations human rights treaty committee system to complain about human rights violations in Australia.¹⁰ Indigenous Australians in particular have been successful in utilising United Nations complaint mechanisms, which are available to all Australian citizens. These mechanisms resulted in a highly controversial adverse decision by the Committee on the Elimination of Racial Discrimination (CERD) in 1999 on Australia's violation of Indigenous human rights.¹¹

When commenting about the relationship between Aboriginal law and Australia's human rights obligations, the media and public often employ the vocabulary of international human rights law. Yet the perennial sentiments of the importance of Aboriginal law to Indigenous Australia and the potential violations of Australia's human rights in failing to accommodate Indigenous culture are not as readily countenanced. The problems Indigenous peoples face within state legal systems is a common experience among Indigenous peoples globally. This explains why the need for recognition of Aboriginal legal systems is a central aspect of the Indigenous right of self-determination. It is enshrined in the *United Nations Draft Declaration on the Rights of Indigenous Peoples*.¹²

This Paper attempts to establish a balance between the practice of Aboriginal law in Western Australia and Australia's human rights obligations. Thus, it examines relevant Commonwealth legislation and international obligations with respect to matters of Aboriginal law. This involved the primary examination of two key questions:

1. How is recognition of Aboriginal law consistent with international human rights law?
2. How may recognition of Aboriginal law conflict with international human rights law?

This approach involved a broader consideration of international human rights law beyond merely domestically incorporated aspects of international law (perhaps more accurately defined as 'Australia's human rights obligations'). Important also to this examination are those unincorporated yet relevant aspects of international human rights law that are becoming increasingly applicable and influential in Australian law. The two key questions that framed this analysis respond to frequently reported concerns in the community about how international human rights law can reconcile the recognition of Aboriginal law with the notion of universality of human rights and core principles of non-discrimination and equality before the law. Furthermore, this Paper considers how the fundamental human rights of Indigenous individuals within a group, in particular women and children, can be guaranteed and protected and what type of cultural practices are viewed as harmful by international human rights law.¹³

International human rights law provides a framework attendant to these concerns; the jurisprudence of the United Nations human rights treaty bodies is particularly instructive. Indigenous peoples enjoy a burgeoning presence in the United Nations system, with a developing corpus of Indigenous specific human rights that calls upon states to respect the right of Indigenous peoples to have their customs, traditions, rules and legal systems taken into account.¹⁴ As it relates to matters of Aboriginal law, it is a formidable challenge to international human rights law and municipal legal systems to ensure that all of these competing rights are balanced. Importantly, concern about the rights of Aboriginal women and children must be balanced equally with concern for substantive and procedural equality of Aboriginal people before the law and fostering respect and recognition of Indigenous culture. This Background Paper does have a significant focus upon women's issues, supported by the fact that 'women's issues are often the point at which Aboriginal Customary Law intersects with human rights'.¹⁵ The underpinning notion of international human rights law is that rights are minimum standards and rights do conflict. The fundamental issue for this reference is how to balance those rights fairly.

8. See generally, Charlesworth H, Chiam M, Hovell D & Williams G, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423.

9. See Lacey W, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5 *Melbourne Journal of International Law* 108; Brennan G, 'The Role and Rule of Domestic Law in International Relations' (1999) 10 *Public Law Review* 185.

10. 'By May 2001, 57 complaints against Australia had been lodged with the UN treaty-monitoring bodies under the three treaties. Eight complaints had gone through all procedural steps and had been determined on their merits. In three cases, the treaty bodies had found violations of international obligations': Charlesworth H, *Writing in Rights: Australia and the Protection of Human Rights* (Sydney: University of NSW Press, 2001) 61.

11. CERD, Decision 2(54) on Australia, 54th Session A/54/18 (1999). See generally Marks G, 'Avoiding the International Spotlight: Australia, Indigenous Rights and the United Nations Treaty Bodies' (2002) 2 *Human Rights Law Review* 19; Triggs G, 'Australia's Indigenous Peoples and International Law: Validity of the *Native Title Amendment Act 1988* (Cth)' (1999) 16 *Melbourne University Law Review* 372.

12. E/CN.4/SUB.2/1994/2/Add.1 (1994).

13. See generally ABC Radio, 'Mick Dodson Calls for "Extreme Action" to Tackle Indigenous Violence', *PM*, 12 June 2003; ABC Radio, 'Aboriginal Community Shut Down in Response to Domestic Violence and Child Abuse', *PM*, 13 June 2003.

14. CERD General Recommendation 23(51), 51st session, UN Doc A/52/18, annex V (1997).

15. Sex Discrimination Commissioner, Submission to the NTLRC Inquiry into Aboriginal Customary Law in the Northern Territory (May 2003), 'Part C: Women and Aboriginal Customary Law', [1].

Recognition

The Terms of Reference state that 'recognition' means that 'there may be a need to recognise the existence of and take into account within the legal system Aboriginal customary laws'. 'Recognition' is a complex and amorphous concept.¹⁶ The use of the term 'recognition' in this paper does not imply any preference for the form in which Aboriginal law is recognised. It does not imply the establishment of a separate legal system nor does it impute any suggested status for Aboriginal customary laws within the Western Australian legal system. The aim of this paper is to elaborate upon the international human rights framework and the possible limitations on legislative power in which a member of the Federation must operate.

It may be constructive, however, to reiterate a number of concerns. Recognition for most people connotes codification in a statutory form or written form. Yet the writing down of Aboriginal law seems at odds with the fluidity of Aboriginal law and restricts the potential for evolution of culture¹⁷ that may lead to the demise of some aspects of Aboriginal law. Aboriginal law is inextricably linked to Aboriginal culture and such laws have never applied to non-Aboriginal citizens and indeed may not apply to other Aboriginal groups. Aboriginal law varies significantly according to the Aboriginal group; therefore, it would be difficult to ascertain those principles that apply to all groups in Western Australia. However, sentencing principles, by which Aboriginal law is most frequently considered, may be helpful in regulating the use of Aboriginal law and indeed providing an effective filter to the use of distorted customary law or 'bullshit law'.

It is also necessary to counter claims that recognition means a 'returning' to old, traditional ways to correct dysfunction in Aboriginal communities. Such claims are simplistic when the content and diversity of Aboriginal law is fully considered. The claims serve only to 'oversimplify the complexity and fluidity of culture by treating culture as monolithic and moral norms within a particular culture as readily ascertainable'.¹⁸

The general tenor of this brief is that the way forward must be predicated upon the international principle of consultation and participation of the affected Aboriginal community. In the context of international human rights law, the process is as important as the substantive rights.¹⁹

This paper employs a preference for the phrase 'Aboriginal law' rather than 'Aboriginal customary law'. Aboriginal law accords more closely to the nature of Aboriginal law today – a diverse mix of urban and rural communities practising forms of Aboriginal law from 'traditional' customary law to more contemporary hybrid configurations of Aboriginal law that have manifested themselves in initiatives such as community justice mechanisms.

2. Background

Who are Indigenous Australians?

Aboriginal and Torres Strait Islanders are the first peoples of Australia. Today, the Indigenous population of Australia is estimated to be 458 500 people or 2.4 per cent of the Australian population.²⁰ Of that estimate, 58 496 are identified as living in Western Australia, a large proportion of which live in urban areas, more specifically in the Perth region. This pattern of urbanisation is replicated in all states and territories; however, the proportion of Indigenous people living in remote or very remote areas is higher than that of the non-Indigenous population. For example, 30.2 per cent of Indigenous Australians live in major cities compared to 67.2 per cent of non-Indigenous Australians.²¹ The majority of Indigenous peoples live in the eastern states of New South Wales and Queensland. These population statistics are useful in understanding the nature and content of Aboriginal customary law. Not all Indigenous peoples live in rural and remote areas. Most live in urban areas and do not practise what is perceived as 'traditional' Aboriginal law or the type of customary practices that may breach Australia's international human rights obligations. Another telling statistic of Indigenous Australia is that the median age for Indigenous peoples is 20 years compared with 36 for non-Indigenous

16. Svensson TG, 'On Customary Law: Inquiry into an Indigenous Rights Issue' (2003) 20 *Acta Borealia* 95.

17. See generally Zorzi CA, 'The Irrecognition of Aboriginal Customary Law' (Speech delivered at the Brisbane Institute seminar, 18 May 2001).

18. Higgins TE, 'Anti-essentialism, Relativism and Human Rights' (1996) 19 *Harvard Women's Law Journal* 89, 112.

19. McGlade H, 'Not Invited to the Negotiating Table: The Native Title Amendment Act 1998 (Cth) and Indigenous Peoples Rights to Political Participation and Self-determination Under International Law' (2000) 1 *Balayi: Culture, Law and Colonialism* 97.

20. Australian Bureau of Statistics, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, cat no 4713.0 (Canberra: Commonwealth of Australia, 2003) 15.

21. *Ibid* 22, Table 2.5.

Australians. The relative youth of Aboriginal and Torres Strait Islanders is at odds with the aging population of non-Indigenous Australia and raises vastly different social issues for the Indigenous community than for non-Indigenous Australia. This is significant because of the perceived need to strengthen cultural education and to remedy societal breakdown and youthful dislocation to culture through the revival in some cases and ongoing protection of Aboriginal law. Respect for Aboriginal culture is vital to survival of future generations.

Self-determination

The urban/rural dichotomy of the diverse demographics of the Indigenous population is paralleled by the diversity of issues, governance mechanisms and resource needs that are required from community to community.

Indigenous communities are diverse in culture and circumstance and therefore their needs are very different. Communities that are enclaves within urban areas finding themselves a sub-group of a larger, non-Indigenous political unit, have different needs and strategies to those of Indigenous communities living in remote and distinct geographical areas where they may already be engaged in initiatives that can be categorised as decentralised self-governing actions.²²

In Western Australia, aspirations of self-determination are recorded as far back as 1928 when William Harris led a delegation of Aborigines to the Premier of Western Australia. The men protested to the Premier about the treatment of Aboriginal people by the government and told the Premier that Aboriginal people should be 'allowed to live our lives in our own way'.²³

Today in Western Australia, the South West Aboriginal Land and Sea Council articulated a very clear strategy of what it perceived to be self-determination for Noongar people including a governance structure and vision for the future. One Noongar woman described self-determination as women and men working towards a much more interdependent model of decision-making within families and communities.²⁴ Obviously Noongar visions of self-determination and the needs and aspirations of the Noongar people will differ significantly to the needs and aspirations of the Bardi of Broome, the Wongi of the Goldfields or the Ngarinyin people in the north-west Kimberley.

Dean Collard has written about the history of the Noongar Nation and governance issues, including the vision of the Coalition of Aboriginal Agencies whose mission statement highlights the importance of the application of the principle of self-determination and Noongar cultural values.²⁵

Despite differing views on the content of self-determination, all Indigenous peoples would agree upon the unique and distinct nature and place of Aboriginal and Torres Strait Islander culture and identity in Australia and that a common goal that unites all Indigenous groups is the importance of the right of self-determination to the survival of Indigenous cultures in Australia. Self-determination has different meanings for different communities but essentially means 'Aboriginal people controlling all aspects of [their] lives and destiny',²⁶ and a mechanism that can 're-empower Indigenous peoples within society'.²⁷ Opinions on the manner in which self-determination can be achieved will differ from community to community; nevertheless, the core principle remains that Indigenous communities, as a distinct cultural group, should determine the nature and direction of their own affairs and should be consulted on the decisions that affect their lives.²⁸

There are many important Indigenous statements that enumerate Indigenous claims to self-determination and sovereignty such as the Barunga Statement and the Eva Valley statement.²⁹ The Royal Commission into Aboriginal Deaths in Custody found that:

[T]he elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands.³⁰

22. Behrendt L, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Sydney: Federation Press, 2003) 87.

23. Haebich A, *For Their Own Good: Aborigines and Government in the South West of Western Australia* (Perth: University of Western Australia Press, 1988) 275.

24. Beertwah K, Beediyar K & Kudaginy W, 'Old Lore, New Law: A Noongar Woman's Perspective on the Treaty Process' (2002) 4 *Balayi: Culture, Law and Colonialism* 53.

25. Collard D, *Coordination of a Collaborative Approach in the Context of Aboriginal Service Delivery Within a Noongar Nation Framework* (Paper presented at a National Conference on Racism, Land and Reconciliation in a Global Context, Perth, 26–28 June 2002).

26. Kooriweb, 'Sovereignty' (1983) <<http://www.kooriweb.org/foley/news/story8.html>>.

27. Cronin D, 'Indigenous Disadvantage, Indigenous Governance and the Notion of a Treaty in Australia: An Indigenous Perspective' in McGlade H (ed), *Treaty: Let's Get it Right!* (Canberra: Aboriginal Studies Press, 2003) 151.

28. Langton M & Palmer L, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Politics' in Langton M, Tehan M, Palmer L & Shain K (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne: Melbourne University Press, 2004) 34.

29. 'The Barunga Statement' in Moores I (ed), *Voices of Aboriginal Australia: Past, Present and Future* (Sydney: Butterfly Books, 1995) 332; 'Eva Valley Statement', 364.

30. Commonwealth Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 1 (Canberra, 1991) [1.7.6].

Similarly, an Attorney General Department's report into violence in Aboriginal communities observed that:

The impact of personal, family and community disintegration in many Aboriginal societies, enacted by missions, statutes and regulation, and State and Commonwealth policies, is still being realised today ... The ability of Aboriginal people to be self-determining must be addressed if Indigenous communities are to implement programs that come some way to resolving the issue of violence.³¹

Yet the employment of the term 'self-determination' by Indigenous peoples always invokes controversy and fear of secessionist movements that distort and divert public debate from the 'unfinished business' of resolving the relationship between Indigenous peoples and the state.³² This is despite most Indigenous peoples' understanding of self-determination or sovereignty as 'greater community autonomy yet falling short of advocating a separation from the Australian state'.³³

What contributes to the confusion of Indigenous claims to self-determination in Australia is the precarious nature of Indigenous peoples' rights in a liberal democracy. In the absence of any treaty or agreement Indigenous rights are often dependent upon the government of the day. Indigenous claims to self-determination at international law are good examples. Prior to 1993 the Labor government supported Indigenous peoples' right to self-determination.³⁴ Since then the new Coalition government opposed the use of the right to self-determination for Indigenous peoples at international law.³⁵ In 2004, the Howard Government unexpectedly revoked its opposition to the right to self-determination for Indigenous peoples at international law and endorsed the principle at the working group. Professor Larissa Behrendt explained this conundrum of Indigenous advocacy for self-determination:

The use of the term sovereignty in Indigenous rights advocacy illustrates how a technical legal term can leak into the political rhetoric of a disadvantaged and alienated group, become a catch-phrase for political goals and transform into a word with a different meaning. In this way, language can actually confine a debate in the absence of a clear understanding by both parties as to what is meant by the lexicon of political terms being used. This highlights how a semantic block can occur when two sides in a debate have different understandings of the vocabulary they are using, a stand off that has, and continues to stifle debate about Indigenous aspirations and rights.³⁶

Despite the semantic confusion in the national debate over Indigenous self-determination, an undeniable component of Indigenous aspirations is the recognition of Aboriginal law. Having conducted research on Indigenous Australian ideas about what constitutes self-determination, Behrendt discovered that the protection of Aboriginal law was a recurring theme reflecting the sentiments of key national Indigenous statements.³⁷ This is the case regardless of the geographical location of Indigenous peoples. Although Aboriginal law is popularly viewed as affecting only a small proportion of the population in Western Australia, its recognition is a common goal of Indigenous peoples' aspirations.

The view that recognition of Aboriginal law is an important aspiration for Indigenous peoples is reflected in a number of key national documents including the Barunga statement,³⁸ the Eva Valley statement,³⁹ the Royal Commission into Aboriginal Deaths in Custody,⁴⁰ the Final Recommendations of the Council for Aboriginal Reconciliation⁴¹ and, most recently, the Senate Legal and Constitutional References Committee report *Reconciliation: Off Track*.⁴²

What is Aboriginal law?

Aboriginal law is popularly viewed as Aboriginal communities reliving the halcyon days of Aboriginal culture practising brutal, traditional punishment such as wounding or tribal payback. The emphasis upon non-Indigenous repulsion of payback spearing or child marriage tends to obfuscate the organic nature of customary law in Aboriginal culture, and

31. Memmott P, Stacy R, Chambers C & Keys C, *Violence in Indigenous Communities* (Canberra: AGPS, 2001).

32. See especially, for analysis of the semantic confusion of use of word 'sovereignty', Brennan S, Gunn B & Williams G, 'Sovereignty and Its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307; Strelein L, 'Missed Meanings: The Language of Sovereignty in the Treaty Debate' (2002–03) *Arena Journal* 20; Reynolds H, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Sydney: Allen & Unwin, 1996).

33. Behrendt above n 22, 102.

34. At the United Nations Commission on Human Rights Working Group on the *Draft Declaration on the Rights of Indigenous Peoples*, above n 12.

35. McGlade, above n 19. See also Dodson M & Pritchard S 'Recent Developments in Indigenous Policy: The Abandonment of Self-determination' (1998) 4 *Indigenous Law Bulletin* 4.

36. Behrendt above n 22, 103.

37. Ibid 113.

38. Above n 29.

39. Above n 29.

40. Above n 30.

41. 'State and territory governments consider giving magistrates and judges the discretion to take account of traditional laws in sentencing as already occurs in some circumstances in the Northern Territory': Council for Aboriginal Reconciliation, *Final Report* (December 2000) 111.

42. Australian Law Reform Commission, above n 1.

the dynamic and shifting course of Aboriginal law.⁴³ Like all legal systems, Aboriginal law is complex and is not frozen in time but evolves and adapts.

Attempts to consign customary law to the time when Aborigines wore lap laps, used spears and stood on bended knee will result in the strengths of many Aboriginal communities being excluded from devising solutions to difficult, intransigent problems.⁴⁴

There are many public misconceptions about Aboriginal law that is deleterious to Indigenous efforts to achieve law reform. The Northern Territory government remarked in the preamble to its inquiry into Aboriginal customary law:

Aboriginal law is commonly misunderstood as relating primarily to issues of punishment and payback ... This is simply untrue. Aboriginal law encompasses an extremely broad and complex set of rules and unwritten legislation governing social relationships, economic rights, land ownership, wildlife conservation, land management and intellectual property rights.⁴⁵

Aboriginal law resides in an extensive number of legal issues such as dispute resolution, intestacy, child adoption and marriage. Australian legislatures have differing approaches to the use of Aboriginal law and there is no formal legislative recognition of Aboriginal law in the Australian criminal law system.⁴⁶ Some jurisdictions have enacted legislation that takes into account Aboriginal law in relevant circumstances. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), for example, gives Aboriginal people the right to use land based on

the body of traditions, observances, customs and beliefs of Aborigines or of a community or group of Aborigines, and includes those traditions, observances, customs and beliefs as applied to particular persons, sites, areas of land, things or relationships.⁴⁷

The *Aboriginal Affairs Planning Authority Act 1972* (WA) is an example of Aboriginal custom being taken into account in the context of intestacy.⁴⁸ The Second Reading speech explains that if the Public Trustee cannot determine who is entitled to benefit, the balance may be 'distributed in accordance with the Aboriginal customary law as it applied to the deceased at the time of his death'.⁴⁹ Legislation exists in different states across a diverse number of areas such as adoption, marriage and intestacy laws.⁵⁰ Aboriginal law also involves the protection of traditional knowledge as manifest in paintings, drawings and songs. The Australian government has been considering law reform in the field of intellectual property for decades but has laboured with the same institutional inertia that all political institutions exhibit when dealing with law reform in the context of Aboriginal law.⁵¹ While community emphasis is placed upon 'traditional' Aboriginal law, a broader analysis of Indigenous communities shows that Aboriginal law is being practised in many forums throughout the country.

Indigenous participation in sentencing procedures has been occurring informally in remote communities for some time. During the late 1990s, formalisation of this practice began in urban areas with the advent of Indigenous sentencing and Circle Courts.⁵²

The Aboriginal and Torres Strait Islander Social Justice Commissioner has highlighted a number of important and successful community justice mechanisms, such as Ali-Curung, Lajamanu and Yuendumu law and justice committees, as an exercise of Aboriginal law.⁵³ While these dispute resolution processes are not viewed as 'a straightforward revival of customary law', they are contributing to the empowerment of Aboriginal communities and give form to claims of self-determination.⁵⁴ These mechanisms have become successful configurations of contemporary Aboriginal law.⁵⁵

43. See generally, ABC Radio, 'Bail Refused to Man Wanting to Undergo Tribal Punishment', *The World Today*, 17 February 2004; ABC Television, 'Aboriginal Traditional Law', *ABC Online*, 20 February 2004; ABC Radio, 'Aboriginal Law', *The Law Report*, 31 October 1995; ABC Online, 'Tribal Payback Reduces Jail Time for Woman', *Messagestick*, 9 November 2004.

44. Jonas W, 'The Recognition of Aboriginal Customary Law' (Paper presented at the Human Rights and Equal Opportunity Commission/International Lawyers' Association Seminar on Aboriginal Customary Law, Sydney, 20 November, 2003).

45. NTLRC, above n 1, Preamble.

46. LBC, *Laws of Australia* (at 6 October 2004) Aborigines and Torres Strait Islanders, '1.2 Aboriginal Customary Law', Ch 2, Pt E: Criminal Justice System.

47. *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3(1).

48. Cited in Vines P, 'Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights' (2004) 8 *Australian Indigenous Law Reporter* 1.

49. WA Parliament *Hansard* (HA) 11 May 1972.

50. See, eg, *Adoption Act 1988* (SA); *Adoption Act 1984* (Vic); *Adoption Act 2000* (NSW); *Adoption of Children Act 1994* (NT). Traditional Aboriginal marriages are recognised as de facto relationships in NSW: see *De Facto Relationships Act 1984* (NSW). In the Northern Territory Aboriginal marriages are recognised particularly in relation to intestacy and family provision: see *Administration and Probate Act 1979* (NT) Div 4A; *Family Provision Act 1979* (NT) s 7(1A).

51. Commonwealth Attorney-General's Department, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islanders*, Issues Paper (1994).

52. Marchetti E & Daly K 'Indigenous Courts and Justice Practices in Australia' in Australian Institute of Criminology *Trends and Issues No 277* (10 August, 2004); see also Larsen A & Petersen A, 'Rethinking Responses to "Domestic Violence" in Australian Indigenous Communities' (2001) 23 *Journal of Social Welfare and Family Law* 121.

53. ABC Television, *Messagestick*, above n 3; see especially section on Customary Law and Community Justice Models.

54. Ryan P & Antoun J, *Report on the Law and Justice Plans* (Darwin: Department of Community Development, Sport and Cultural Affairs, 2002) 21.

55. See ABC Radio, 'Bush Courts', *The Law Report*, 21 August 2001.

According to Marchetti and Daly, these judicial practices 'indicate a transformation' in the Australian legal system, and 'although the practices are experimental and fluid, they will lead to changes in how justice is done for both Indigenous and non-Indigenous peoples'.⁵⁶

These developments are consistent with the recommendations made by states at a United Nations experts meeting at a Seminar on the Administration of Justice and Indigenous peoples. The meeting recommended that states should help to restore Indigenous legal practices in cooperation with Indigenous legal experts as such a collaboration is more likely to result in the development of an impartial system of justice that is in full compliance with international human rights law.⁵⁷

The significance of law reform

The perennial sentiments about the importance of law reform to Aboriginal communities and culture are also informed by implacable public unease about 'extreme levels of violence (including sexual violence) in some Aboriginal communities'.⁵⁸ The Western Australian reference is contiguous to a number of other inquiries examining the problem of abuse and violence in Aboriginal communities.⁵⁹ In 2001, the National Crime Prevention Program published its full report into *Violence in Indigenous Communities*;⁶⁰ in 2002, the Western Australian Gordon Inquiry⁶¹ reported evidence of extensive Aboriginal family violence and child abuse in Aboriginal communities; and in 2003, Boni Robertson led a Queensland taskforce that handed down *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*.⁶²

Growing concern about the conflict of Aboriginal law with Australia's human rights obligations must also be viewed through the prism of Aboriginal women's experiences in Australia. Indigenous women experience challenges in Australian society. They include those broad challenges encountered by women in a patriarchal society such as issues of childcare, employment and maternity leave. Indigenous women also face challenges related to race.

To assume that patriarchal gender relations are the primary cause and to locate the family as the primary site of women's oppression, does not accord with the analysis of these issues by Aboriginal women.⁶³

Family violence in Aboriginal communities and its impact upon Aboriginal women has become an increasing focus of mainstream media. For many Aboriginal women, issues of family violence and intervention are often inflicted with race and gender conflicts. National concern for Indigenous issues is often met with great suspicion. This dilemma is highlighted by Indigenous women who say that:

Aboriginal women have been silent because of the shame it reflects on their people, and because they do not want their men, already imprisoned at a hugely disproportionate rate, further oppressed by white society.⁶⁴

Another example is the assertion that 'women don't want to lock their men out forever. That's a very big feminist thing, but not in these communities. They just want the violence to stop',⁶⁵ or 'many Aboriginal women do not go to the police when they are assaulted because of the way police treat the men ... police just bash black men'.⁶⁶ Professor Mick Dodson in a National Press Club address on 'Violence, Dysfunction and Aboriginality' remarked that:

People are also silent because they fear the interrogation of the police more than the fear of repeated violent acts against them by their relatives. And there is silence because 'it is not our business to talk up'.⁶⁷

56. Marchetti & Daly, above n 52.

57. Office of the United Nations High Commissioner for Human Rights, above n 7, 13.

58. Blagg H, Morgan H & Yavu Kama Harathunian C, 'Aboriginal Customary Law in Western Australia' (2002) 80 *Reform* 12.

59. See generally ABC Radio, 'Aboriginal Community Shut Down', above n 13; ABC Radio, 'Summit on Domestic Violence in the Aboriginal Community', *PM*, 23 July 2003; ABC Television, 'The Shame', *Four Corners*, 3 September 2001.

60. Memmott et al, above n 31.

61. 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* ('Gordon Report') (Perth: Department of Premier and Cabinet, 2002).

62. Robertson B, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (Brisbane: Department of Aboriginal and Torres Strait Islander Policy and Development, 2000).

63. Koshan J 'Sounds of Silence: The Public/Private Dichotomy, Violence and Aboriginal Women' in Boyd S (ed), *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) 100.

64. Burchill M, former manager of the Family Preservation Program in Shepparton, quoted in Bone P 'One Year On, Has Much Changed?' *The Age*, 8 June 2002.

65. Guivarra R in Jopson D 'A Body Blow for Reconciliation' *The Sydney Morning Herald*, 29 June 2001.

66. Stephen S, 'Domestic Violence: Just an Indigenous Issue?' (2001) 454 *Green Left Weekly* 11; see generally Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems Facing Aboriginal Women Victims of Rape in Central Australia' in Eastaugh PW (ed), *Without Consent: Confronting Adult Sexual Violence* (Canberra: Australian Institute of Criminology, 1993).

67. Dodson M, 'Violence Dysfunction Aboriginality' (Paper presented at the Telstra Address, National Press Club, Canberra, 11 June 2003).

These observations about the conflict of race and gender have been identified by the United Nations Committee on the Elimination of all Forms of Discrimination against Women. In a General Recommendation on gender related dimensions of racial discrimination, the committee noted that:

[R]acial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life... [W]omen may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life.⁶⁸

In being cognisant and sensitive to the double-edged sword of intervention, it is important and necessary to reject the mythology that family violence is culturally sanctioned by Aboriginal customary law. Former Social Justice Commissioner Bill Jonas commented that:

Indigenous family violence is not normal. And contrary to popular myth, or romanticised notions of Aboriginal culture, or the less pre-dominant but still existing racist stereotypes of 'savagery', it is not culturally acceptable. And it is not part of our systems of customary law. In fact it is the reverse. It is an indication of the fragility of such customary law and a sign of the breakdown in traditional governance mechanisms in communities. It is, in short, an indication of community dysfunction.⁶⁹

Audrey Bolger, in her study on Aboriginal women and violence, reinforced the distinction between Family violence and Aboriginal law:

When discussing violence against Aboriginal women, it should be noted that while it is important to distinguish between traditional and non-traditional violence, in practice it is often difficult to do so. Strictly speaking traditional violence refers to clearly defined and controlled punishments which were applied in cases where Aboriginal Law was broken, many of which are still in use in communities where traditional Law is followed. However, it may sometimes be used to describe violence which is not prescribed by Aboriginal Law but which is condoned as a response to socially disapproved behaviour ... One result of this is that they are now subject to violence from their own men of a kind which would not have been countenanced in traditional society.⁷⁰

The Commission's reference is temporal to national controversy and public debate surrounding the Northern Territory decision in *Hales v Jamilmira*.⁷¹ The decision has contributed to a burgeoning perception in the non-Indigenous community that custom is being used to justify the abuse of women and children in Aboriginal communities. And in Indigenous communities there has been concern for decades that customary law has at times become a conduit for distorted customary law or 'bullshit law'. In particular, the adversarial nature of our legal system has provided opportunities for white legal counsel representing Aboriginal men to employ distorted custom in defence. The prospect of distorted customary law regularly invites populist hysteria and calls for wholesale public prohibition of the practice. Nevertheless, this reference provides an opportunity for measured and informed analysis of the many configurations of Aboriginal law and the circumstances in which its practice may infringe international human rights law.⁷²

In determining the most appropriate means of recognising Aboriginal law, consideration must be given to fostering informed understanding within non-Indigenous communities about Aboriginal people, the complexity of the Aboriginal culture and the importance of Aboriginal customary law to Aboriginal communities. Such an approach would be consistent with the recommendations of the 2003 United Nations Expert meeting at the Seminar on Indigenous Peoples and the Administration of Justice in Madrid, recommending that '[s]tates should recognise Indigenous peoples own systems of justice and develop these systems to function effectively in cooperation with the official national systems'.⁷³ More important and fundamental to this reference is the recommendation that 'states and Indigenous peoples should incorporate internationally recognised human and Indigenous rights into their systems of justice'.⁷⁴ The single most effective way in which this can be achieved is through open and widespread consultation with Aboriginal communities.

68. CERD General Recommendation No 25: 'Gender Related Dimensions of Racial Discrimination', 56th session (2000).

69. Jonas W, 'Family Violence in Indigenous Communities: Breaking the Silence?' (Speech delivered at the Launch of the University of New South Wales Law Journal Forum, Sydney, 25 July 2002).

70. Bolger A, *Aboriginal Women and Violence* (Darwin: Australian National University, North Australia Research Unit, 1991) 4.

71. *Hales v Jamilmira* [2003] NTCA 9. See also *Jamilmira v Hales* [2004] HCATrans 18 (13 February 2004).

72. Albrechtson J, 'Stop Tolerating Tribal Punishment', *The Weekend Australian*, 1 December 2004.

73. Office of the United Nations High Commissioner for Human Rights, above n 7, 14.

74. *Ibid.*

3. International human rights law

This section establishes the context of the paper and examines international human rights law which is a specific classification of public international law. It explains how international law is related to the domestic Australian legal system. It also explains how Australian citizens can employ international law when their human rights have been violated. Nations like Australia are known as 'states' at international law. International law belongs to a legal system that is separate from and discrete to domestic legal systems. All states are sovereign with their own legal and political systems. Thus, international law is often a controversial source of law, mainly because there is no viable or organised international governance structure. Therefore, international law is viewed as undemocratic. This explains why there is an ongoing debate about the relevance of international human rights law to the Australian legal system. Similarly, there is an ongoing debate in international law about the nature of international human rights law and whether they are truly universal. These debates are important when determining the notion of 'conflict' in the context of Aboriginal law. How Aboriginal law may conflict with Australia's obligations under international law is considered in an analysis of non-discrimination, equality before the law, obligation to protect culture and harmful cultural practices.

International law

International law, often described as the Law of Nations, is a body of rules or laws governing the relationship and conduct between sovereign states. These laws involve a diverse range of matters including trade, war, human rights and the law of the sea. International law is primarily governed by treaties which are agreements between states that govern their conduct in international relations. A treaty, a generic word, is the primary source of international law that may also be referred to as a 'convention', 'covenant' or 'international agreement'. Examples of major international treaties include the *United Nations Charter*, *International Covenant on Civil and Political Rights*, the *Statute of the International Criminal Court* and the *International Convention on the Law of the Sea*.

There are other sources of international law such as rules of customary international law that are derived from the practice and custom of states.⁷⁵ For state practice to become customary international law the practice must be uniformly, consistently and widely practised by states and the practice must be *opinio juris*; that is, the practice must be considered obligatory by states. Customary international law is binding on all states. Aspects of treaties such as the *Universal Declaration on Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* (also referred to as the International Bill of Rights) are now widely regarded as customary international law.⁷⁶ In particular, provisions of the *Universal Declaration on Human Rights* relating to racial discrimination, torture, slavery and arbitrary detention have achieved the status of customary international law. The Federal Court in *Nulyarimma v Thompson* held that customary international law has no effect in the Australian legal system until it is incorporated into Australian law.⁷⁷ In this case consideration was made of the prohibition of genocide that is a peremptory norm of customary international law. Peremptory norms or the rule of *jus cogens* constitutes another rule of international law from which no state is permitted to derogate. *Jus cogens* principles are so fundamental that they override treaty provisions if they are inconsistent. Racial discrimination, slavery and genocide are examples of *jus cogens*. Nevertheless, in *Nulyarimma* the majority found that the court should be guided by legislative intention before it could exercise consideration of a peremptory norm of international law.

International law does not automatically become operative in the Australian legal system.⁷⁸ In Australia, the authority to enter into treaties is a power of the Executive under the Australian Constitution.⁷⁹ Treaties, for example, must be incorporated into domestic law before they can be effective. The first stage toward binding force of a treaty is signature, which is followed by the ratification stage. Australia has ratified a number of international human rights instruments.⁸⁰

75. *Concise Australian Legal Dictionary* (Butterworths, 3rd ed., 2004).

76. See *Advisory Opinion on Namibia* (1971) 16 ICJ Rep 57.

77. *Nulyarimma v Thompson* (1999) 165 ALR 621; but see Merkel J's dissenting judgement. See also Guilfoyle D, 'Nulyarimma v Thompson: Is Genocide a Crime at Common Law in Australia' (2001) 29 *Federal Law Review* 23.

78. The Whitlam government (2 December 1972–11 November 1975) was a significant period for Australia's engagement with international human rights law. Most significantly, Whitlam ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* and implemented it into domestic law through the *Racial Discrimination Act 1975* (Cth). Following the Whitlam government, successive Australian governments continued to ratify international human rights treaties. During the period of ratification by Australian governments, two important human rights covenants were ratified: the *International Covenant on Civil and Political Rights* [1980] ATS 23 and the *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5.

79. Australian Constitution ss 51(xxix), 61. See generally Department of Foreign Affairs and Trade, *Human Rights Manual* 3rd edn (Canberra, 2004).

80. *International Covenant on Civil and Political Rights* [1980] ATS 23; *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5; *Convention on the Rights of the Child* [1991] ATS 4; *Conventions on the Prevention and Punishment of Crime of Genocide* [1951] ATS 2; *Convention on the Elimination of All Forms of Racial Discrimination* [1975] ATS 40; *Convention on the Elimination of All Forms of Discrimination Against Women* [1983] ATS 9; *Convention Against Torture and Other*

The obligation to give effect to those instruments once ratified is enshrined in the *Vienna Convention on the Law of Treaties*, the key international instrument regulating the interpretation of international treaties.⁸¹

Ratification does not automatically render an international treaty operational in domestic law. Whether ratification automates domestic effect depends upon whether a legal system implements international law by incorporation or transformation of international law. The incorporation theory holds that international law is effectively part of the domestic law and does not require enabling legislation to incorporate it into the legal system. The alternative theory holds that international law is a discrete area of law that requires its transformation into domestic law. Transformation is usually achieved through enabling legislation.

In the Australian legal system, the dominant contemporary theory that determines the effect of international law upon the domestic legal system is one of transformation – otherwise referred to as the 'dualist approach'. Because the act of ratifying international treaties by the Australian Executive does not automatically transform international treaties into domestic law, enabling legislation is required to incorporate that particular treaty or aspect of international law into domestic law (or via the use of existing Commonwealth or state legislation).⁸² The notion of transformation operates to maintain the separation of powers so that the Executive power to ratify a treaty is diluted by the parliament's capacity to make the law.

International law and the Australian legal system

The increased awareness and importance of international law in Australia means that international human rights law, in particular, has become significant in many public debates on legal and political issues such as the refugees, unions and Indigenous peoples. International law is used in Australia in a variety of ways. NGOs, legal advocates and community groups use international law as benchmarks by which the conduct of the government can be measured using internationally accepted standards. Public institutions and decision makers also employ and implement international law where relevant. For example, during the negotiations in amending the *Native Title Act 1993* (Cth) Indigenous peoples argued that they were not adequately consulted on the drafting of legislative amendments that would directly affect their rights. Indigenous peoples were able to identify the relevant standard in the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).⁸³ In recent years public debate about the rights of asylum seekers has been dominated by reference to the international standards that were drafted after World War II. These standards were designed to provide a framework for states indicating the manner in which asylum seekers are to be treated.

International law may be used by courts when attempting to construe the meaning of a statute or in cases of statutory ambiguity. In circumstances of statutory ambiguity, legislation may also be interpreted in accordance with customary international law.⁸⁴ A general rule of statutory construction is that, in the event of statutory ambiguity, interpretation should be consistent with international law. On this point Gleeson CJ commented that:

[W]here legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations.⁸⁵

Yet in decisions like *Polites*⁸⁶ and *Teoh*⁸⁷ it was apparent that, when interpreting statutory ambiguity consistent with international law, it does not principally require incorporating legislation to give effect to the principle of statutory

Cruel, Inhuman or Degrading Treatment or Punishment [1989] ATS 21; Convention Relating to the Status of Refugees [1954] ATS 5; Convention Against Discrimination in Education [1966] ATS 20; ILO Convention 87 concerning Freedom of Association and Protection of the Right to Organise [1974] ATS 3; ILO Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively [1974] ATS 5; ILO Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value [1975] ATS 45; ILO Convention 111 concerning Discrimination in respect of Employment and Occupation [1974] ATS 12; ILO Convention 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities [1991] ATS 7; ILO Convention 158 concerning Termination of Employment at the Initiative of the Employer [1994] ATS 4; First Optional Protocol to the International Covenant on Civil and Political Rights [1991] ATS 39; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty [1991] ATS 19; Protocol relating to the Status of Refugees [1973] ATS 37.

81. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (entered into force 27 January 1980) Art 26.

82. The transformation/incorporation debate remains contentious. For further reading: Campbell W, 'The Implementation of Treaties in Australia' in Opeskin B & Rothwell D (eds), *International Law and Australian Federalism* (Melbourne: Melbourne University Press, 1997) 132; Balkin R, 'International Law and Domestic Law' in S Blay, R Piotrowicz and BM Tsamenyi (eds), *Public International Law: An Australian Perspective* (Melbourne: Oxford University Press, 1997) 119.

83. Hoffman S, 'United Nations on the Elimination of Racial Discrimination: Consideration of Australia Under Its Early Warning Measures and Urgent Action Procedures' (2000) 6 *Australian Journal of Human Rights* 13, documenting in detail the 54th and 55th sessions of CERD in which the *Native Title Act* amendments were considered and decided.

84. *Polites v Commonwealth* (1945) 70 CLR 60.

85. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492.

86. Above n 84.

87. (1995) 183 CLR 273.

interpretation. This serves to highlight the ongoing debate about the role of international law in the Australian legal system. Nevertheless, the importance of the vocabulary of international law has been extremely valuable for law reform advocacy. In the absence of an entrenched rights protection in Australia, incorporated international law, as well as those standards that are neither ratified by Australia nor effectively international law, have significant influence for Indigenous peoples. The International Labor Organisation (ILO) Convention has been valuable despite Australia's failure to ratify it. Also of importance is the United Nations Draft Declaration on the Rights of Indigenous Peoples, which remains in draft form while being negotiated. In *Police v Abdulla* Perry J referred to the *Convention Concerning Indigenous and Tribal Persons in Independent Countries* (ILO Convention 169), which has not been ratified by Australia:

Section 11 of the *Criminal Law (Sentencing) Act* makes it plain that a sentence of imprisonment must be regarded as a sentence of last resort. In the case of Aborigines this is reinforced by provisions to be found in [ILO Convention 169]. Australia is not a party to the Convention. But it is an indication of the direction in which international law is proceeding. In the area of human rights particularly, Australian courts should always be prepared to take into account international instruments where they identify precepts of universal application, at least where they are not in conflict with the domestic laws of this country.⁸⁸

Perry J's use of the ILO Convention 169 intimates that such standards may be an important source for the judiciary. The Draft Declaration on the Rights of Indigenous Peoples provides an instructive list of standards that is becoming increasingly practised by United Nations agencies and human rights advocates. While some Indigenous groups argue that aspects of the Draft Declaration have entered customary international law, it is doubtful that this is the case. Nevertheless, the Draft Declaration contains an exhaustive list of rights that defines self-determination for Indigenous peoples and elaborates on the content of self-determination.

Legitimate expectation

In *Minister for Immigration and Ethnic Affairs v Teoh*, a majority of the High Court held that a legitimate expectation arises when the Executive ratifies international instruments.⁸⁹ The majority of the High Court found that there was a legitimate expectation that decision makers would take into account relevant treaty provisions when interpreting legislation and formulating a decision. In this case the relevant treaty was the *Convention on the Rights of the Child* which had not been implemented into Australian law.

[R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.⁹⁰

After the decision in *Teoh* a bill was introduced in federal parliament with the intention of expressly precluding ratified treaties from effect in the domestic legal system unless incorporated through implementing legislation into the domestic legal system.⁹¹ The bill has since expired, though *Teoh* remains a contentious issue. Of note, however, is the Australian *National Framework for Human Rights: National Action Plan* released in December 2004, which states that:

The provisions of treaties to which Australia has become a party do not become part of Australian domestic law by virtue only of the formal acceptance of the treaty by Australia. The general approach taken in Australia to human rights and other conventions is to ensure, as far as is possible, that domestic legislation, policies and practice comply with the convention prior to ratification.⁹²

The controversy of international law and the Australian legal system

Australia's engagement with international law has always been politically controversial. The High Court has historically 'shown ambivalence towards international law'.⁹³ For example, the *Universal Declaration on Human Rights* was cited

88. *Police v Abdulla* (1999) 106 A Crim R 466, 472.

89. *Teoh*, above n 87.

90. Ibid 291 (Mason CJ & Deane J).

91. Administrative Decisions (Effect of International Instruments) Bill 1999.

92. Attorney-General's Department, *National Framework for Human Rights National Action Plan* (Canberra, December 2004).

93. Charlesworth H, 'International Law' in Blackshield T, Coper M & Williams G (eds), *The Oxford Companion to the High Court of Australia* (Melbourne: Oxford University Press, 2001) 348.

only once from the World War II period until the 1970s.⁹⁴ Federalism inevitably fuelled the controversy of international law.⁹⁵ Decisions in *Koowarta v Bjelke-Peterson*⁹⁶ and *Commonwealth v Tasmania*⁹⁷ assuaged state doubts that the Commonwealth has the capacity to pass laws with respect to external affairs, and the power to ratify international treaties and enact laws with respect to international human rights law.

This historical ambivalence of the High Court was discarded during the period of the Mason High Court (6 February 1987 to 20 April 1995) and the Brennan High Court (21 April 1995 to 21 May 1998). The Mason/Brennan courts are credited as a period in which the judiciary became increasingly attendant to international law, in particular international human rights law. This period contributed to permeation in the broader community of the importance of human rights. During this period the High Court drew extensively from international law, making reference to major human rights instruments Australia had ratified such as the *International Covenant on Civil and Political Rights* (ICCPR) and *Convention on the Rights of the Child*, as well as drawing on international jurisprudence from the International Court of Justice and the European Court of Justice.

During the Mason court, decisions such as *Mabo v Queensland (No 2)*,⁹⁸ *Minister for Immigration and Ethnic Affairs v Teoh*⁹⁹ and *Dietrich v The Queen*¹⁰⁰ were clearly influenced by international human rights law.¹⁰¹ The recognition of Aboriginal customary law in *Mabo* was directly influenced by international human rights law:

The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.¹⁰²

The High Court's rejection of Australia as a terra nullius country in *Mabo* was consistent with international law and the decision of the International Court of Justice in the Western Sahara case.¹⁰³ The High Court's endorsement of international law, in particular *Mabo* and *Teoh*, attracted criticism and allegations of judicial activism. It was said that international law has 'become a charged and politicised field in Australia'.¹⁰⁴ The *Teoh* decision was controversial because it rendered international law effective in the domestic legal system without clear legislative intention by the state. The government was of the view that the *Teoh* principle—whereby entry into a treaty created a legitimate expectation that the treaty obligations would be followed—'[was] not consistent with the proper role of Parliament in implementing treaties in Australian law'.¹⁰⁵

While Australia is party to numerous United Nations human rights treaties it has ratified, most treaty provisions have not been implemented into domestic law. This has been described as Australia's 'Janus-faced approach' to human rights treaties; 'the international face smiles and accepts obligations, while the domestic-turned face frowns and refrains from giving them legal force'.¹⁰⁶

The Howard era (1993–) has become distinguished by its ambivalence toward international human rights law.¹⁰⁷ Some commentators have viewed this approach to international human rights by the Howard Government as useful for reform of the United Nations human rights treaties.¹⁰⁸ Other commentators have interpreted this ambivalence as

94. Devereux A, 'International Bill of Rights' in Blackshield, Coper & Williams, *ibid* 348.

95. See generally Opeskin & Rothwell, *above* n 82.

96. (1982) 153 CLR 168, 229: 'Increasing emphasis is given in the United Nations and in regional organisations to the pursuit by international treaties of idealistic and humanitarian goals. It is important that the Commonwealth retain its full capacity through the external affairs power to represent Australia, to commit it to participation in these developments when appropriate and to give effect to obligations thereby undertaken': (Mason J).

97. (1983) 158 CLR 1.

98. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

99. *Above* n 87.

100. *Dietrich v The Queen* (1992) 177 CLR 292.

101. Walker K, 'Treaties and the Internationalisation of Australian Law' in C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Sydney: Federation Press, 1996) 232.

102. *Mabo (No 2)* *above* n 98, 42 (Mason CJ & McHugh J).

103. *Advisory Opinion on Western Sahara* (1975) ICJ Rep 12.

104. Charlesworth et al, *above* n 8, 424; See generally T Tenbensen, 'International Human Rights Conventions and Australian Political Debates: Issues Raised by the "Toonen Case"' (1996) 31 *Australian Journal of Political Science* 7.

105. Statement of 25 February 1997, reprinted (1998) 17 *Australian Year Book of International Law* 224.

106. Charlesworth et al, *above* n 8, 436.

107. See generally Hovell D, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alternative Law Journal* 297; Kinslor J, "'Killing Off' International Human Rights Law: An Exploration of the Australian Government's Relationship with United Nations Human Rights Committees (2002) 8 *Australian Journal of Human Rights* 79; Zifcak S, *Mr Ruddock Goes to Geneva* (Sydney: UNSW Press, 2003); Charlesworth H, 'Globalisation, the Law and Australian Sovereignty: Dangerous Liasons' (Paper presented at the Senate Occasional Lecture Series, Canberra, 12 June 1998) 7.

108. ABC Television, 'Government Calls for UN Overhaul', 7.30 Report, 29 August 2000; Downer A, Williams D & Ruddock P, 'Australian Initiative to Improve the Effectiveness of the UN Treaty Committees', Media Release, 5 April 2001.

a form of 'legal xenophobia', stating that international law is 'an intrusion from "outside" into our self-contained and carefully bounded legal system'.¹⁰⁹ Still others have viewed international law as 'vague and conflicting' and deriving from an inherently undemocratic process that is in conflict with parliamentary sovereignty.¹¹⁰ The debate about the role of international law in the Australian legal system is ongoing. Nevertheless, for Indigenous Australia, in the absence of any formal recognition as first peoples of Australia with no entrenched rights, international human rights law provides a comprehensive framework of standards upon which Indigenous peoples may articulate their claims to the state.

What is meant by Australia's international human rights obligations?

Despite Australia's impressive ratification record there are relatively few international human rights implemented into domestic law. The two major international human rights instruments are the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). The ICCPR enumerates civil and political rights and the ICESCR enumerates economic, social and cultural rights. Article 50 of the ICCPR states that in federal governance structures the Commonwealth must ensure all members of the federation respect the covenant. The other significant instrument is the *International Covenant on the Elimination of All Forms of Racial Discrimination* (ICERD) that deals with the prohibition of racial discrimination.

ICERD is implemented in the *Racial Discrimination Act 1975* (Cth). The *Sex Discrimination Act 1984* (Cth) incorporates some of the treaty provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW) into Australian law. The *Disability Discrimination Act 1992* (Cth) incorporates some provisions of the ICCPR, the ICESCR and the *Convention on the Rights of the Child* into Australian Law.

Table 1: Relevant International Human Rights Treaties

Treaty	Name of treaty body	Entry into force of treaty	Complaint mechanism	Entry into force of complaint mechanism	Reporting period
International Convention on the Elimination of All Forms of Racial Discrimination	The Committee on the Elimination of All Forms of Racial Discrimination	October 1975	Yes	28 January 1993	2 years
International Covenant on Civil and Political Rights	Human Rights Committee	November 1980	Yes	25 December 1991	5 years
International Covenant on Economic, Social and Cultural Rights	The Committee on Economic, Social and Cultural Rights	March 1976	No	n/a	5 years
International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	The Committee against Torture	September 1989	Yes	28 January 1993	4 years
Convention on the Rights of the Child	The Committee on the Rights of the Child	January 1991	No	n/a	5 years
Convention on the Elimination of All Forms of Discrimination against Women	The Committee on the Elimination of Discrimination against Women	August 1983	Yes	n/a	4 years

109. Charlesworth et al, above n 8, 424.

110. *Western Australia v Ward* (2002) 191 ALR 1, 274 (Callinan J).

The ICCPR and the *Convention on the Rights of the Child* are both scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). The Human Rights and Equal Opportunity Commission (HREOC) was established in 1986 consistent with Australia's ratification of the ICCPR. HREOC has a complaints mechanism that Australian citizens can use to complain about violations of the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Age Discrimination Act 2004* (Cth) and the two scheduled Acts. HREOC is empowered to inquire into 'any act or practice that may be inconsistent with or contrary to any human rights'.¹¹¹ However, HREOC's processes provide for a remedy that is unenforceable and this has been criticised as 'an inadequate implementation of the obligations under [the ICCPR] and *Convention on the Rights of the Child*'.¹¹² Nevertheless, its role is to investigate and attempt to conciliate. If HREOC is unable to resolve the complaint then proceedings can be instituted in the Federal Magistrates Court or the Federal Court of Australia.

The *International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* is not scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth); therefore, there is no domestic or international complaints mechanism. The *Crimes (Torture) Act 1988* (Cth) does, however, incorporate aspects of the *International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

In the absence of effective rights implementation, the international individual complaints mechanism is an important avenue for Australian citizens. Australia has ratified the First Optional Protocol to the ICCPR which came into force on 25 December 1991. This gives Australian citizens the right to make complaints of violations under the ICCPR to the United Nations Human Rights Committee (HRC). HRC's role is to investigate the complaints and to publish its view on such complaints. For the HRC to consider individual complaints against a state it is important and necessary for the complainant to have exhausted domestic remedies within the Australian legal system. Article 14 of the *Racial Discrimination Act 1975* (Cth) allows for individual complaints to the Committee on the Elimination of Racial Discrimination. This came into force in Australia in January 1993. Australian citizens also have access to an individual complaint mechanism under the *International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* under Article 22 of the Convention. This came into force in January 1993.

The effectiveness of international human rights law: Indigenous Australia and the Committee on the Elimination of Racial Discrimination

Indigenous leaders in Australia viewed the government's conduct during consultations on amendments to the *Native Title Act 1993* (Cth) as breaching Australia's obligations under ICERD.¹¹³ Of particular concern was the government's intention to suspend the operation of the *Racial Discrimination Act 1975* (Cth) with respect to certain provisions of the amending act. Indigenous advocates, including the National Indigenous Working Group, Aboriginal and Torres Strait Island Commission (ATSIC) and the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, submitted complaints to CERD and on 11 August 1998 the committee listed Australia under its urgent action/early warning mechanisms. The committee requested the state party to provide information about its native title policy and to abolish the position of the HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner.

This was the first time a Western nation had been listed using the urgent action/early warning mechanism. The ultimate decision by the committee was to condemn the Australian government for its failure to consult meaningfully with Aboriginal people.¹¹⁴ The committee also noted the lack of entrenched basic human rights in the Australia legal system. The paucity of rights protection in Australia means that the parliament can override any statutory rights such as those contained in the *Racial Discrimination Act 1975* (Cth). This makes rights, such as prohibition of racial discrimination, subject to the political tenor of the day and easily overridden. It effectively enables government to legislate against Indigenous interests on the basis of their race. This capacity is arguably supported by the race's power in the Australian constitution.¹¹⁵

The political backlash against CERD from the Australian government was severe.¹¹⁶ It entailed threats of withdrawing

111. *Human Rights Equal Opportunity Commission Act 1986* (Cth) s 11(f).

112. O'Neill N, Rice S & Douglas R, *Retreat from Injustice: Human Rights Law in Australia*, 2nd edn (Sydney: Federation Press, 2004) 203.

113. See McGlade H, 'Aboriginal Women and the Commonwealth Government's Response to *Mabo*: An International Human Rights Perspective' in Brock P (ed), *Words and Silences: Aboriginal Women, Politics and Lands* (Sydney: Allen & Unwin, 2001) 131–57, considering the various international human rights treaties and their relevance to Aboriginal women and native title.

114. 'CERD Committee Decision on Australia' (1999) 4 *Australian Indigenous Law Reporter* 140.

115. *Australian Constitution* s 51 (xxvi); see *Kartinyeri v Commonwealth* (1998) 195 CLR 337; see especially Gummow and Hayne JJ. See generally Pngelley N, 'The Hindmarsh Island Bridge Act. Must Laws Based on the Race Power Be For the "Benefit" of Aborigines and Torres Strait Islanders? And What Has Bridge Building Got to Do with the Race Power Anyway?' (1998) 20 *Sydney Law Review* 144.

116. See eg Kinley D & Martin P, 'International Human Rights Law at Home: Addressing the Politics of Denial' (2002) 26 *Melbourne University Law Review* 466. See generally Collings N, 'Australian Government Exposes Itself Before the UN' (2000) 5(4) *Indigenous Law Bulletin* 11.

from the human rights system,¹¹⁷ as well as accusations of violations of Australian state sovereignty.¹¹⁸ For Indigenous peoples in Australia and around the world it stands as an example of the importance and symbolic power of the human rights treaty system. As Shane Hoffman, a key Indigenous lobbyist at the United Nations for CERD decision, observed:

While it is highly unlikely that the current government will revisit the *Native Title Amendment Act 1998* (Cth), continued critical scrutiny of the legislation by international bodies such as the CERD committee will pressure future governments to amend the legislation to remove its racially discriminatory aspects.¹¹⁹

While the United Nations treaty bodies cannot force states to change domestic law or policy, the process was important for Indigenous Australians. It confirmed that the amendments violated Australia's human rights obligations under international law. It confirmed the value of international human rights law in the absence of any rights and protection within a domestic legal system, an international instrument that provides standards to states as to how its citizens should be treated and consulted. As Larissa Behrendt observed:

In the absence of rights protection in the constitution, it is the reporting and monitoring mechanisms under international law that have created the most effective method of monitoring human rights in Australia.¹²⁰

Moreover, broader international law has been significant to the campaign advocacy for Indigenous rights in Australia. Mick Dodson has remarked that:

[T]he *Racial Discrimination Act 1975* (Cth), the *Land Rights (Northern Territory) Act 1976* (Cth), the High Court's 1992 decision on native title – all of them were firmly grounded in, if not derived from, international law.¹²¹

However, this is not to provide a romanticised or naïve view of international law. The *Native Title Amendment Act 1999* (Cth) showed nothing can protect Indigenous rights in the event of a government willingly legislating on the basis of race. Parliamentary sovereignty and the rhetoric of state sovereignty are powerful political images in the Australian community and, given that the amendments were barely six years ago, nothing has changed in the Australian polity to indicate that Indigenous reliance on supra-national institutions will lessen in the near future.

Rights and cultural relativism

The apotheosis of 'rights' as an entitlement of all human beings occurred in the 20th century.¹²² While the concept of human rights had been developing for centuries, after the end of the two World Wars, the rights and fundamental freedoms of individuals became the central tenets of international cooperation and peace among states. The tragic legacy of human rights violations during the two World Wars fostered a spirit of cooperation among states. This intimated a willingness to permit legitimate incursions on state sovereignty to ensure that sovereignty could not be invoked as a shield behind which the rights and fundamental freedoms of citizens could be systematically abused. The treatment of Jewish people sanctioned by the policies of Nazi Germany is often invoked as an example of the horrific violation of human rights that the international community sought to prevent.

As a result, human rights were enshrined in the *United Nations Charter 1945*,¹²³ Article 1(3) of the Charter urging member states to promote and encourage 'respect for human rights and for fundamental freedoms for all'. Article 55 of the Charter empowers the United Nations member states to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'; and Article 56 calls upon all members to 'pledge themselves to take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55'.

The *Universal Declaration of Human Rights* (UDHR)¹²⁴ in particular was a significant achievement of the renewed international consensus toward affirming human rights as a condition to maintaining peace and international

117. Downer A, Williams D & Ruddock P, 'Improving the Effectiveness of United Nations Committees', Press Release, 29 August 2000; Downer A, 'Government to Review UN Treaty Committees', Press Release, 30 March 2000. See generally Kinslor, above n 107.

118. See eg Marks G, 'Sovereign States vs Peoples: Indigenous Rights and Origins of International Law' (2000) 5(2) *Australian Indigenous Law Reporter* 1. See generally Hovell, above n 107.

119. Hoffman, above n 83, 33.

120. Behrendt, above n 22, 5.

121. Dodson M, 'Linking international standards with contemporary concerns' in Pritchard S (ed), *Indigenous Peoples, the United Nations and Human Rights* (Sydney: Federation Press, 1998) 21.

122. Department of Foreign Affairs and Trade, above n 79.

123. *Charter of the United Nations*, signed on 26 June 1945 (entered into force 24 October 1945) Art 1(3).

124. GA Res 217A(III), 10 December 1948.

cooperation. The UDHR was the first international human rights instrument to reflect universal values of all states. It included economic and social rights, as well as civil and political rights. The UDHR is not legally binding in the sense that it is a General Assembly resolution; however, there is growing acceptance that aspects of the UDHR constitute customary international law.

United Nations human rights discourse and the universal nature of the international human rights legal framework has imbued rights with significant moral influence upon domestic legal systems throughout the world. This is reflected, for example, in the statutory or constitutional entrenchment of rights in all new political systems since World War II. Yet there is an argument within the United Nations system itself, challenging the 'universality' of human rights and human rights rhetoric as deriving from a Western liberal tradition.¹²⁵ The question asked by these groups is: who decides what is culture?

Many view that [rhetoric human rights] as unproblematic as the central and inevitable component of a universal discourse about human dignity and humane treatment of individuals by governments. Others to the contrary, view a discourse about rights as alien and harmful to their states or cultures, disruptive of traditional social structures subversive of authority.¹²⁶

As the *Hales v Jamilmira*¹²⁷ controversy illustrated, there are many in the Australian community who view practices such as payback spearing or child brides as harmful cultural practices, yet those Aboriginal people who practise such traditions understand that its system of law is a controlled and complex one.

The argument of cultural relativists is that it is the dominant group in a community that determines the content of 'rights' on the basis of its own core values and standards. The dominance of this group within a community, and therefore the permeation of their culture, renders true universality of culture nugatory. For example, during the drafting sessions for the Draft Declaration on the Rights of Indigenous Peoples some Indigenous nations did not believe that the practice of Aboriginal custom should be subject to international human rights law:

The phrase 'in accordance with internationally recognised human rights standards' must be deleted. This phrase [Article 33] allows us the right to have our own structures, customs, traditions, as is inherent within our right of self-determination and the phrase added on to it, seeks to limit the full exercise of our right.¹²⁸

Conversely, the Department of Foreign Affairs and Trade *Human Rights Manual* explains the Australian government's position on cultural relativism:

Recognition of essential needs such as freedom and dignity is implicit in some of the earliest written codes from ancient Babylon, which refer to the need to help the poor and the dispossessed; in Hindu and Buddhist texts that focus on the human condition; in notions of human virtue and compassion which characterise early Confucianism; and in the natural law tradition of the West. Throughout all, there is recognition that, in human relations, some principles will always hold and that some common standards of behaviour can be regarded as universally valid.¹²⁹

Steiner and Alston explain the human rights instruments in the following way:

On their face, human rights instruments (which in their treaty form mean to impose legal obligations, to convert moral rules into legal rules) are surely on the 'universalist' side of this debate. The landmark instrument is the *Universal Declaration on Human Rights*, parts of which have clearly become customary international law. The two Covenants, with numerous states parties from all the world's regions, also speak in universal terms: 'everyone' has the right to liberty, 'all persons' are entitled to equal protection, 'no-one' shall be subjected to torture, 'every-one' has the right to an adequate standard of living. Neither in the definitions of rights nor in the limitations clauses ... does the text of these basic instruments make any explicit concession to cultural variation.¹³⁰

The debate about the universality of human rights exists in Australia, particularly in regard to Aboriginal law. Like most debates about Indigenous Australian issues it is polarised and therefore void of the required nuances when discussing such complex matters as Aboriginal culture. John Tippet QC has argued that:

125. See generally, Penna DR & Campbell PJ, 'Human Rights and Culture: Beyond Universality and Relativism' (1998) 19 *Third World Quarterly* 7.

126. Charlesworth H & Chinkin C, *The Boundaries of International Law: A Feminist Analysis* (Juris Publishing, 2000).

127. Above n 71.

128. Working Group on Indigenous Populations (25 July 1995), cited in *International Indigenous Issues: An Analysis of the United Nations Draft Declaration on the Rights of Indigenous International Indigenous Issues* (ATSIC, March 1999).

129. Department of Foreign Affairs and Trade, above n 79, Chapter 2: 'The Nature of Human Rights', 9.

130. Steiner H & Alston P (eds), *International Human Rights in Context: Law, Politics, Morals* (Oxford: Clarendon Press, 2nd ed., 2000) 367.

[I]t can be easy perhaps to look from outside in with a wrinkled brow and be concerned about the fact that a young woman is being married to a much older man, and of course to judge that set of circumstances by our own morality and the construct of our own legal system. The fact is, it takes place. It takes place with the consent and agreement and encouragement in many circumstances, of the community.¹³¹

Similarly, it has been argued that:

[O]n such issues [as Aboriginal law] Australia's legal system may simply have to bite the bullet and go against the norms of international human rights. 'Human rights are essentially a creation of the last hundred years. These people have been carrying out their law for thousands of years'.¹³²

Both these arguments illustrate a strong cultural relativist position that attaches an important consequence to diversity:

[T]hat no transcendent or trans-cultural ideas of right can be found or agreed on and hence that no culture or state is justified in attempting to impose on other cultures or states what must be understood to be ideas associated particularly with it. In this strong form, cultural relativism necessarily contradicts a basic premise of the human rights movement.¹³³

The alternative universalist view is captured by Joan Kimm in her study of Aboriginal violence and the Australian legal system. Kimm represents the alternative view that:

A fundamental problem is that many Aborigines and non-Aborigines have competing views about which set of rights should prevail. I believe the basic human right to live free of violence overrides Indigenous rights.¹³⁴

Neither Tippet QC nor Kimm are Indigenous Australians, but like the views of non-Indigenous Australians, the views of Indigenous Australians on this matter are polarised. This reinforces the importance of the international obligation to consult with Indigenous communities before taking action such as legislative measures to address the conflict between the universalist and relativist views. It is important, however, to consider that the tenor of the debate does not, as Tracey Higgins has often observed, 'oversimplify the complexity and fluidity of culture by treating culture as monolithic and moral norms within a particular culture as readily ascertainable'.¹³⁵

This observation is shared by Wendy Shaw who argued that:

[D]amaging fiction(s) about tradition ... have also rendered Aboriginal cultures as, yet again, abhorrent, barbaric and unsuited to the modern world. Such truncation has denied the fluidity and evolution of (Indigenous) culture(s) ... Aboriginal self-determination continues to be hindered as the reputation of a set of different laws has been almost irretrievably tarnished. Such laws, and the capacity for them to help alleviate the incarceration rates for Aboriginal peoples, increasingly sit outside of the domain of the Westminster System of Law in (post) colonial Australia.¹³⁶

As will be discussed later, while condemning harmful cultural practices and traditions, the international human rights system equally acknowledges the capacity of practices to change and evolve.

4. Aboriginal law and the Australian legal system

Aboriginal law and sentencing

The common law provides an extensive corpus of decisions in varying jurisdictions where Aboriginal law has been taken into account in determining criminal liability. There exists no recognised defence of committing an act within the scope of Aboriginal law; however, it can be taken into account if it falls within the scope of existing defences in the criminal law.¹³⁷ There is no general framework of principles that guide particular jurisdictions. However, in the Northern Territory there is a framework of principles that guides the courts in determining the admissibility and relevance of evidence,¹³⁸ and in New South Wales there is a set of principles known as the 'Fernando principles'. In Western Australia

131. ABC Radio, 'Customary Law and Sentencing', *The Law Report*, 22 October 2002.

132. McDonald C, quoted in Fickling D, 'Bridging Whitefella Law and Clan Justice', *The Guardian* (London, 30 December 2002).

133. Steiner & Alston, above n 130, 367.

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

135. Higgins, above n 18.

136. Shaw WS, '(Post)Colonial Encounters: Gendered Racialisations in Australian Courtrooms (2003) 10 *Gender, Place and Culture* 315, 329.

137. LBC, above n 46, Vol XC, [12].

138. Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', Background Paper No 1, above pp 1–76.

the courts 'appear to be less strict in relation to the evidence that is required before customary law will be taken into account'.¹³⁹

The issue of sentencing of children is dealt with in numerous international human rights instruments. The most significant standards for Indigenous peoples are set out in ILO Convention 169:

1. In imposing penalties laid down by the general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. Preference shall be given to methods of punishment other than confinement to prison.

Most public controversies about Aboriginal law arise in those circumstances where the courts may take into account Aboriginal law in the sentencing process. This may occur in mitigation of an offence where evidence is given that the act was informed by traditional Aboriginal custom or practice. In those circumstances, courts will take into account an offender's membership of an Aboriginal group and aspects of traditional practice.

[I]n imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.¹⁴⁰

Aboriginal law may also be taken into account where there is evidence of further customary punishment for the offence and often courts weigh up the severity of the traditional punishment. In *Jadurin v The Queen* it was stated that:

It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognise itself. But to acknowledge that some form of retribution may be exacted by an offender's own community is not to sanction that retribution; it is to recognise certain facts which exist only by reason of that offender's membership of a particular group.¹⁴¹

A judge may lessen or increase an offender's sentence depending on the severity of traditional punishment or to prevent the meting out of a traditional punishment in its entirety. This can lead to different outcomes such as refusal to grant bail. In the Western Australian case *Unchango v The Queen*,¹⁴² the spectre of traditional punishment was taken into account when determining bail under the *Bail Act 1982* (WA). In this case an Aboriginal woman, charged with murder, was granted bail because of assurances that her residency at a spiritual centre and the geographical location of the centre would prevent the carrying out of traditional payback. In *R v Thompson*, a decision that involved an Aboriginal woman from the Eastern Goldfields, the court acknowledged that it was inevitable that customary punishment would be meted out to the offender and her family.

[The offender] not only intends but is determined to present herself to the community for traditional punishment and I accept that it will be inflicted as described by [counsel] not only on her but on her mother and three brothers ... the expectation is that she and her mother will be hit with fighting sticks and her three brothers will be speared in the thigh.¹⁴³

Under the *Bail Act 1982* (NT) the court must take into account the safety of the applicant and whether the applicant is in need of protection. In the Northern Territory decision of *Barnes v The Queen*, Bailey J refused bail on the grounds that 'the court cannot facilitate what would amount to a crime', referring to the expected customary punishment that would be meted when the offender returned to his community and the prospect of double jeopardy.¹⁴⁴

In the New South Wales case *R v Fernando*, Wood J determined a set of principles upon which sentencing of Aboriginal offenders could be based.¹⁴⁵ In *Fernando*, an Aboriginal man from Walgett was charged with maliciously wounding his wife using a knife after a period of excessive drinking. In this case the offender had an extensive criminal record and was an alcoholic. The principles (explained below) were not intended to be applicable to every decision. Aboriginality does not make automatic the application of the principles. An offender must argue that the Fernando principles apply because of the dysfunction or disadvantage an offender experiences as a result of his or her Aboriginality. Fernando does not justify 'special leniency on account of an offender's Aboriginality':

139. Ibid 9.

140. *R v Neal* (1982) 42 ALR 609, 626 (Brennan J); see also *R v Larry Colley* (Unreported, Supreme Court of Western Australia, Brinsden J, 14 April 1978).

141. *Jadurin v The Queen* (1982) 44 ALR 424, 429.

142. [1998] WASC 186.

143. *R v Thompson* (Unreported, Supreme Court of Western Australia (Kalgoorlie), No 199 of 2000, 20 February 2001).

144. *Barnes v The Queen* (1997) 96 A Crim R 593.

145. *R v Fernando* (1992) 76 A Crim R 58, 62.

[The Fernando principles] give recognition to the fact that disadvantages which arise out of membership of a particular group, which is economically, socially or otherwise deprived to a significant and systemic extent, may help to explain or throw light upon the particular offence and upon the individual circumstances of the offender. In that way an understanding of them may assist in the framing of an appropriate sentencing order that serves each of the punitive, rehabilitative and deterrent objects of sentencing.¹⁴⁶

The Fernando principles have been applied to a varying extent in New South Wales. There is some controversy as to the manner in which these principles are employed by advocates and judges. Nevertheless, this overview illustrates the way in which state and territory courts are dealing with Aboriginal law around Australia. There is also a chasm between the reality of the practice of Aboriginal law in courts and the awareness of the Australian community about its widespread practice. Despite the paucity of knowledge within the community of the place of Aboriginal law, the existence and continuing practice of Aboriginal law and its frequent intersection with the common law is evident throughout the country. The debate has moved well and truly beyond the discussion of whether Aboriginal law does operate in the Western Australian legal system. The questions remain as to whether the processes should be formalised and whether aspects of Aboriginal law conflict with Australia's human rights obligations.

Aboriginal law and the common law: a brief overview

Over the past century the common law has consistently found that criminal Aboriginal law cannot be afforded any formal degree of recognition by the Australian legal system. There are early Victorian and New South Wales Supreme Court decisions on Aboriginal law that found Aboriginal defendants subject to Australian criminal law.¹⁴⁷ In *R v Murrell* the Court heard a novel argument by counsel for an Aboriginal man who had been charged with the murder of another Aboriginal man.

This country was not originally desert, or peopled from the mother country, having had a population far more numerous than those that have since arrived from the mother country. Neither can it be called a conquered country, as Great Britain was never at war with the natives, not a ceded country either; it, in fact, comes with neither of these, but was a country having a population which had manners and customs of their own, and have come to reside among them; therefore in point of strictness and analogy to our law, we are bound to obey their laws, not they obey ours. The reason why subjects of Great Britain are bound by the laws of their country is, that they are protected by them; the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which afford them no protection.¹⁴⁸

The court rejected this argument by the counsel for the accused, Alfred Stephen. Nevertheless, Stephen raised important issues that remain unresolved in the 169 years of Australian law since the judgment. Stephen also raised the spectre of double jeopardy, in that if the accused was acquitted he would face traditional punishment consistent with Aboriginal law yet arguably constituting double jeopardy.¹⁴⁹ In *R v Neddy Monkey*, the court found that 'vague rites and ceremonies' of Aboriginal people in relation to marital status were not admissible as evidence.¹⁵⁰ In *R v Cobby* the court found it could not acknowledge a traditional marriage because Indigenous peoples 'have no laws of which we can take cognisance'.¹⁵¹

The question of the conflict between the Australian legal system and Aboriginal legal systems was increasingly countenanced in the growing momentum for Aboriginal land rights. The fact that Aboriginal peoples had a distinct legal system became increasingly irrefutable. In *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)*, Blackburn J commented on the legal systems of Aboriginal communities:

[T]he social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society ... If ever a system could be called a 'government of laws and not of men', it is that shown in the evidence before me.¹⁵²

146. *R v Pitt* [2001] NSWCCA 156, [21] (Wood CJ).

147. Kriewaldt M, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *University of Western Australia Law Review* 1.

148. *R v Murrell* (1836) 1 Legge 72 (FC) 72.

149. LBC, above n 46, 'Ch 2 – Recognition of Aboriginal Customary Law', Pt A – History and Overview [7].

150. *R v Neddy Monkey* [1861] VLR 40, 41.

151. *R v Cobby* (1883) 4 LR(NSW) 355, 356 (Martin CJ).

152. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267.

Despite this, Blackburn J was constrained and could not recognise Aboriginal title because it did not conform to property law as already existed in Australian common law. Murphy J, in *Ngatayi v The Queen*, also considered the intersection between the Australian legal system and Aboriginal law:

The existence of two systems of law side by side, the prevailing one and aboriginal customary law, with their very different attitudes to guilt and responsibility, creates serious problems and the question of how far our laws should apply to aboriginals and how far their law should be allowed to apply to them is controversial.¹⁵³

The most significant development in the common law for the recognition of Aboriginal law was the High Court decision in *Mabo v Queensland (No 2)*.¹⁵⁴ *Mabo* involved an action brought to the High Court by Eddie Mabo, James Rice and David Passi on behalf of the Meriam people. They were asserting traditional Meriam title to the Murray Islands in the Torres Strait Islands. The crucial argument in *Mabo* was that Aboriginal customary title was unimpaired by the annexation of the islands in 1879 by Queensland and ultimately Moynihan J did find that a customary system of law existed on the island. Yet even before *Mabo* could proceed the Queensland government enacted the *Queensland Coast Islands Declaratory Act 1985* (Qld) which retrospectively extinguished any property rights on the islands when they were annexed in 1879. This meant that the High Court had to first decide on the validity of the Act in Queensland's defence. In *Mabo (No 1)*¹⁵⁵ the High Court found (4:3) the legislation to be inconsistent with the *Racial Discrimination Act 1975* (Cth). On 3 June 1992, the High Court handed down its judgment in *Mabo* finding (6:1) that the Meriam people were entitled against the whole world to the possession, occupation, use and enjoyment of the Murray Islands. There was a legal system operating in Australia prior to 1788, which was entitled to respect and recognition by the common law in accordance with the laws and customs of Indigenous peoples. The High Court held that the nature and content of native title will be shaped by the laws and customs of traditional landholders.¹⁵⁶

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.¹⁵⁷

The High Court found that Australian law can protect Aboriginal interests, 'in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs'.¹⁵⁸ The *Native Title Act 1993* (Cth) was enacted after *Mabo* to regulate how native title may be determined. The Act defines native title as

the rights and interests ... possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples of Torres Strait Islanders.¹⁵⁹

While there was some optimism that the *Mabo* decision would lead to a greater recognition of Aboriginal law and sovereignty in the Australian legal system, subsequent decisions have tempered such optimism.¹⁶⁰ The High Court's finding of the acquisition of Australia by way of peaceful settlement as opposed to cession or conquest resulted in the domestic law completely denying sovereignty and consequently Aboriginal customary law and jurisdiction. Settlement 'implied a legal vacuum (to be filled immediately with English law to the exclusion of any other laws or entitlements)'.¹⁶¹

If, in Blackstone's terminology, Australia had been 'conquered' (by British acts of force) or 'ceded' (by Indigenous acts of submission), then Indigenous legal traditions, and entitlements thereunder, would have survived under the new British sovereign (though subject to future extinguishment).¹⁶²

Following *Mabo*, *Walker v New South Wales* countenanced the prospect of Aboriginal criminal law operating alongside the Australian legal system. It was found to be inconsistent with the criminal law of Australia.¹⁶³ In *Walker* the defendant, a Bandjalung man, had been charged with an offence in Nimbin, New South Wales. The plaintiff's statement of claim

153. *Ngatayi v The Queen* (1980) 30 ALR 27, 36–37.

154. *Mabo (No 2)*, above n 98.

155. *Mabo v Queensland (No 1)* (1989) 166 CLR 186.

156. *Mabo (No 2)*, above n 98, 7.

157. *Ibid* 58 (Brennan J).

158. *Ibid* 60.

159. Section 223(1)(a).

160. Pearson N, 'The High Court's Abandonment of "The Time-honoured Methodology of the Common Law" in Its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*' (2003) 7 *Newcastle Law Review* 1.

161. Blackshield T & Williams G, *Australian Constitutional Law and Theory* (Sydney: Federation Press, 3rd ed., 2002) 203.

162. *Ibid*.

163. *Walker v New South Wales* (1995) 182 CLR 45 ; see also *R v Wedge* [1976] 1 NSWLR 581.

asserted, among a number of arguments, that the common law was only valid to the extent in which it was accepted by Aboriginal people:

If the Parliament of the Commonwealth or of a State legislates in a manner affecting aboriginal people the law in so far as it relates to aboriginal people is of no effect until it is adopted by the aboriginal people whom, or whose land, it purports to effect.¹⁶⁴

Mason CJ in rejecting the arguments of the plaintiff held that:

It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle.¹⁶⁵

Mason CJ went on to consider that:

Even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application ... English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.¹⁶⁶

Meanwhile the relationship between Aboriginal customary law and the Australian legal system became the subject of an Australian Law Reform Commission (ALRC) inquiry. The lengthy and comprehensive report into Aboriginal law was released in 1986. It contained recommendations on the extent to which Aboriginal law should be recognised in Australian law. The ALRC recommended that, as far as possible,

Aboriginal customary laws should be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures, unless the need for these is clearly demonstrated.¹⁶⁷

The ALRC report advocated 'functional recognition' that gave recognition to Aboriginal laws in relevant areas such as Indigenous marriage and families, criminal law and sentencing, and hunting, fishing and gathering. The report also included draft legislation that would ensure uniformity of approach in all Australian jurisdictions. The ALRC recommendations have remained unimplemented, a fact that is perennially criticised by Indigenous Australians.

The current position of the Commonwealth government on the recognition of Aboriginal law is that:

[T]he Government believes all Australians are equally subject to a common set of laws.¹⁶⁸

Neither the government nor the general community ... is prepared to support any action which would entrench additional, special or different rights for one part of the community.¹⁶⁹

In response to this position the Social Justice Commissioner has argued that:

The view that everyone should be treated the same overlooks the simple fact that throughout Australian history Indigenous peoples never have been ... The failure to provide us with the same opportunities as the rest of society in the past means that to now insist on identical treatment will simply confirm the position of Indigenous people at the lowest rungs of Australian society.¹⁷⁰

The most recent inquiry was conducted by the Northern Territory Law Reform Committee,¹⁷¹ which made a number of recommendations including cross cultural training of judicial officers; consultation with Aboriginal communities to clarify government policy in regard to 'promised brides'; and a further inquiry to determine the extent of the use of payback as traditional punishment in order to develop government policy. The Northern Territory government's response has been controversial.¹⁷² While a core aspect of the government's response has been the commitment to develop law at a local level and to develop community law justice plans for broad consultation, the government announced that it would withdraw the defence of traditional marriage to child sexual assault cases as provided in the Criminal Code (NT). The government also found that payback would be addressed further in the development of localised Aboriginal law and justice plans. According to the government, payback will be recognised to the extent that it is not inconsistent with the Criminal Code (NT). Ultimately, the government will continue to rely upon the Supreme Court precedent relating to payback and bail decisions.

164. Walker, *ibid* 48.

165. *Ibid* 49.

166. *Ibid* 50.

167. Australian Law Reform Commission, above n 1, Part VIII, [196].

168. Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report, *Reconciliation: Australia's Challenge* (September 2002) 10.

169. *Ibid* 17.

170. Human Rights and Equal Opportunity Commission, *Social Justice Report*, Report No 2 (2001).

171. NTLRC, above n 1.

172. Northern Territory Government, Response to NTLRC, *ibid* (November 2003).

Recently the government also announced plans to provide courts with new powers to test evidence of Aboriginal customary law. According to Attorney General Peter Toyne, the current arrangements needed amending because they 'often see evidence regarding traditional practices presented only from the offender's perspective without giving opposing counsel a chance to explore differing community views'.¹⁷³ The Attorney General also stated that 'research with Indigenous women has revealed that some beliefs presented to courts as embodying customary law, do not represent the views of all people within Aboriginal communities'.¹⁷⁴

The Northern Land Council opposes the amendments that were passed in December 2004. The Council is claiming that the changes are racially discriminatory, based on legal advice from John Basten QC, because 'Aboriginal people are being treated differently before the courts as a result of this legislation ... When they wish to present certain material before the courts ... relating to customary law'.¹⁷⁵

Barriers to recognition: contemporary problems with Aboriginal law and sentencing

Public controversy of Aboriginal law periodically arises in those cases reported by the media where Aboriginal law conflicts with contemporary expectations of human rights. Germane to the growing momentum for recognition of Aboriginal law are those controversial decisions where evidence of Aboriginal law was ostensibly central to the commission of the offence. The most prominent cases have been those where evidence of Aboriginal law has sanctioned violence or sexual abuse against Aboriginal women or children. In *Sydney Williams*,¹⁷⁶ Wells J took into account in sentencing the fact that the community wanted to deliver traditional punishment. In *Williams* a two-year sentence was suspended contingent upon his receiving twelve months of tribal instruction from Elders.¹⁷⁷ Williams had been charged with the murder of a woman who had allegedly been taunting him about disclosing customary secrets. Williams received a traditional punishment of spearing through the thigh. This example was problematic because, as the ALRC noted, Williams then went on to commit assaults on a number of Aboriginal women.¹⁷⁸ Situations like these highlight 'the problems of predicting the course of traditional dispute resolution procedures which are flexible and dependent upon changing circumstances, as well as being open to misunderstanding by lawyers'.¹⁷⁹

In the Northern Territory, community outrage followed the decision in *Hales v Jamilmira*.¹⁸⁰ In this case, the defendant Jackie Pascoe, a 50-year-old Aboriginal male, used Aboriginal law in defence of statutory rape.¹⁸¹ The girl who was referred to as 'A' in the proceedings was promised to Jackie Pascoe under Burarra culture and had been under pressure to fulfil her cultural obligations. In August 2001, 'A' was taken to Pascoe's outstation, east of Maningrida. On Monday, 20 August 2001, the couple had sexual intercourse. Initially the Director of Public Prosecutions charged Pascoe with rape, which was reduced to unlawful intercourse with a minor. Pascoe was convicted and sentenced. The defendant, Jackie Pascoe, understood that his offence was carnal knowledge. In a recorded interview at Maningrida Police Station Pascoe stated that: 'She is my promised wife. I have rights to touch her body' and that 'its Aboriginal custom, my culture. She is my promised wife'.¹⁸² The court recognised that Jackie Pascoe held a reasonably sophisticated knowledge of the criminal law. Gallop J reduced the magistrate's sentence of four months to one-day imprisonment and in his reasoning controversially stated that: 'She didn't need protection (from white law); she knew what was expected of her.... It's very surprising to me [Pascoe] was charged at all'.¹⁸³ Community outrage was predicated upon the discussion of human rights and Australia's international human rights obligations. On appeal Riley J stated that:

Whilst proper recognition of claims to mitigation of sentence must be accorded, and such claims will include relevant aspects of customary law, the court must be influenced by the need to protect members of the community, including women and children, from behaviour which the wider community regards as inappropriate.¹⁸⁴

The fact that Aboriginal law can be used for mitigation for sexual assault is of growing concern in Aboriginal communities, particularly among Aboriginal women. It has been referred to as distorted customary law or 'bullshit law'.¹⁸⁵ Sharon

173. ABC Northern Territory, 'Government Gives Courts Power to Test Customary Law', 13 October 2004.

174. Ibid.

175. ABC Television, 'Customary Law', *Stateline*, 3 December 2004.

176. (Unreported, Supreme Court of South Australia, 14 May 1976).

177. Ibid.

178. Australian Law Reform Commission, above n 1, [492].

179. McRae H, Nettheim G, Beacroft L & McNamara L, *Indigenous Legal Issues: Commentary and Materials* (Sydney: Law Book Co, 3rd ed., 2003) 549.

180. Above n 71. See ABC Radio, 'Aboriginal Customary Law/White Law Divide', *PM*, 16 April 2003.

181. See generally Bryant G, 'Promised Marriages: The Jackie Pascoe Case' (2003) 5(23) *Indigenous Law Bulletin* 20.

182. (2003) 142 NTR 1.

183. Toohey P, 'Victim Trapped Between Two Worlds: Tribal and White Law Clash Over Sex', *The Australian* (Sydney) 9 October 2002, 2.

184. *Hales v Jamilmira*, above n 71.

185. See generally, ABC Radio National, 'Customary Law and Sentencing', *The Law Report*, 22 October 2002; Memmott et al, above n 31.

Payne, an Aboriginal lawyer, explains the term 'bullshit law' as 'a distortion of traditional law used as a justification for assault and rape of women ... It is ironic that the imposition of the white mans law on traditional law which has resulted in the newest one'.¹⁸⁶

Audrey Bolger, in the course of her research on violence and Aboriginal women, quoted an Aboriginal woman as saying that 'there are now three kinds of violence in Aboriginal society – alcoholic violence, traditional violence and bullshit traditional violence'.¹⁸⁷ According to Bolger, bullshit traditional violence is 'the sort of assault on women which takes place today for illegitimate reasons, often by drunken men, which they then attempt to justify as a traditional right'.¹⁸⁸ Professor Mick Dodson also acknowledged the problem of distorted customary law: 'Some of our perpetrators of abuse and their apologists corrupt these ties and our culture in a blatant and desperate attempt to excuse their abusive behaviour'.¹⁸⁹

While *Hales v Jamilmira*¹⁹⁰ drew national attention to problems of distorted Aboriginal law, it also raised questions about the role of courts in not only applying 'bullshit law' but also to over a decade of disparaging sentencing comments about Aboriginal women.

Courts must be extremely careful not to act upon inaccurate evidence about the extent to which Indigenous law tolerates or mandates violence, especially in cases involving women.¹⁹¹

In *R v Lane*, the judge asserted that the evidence before him proved that rape was 'not considered as seriously in Aboriginal communities as it is in the white community' and that 'the chastity of women is not as importantly regarded as in white communities'. Moreover the 'violation of an Aboriginal woman's integrity is not nearly as significant as it is in a white community'.¹⁹² Audrey Bolger wrote that the rape resulted in the eventual death of the woman. Bolger observed that:

The defence adduced evidence, all obtained from non-Aboriginal males, to show that rape was not a very serious crime in Aboriginal society and that by approaching the men and asking for a cigarette the woman may have been seen as inviting the men to join her.¹⁹³

Bolger argued that the difficulty in determining what constitutes Aboriginal custom arises when 'the determination as to what is Aboriginal culture or tradition is derived from a male perspective'.¹⁹⁴ Bolger's observation is reflected in a series of derogatory comments that have been made about Aboriginal women in sentencing. In *Mungkilli, Martin and Mintuma* the court stated that rape was not acceptable in Aboriginal communities, but not 'regarded with the seriousness that it is by the white people'.¹⁹⁵ In *R v Narjic*, the defence argued in its submission that 'it is the custom ... for whatever reason, that wives are assaulted by their husbands'.¹⁹⁶ These comments have been widely condemned by Indigenous women. Professor Larissa Behrendt, in condemning such sentencing comments, argued that:

Colonial notions that Aboriginal women are easy sexual sport have also contributed to the perception that incidents of sexual assault are the fault of Aboriginal women. While behaviour and treatment of Aboriginal men is often contextualised within the process of colonization, no context is provided for the colonial attitudes that have seen the sexuality of Aboriginal women demeaned, devalued and degraded. The result of these messages given to Aboriginal women by their contact with the criminal justice system would only reinforce any sense of worthlessness and lack of respect that sexual assault and abuse have scarred them with.¹⁹⁷

This dual oppression has been identified by the United Nations: 'All women and particularly racialised women ... run the risk of gender discrimination in the judicial process'.¹⁹⁸ The HRC highlighted the dual oppression as a consideration that states like Australia should take into account when addressing discrimination against women. The HRC stated that:

186. Payne S, 'Aboriginal Women and the Law' in PW Eastaale and S McKillop (eds), *Women and the Law* (Canberra: Australian Institute of Criminology, 1993).

187. Quoted in Bolger, above n 70, 50. See also Andrews P, 'Violence Against Aboriginal Women in Australia: Possibilities for Redress within the International Human Rights Framework' (1997) 60 *Albany Law Review* 917.

188. Bolger, *ibid*.

189. Dodson, above n 67.

190. Above n 71.

191. McRae et al, above n 179, 543.

192. *R v Burt Lane, Ronald Hunt & Reggie Smith* (Unreported, Northern Territory Supreme Court, 29 May 1980).

193. Bolger, above n 70, 81.

194. Cunneen C, 'Judicial Racism', in McKillop S (ed), *Aboriginal Justice Issues* (Canberra: Australian Institute of Criminology, 1993).

195. *Mungkilli, Martin and Mintuma* (Unreported, South Australian Supreme Court, Millhouse J, 20 March 1991).

196. *R v Narjic* cited in Cunneen, above n 194, 128.

197. Behrendt L, 'Law Stories and Life Stories: Aboriginal Women, the Law and Australian Society' (Speech delivered at the 2004 Clare Burton Memorial Lecture, Hyatt Regency Perth, 24 September 2004).

198. United Nations Division for the Advancement of Women, *Report of the Expert Group Meeting on Gender and Racial Discrimination* (Zagreb, 21–24 November 2000).

Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. State parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way.¹⁹⁹

Aboriginal women's dislocation with the legal system is also hampered by the 'populist vision of the neutrality and fairness of the legal system' that ignores 'the gendered and racialised biases that exist on the bench'.²⁰⁰ The disparaging sentencing tradition, however, must be balanced with the decisions in which the inconsistency between aspects of Aboriginal law and Australia's international human rights law obligations has been raised, which is often influenced by international human rights law. This in itself is growing evidence of the value of applicable human rights standards in the common law. In *R v Daniel*, a case involving the sexual assault of an Aboriginal woman in Kowanyama, Fitzgerald P said:

It would be grossly offensive for the legal system to devalue the humanity and dignity of members of Aboriginal communities or to exacerbate any lack of self-esteem felt within those communities by reason of our history and their living conditions ... Aboriginal women and children who live in deprived communities or circumstances should not also be deprived of the law's protection ... [T]hey are entitled to equality of treatment in the law's responses to offences against them, not to some lesser response because of their race and living conditions.²⁰¹

In *Edwards*, Muirhead J commented that: 'I am just not prepared to regard assaults of Aboriginal women as a lesser evil to assaults committed on other Australian women'.²⁰² In *Ashley v Materna*, the Northern Territory Supreme Court agreed with the magistrate's dismissal of a defence argument for the mitigation of sentencing involving the assault of an Aboriginal woman. In sentencing the Magistrate stated that:

Now this may be conduct ... which justifies action of this nature by you in Aboriginal law, but quite clearly as a matter of public policy the court cannot take it into account except perhaps in the most minor way ... Women, including Aboriginal women, stand equal to men in the law of the Northern Territory and, if Aboriginal traditional laws do come to receive recognition in whatever form by the general law of the Territory, I think it is highly unlikely, in view of international treaties that Australia has signed, if a law such as has been explained to me will have any standing because it is – I regret to have to say this to you in the presence of Elders, but it is, in my view, of such a nature that people in many countries would hold it to be discriminatory and I believe the Discrimination Boards of this country and missions and whatever would call it discriminatory.²⁰³

Bailey J in *Ashley v Materna* also commented that:

In the absence of evidence as to the obligatory nature of the alleged law and the consequences for non-compliance, elevation of a morally indefensible practice to the status of 'customary law' to which courts could or should have regard would be to invite ridicule of the courts and make a mockery of the fundamental principle that all people stand equal before the law.²⁰⁴

In *Amagula v White*, Kearney J expressed the view that:

The courts must do what they can to see that the pervasive violence against women in Aboriginal communities is reduced. There is a fairly widespread belief that it is acceptable for men to bash their wives in some circumstances; this belief must be erased.²⁰⁵

In *R v Wurramara* it was stated that:

Whilst it must be acknowledged that the 'criminal law is a hopelessly blunt instrument of social policy' ... and that the courts 'cannot deal with the 'root problem'', the courts must and will do what they can to deter the violence.²⁰⁶

There has been growing concern in Western Australia about the attitude of the Director of Public Prosecutions toward prosecuting men who have killed Aboriginal women in Western Australia. The media has asked the question: 'Is human life valued too cheaply by our Supreme Court judges – especially the lives of Aboriginal women who have been killed by

199. United Nations Document CCPR/C/21/Rev.1/Add.10, CCPR General Comment 28, [30].

200. Shaw, above n 136, 329.

201. *R v Daniel* (1997) 94 A Crim R 96, 127.

202. *Edwards* (Unreported, Northern Territory Supreme Court, 1981 SCC No 155, 156).

203. *Ashley v Materna* [1997] NTSC 101 (21 August 1997).

204. *Ibid.*

205. *Amagula v White* [1998] NTSC 61 (7 January 1998). Angel J expressed his agreement with this passage in *R v Chula* (Unreported, Supreme Court of the Northern Territory, 20 May 1998).

206. *R v Wurramara* [1999] NTSCCA 45, [31] (Mildren, Thomas & Riley JJ).

abusive and drunken men?²⁰⁷ It has also been claimed that Western Australian juries believed that alcohol-related violence in Aboriginal communities was so common that they were more likely to convict for manslaughter rather than murder.²⁰⁸

Also of significance to this reference is the finding of the Chief Justice's Taskforce on Gender Bias that courts were stereotyping Aboriginal people, engaging in unconscious bias which resulted in:

- judicial officers' inappropriate attitude towards, and lack of understanding of, Aboriginal victims of assaults;
- an inappropriate reliance on 'customary attitudes' (eg, rape not being as serious as in some other cases; the accused losing his 'culture', etc);
- some Aboriginal women receiving more severe penalties than other women for certain charges;
- an inappropriate attitude and lack of understanding on the part of prosecutors and other persons towards Aboriginal women in the court process.²⁰⁹

The way in which the law views Aboriginal women's human rights influences the decisions that women are likely to take; for example, the choice of intervention in relation to family violence. A study by the Office of the High Commissioner for Human Rights has analysed this intersection of gender and racial discrimination and noted that:

Women from marginalised communities may be reluctant to report violence for fear of inaction or indifference by, or hostility from, State authorities who may even condone such violence ... In some societies, gender-based violence may be perceived as 'justified' by racial, national, cultural or religious traditions, and a State's reluctance to remedy the situation can pose further problems for women.²¹⁰

Any suggestion from the judiciary that Indigenous women may be afforded lesser standards of protection on the basis of custom is a tacit sanction to the continuing problems of family violence and treatment of Aboriginal women.

5. Aboriginal law and international human rights law

Background

Indigenous peoples in international law

Indigenous peoples' issues are recorded as being considered in international law as early as the 1930s in the ILO. It was not until the adoption by the General Assembly on 21 December 1965 of ICERD that the claims of Indigenous peoples' rights were more fluent. Nevertheless, Indigenous human rights issues are regarded as a relatively recent human rights priority in international law, with the 1970s viewed as the watershed decade of the ascendancy of international advocacy of Indigenous rights.

[A]rmed with a new generation of men and women educated in the ways of the societies that had encroached upon them, Indigenous peoples began drawing increased attention to demands for their continued survival as distinct communities with historically based cultures, political institutions and entitlements to land.²¹¹

In responding to this newly emerging human rights issue, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities engaged Jose R Martinez Cobo, a United Nations expert and diplomat, to conduct a comprehensive study on the *Problem of Discrimination Against Indigenous Populations* in 1971.²¹² The Cobo study was a defining moment for Indigenous peoples in the United Nations system. The study produced a series of volumes, released over a decade and completed in 1987. In the study Cobo identified racial discrimination as the common experience between Indigenous peoples globally. The report also highlighted the paucity of protection for Indigenous peoples in the administration of justice as well as inequity in the provision of education and health services.²¹³ The study defined 'Indigenous peoples' as

207. Gibson R, 'Killing's Test DPP's Limit' *The West Australian*, 8 April 2002, 12.

208. Egan C, 'Juries Letting Aborigines Get Away With Murder, says DPP', *The Australian*, 15 March 2002, 5.

209. Aboriginal Women's Committee, *Report of the Chief Justice's Taskforce on Gender Bias*, Report No 30 (June 1994) 115–16. See also Iorns C, *Report on Aboriginal Women and Bias in the Western Australian Justice System* (1995) 2(1) *E-Law* – Murdoch University Electronic Journal of Law <<http://www.murdoch.edu.au/elaw>>.

210. United Nations Office of the High Commissioner for Human Rights, *Gender Dimensions of Racial Discrimination* (2001) 11.

211. Anaya SJ, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) 46; See generally, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (Human Rights and Equal Opportunity Commission, 2002) 179; Pritchard, above n 121.

212. United Nations E/CN.4/Sub.2/1986/7.

213. United Nations E/CN.4/Sub.2/1984/SR.32, [48].

those people having an historical continuity with pre-invasion and pre-colonial societies [who] consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations, their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions, and legal systems.²¹⁴

This has become the contemporary United Nations definition of Indigenous peoples. This burgeoning Indigenous presence in international law constituted what Richard Falk contended was the 'first truly intercivilisational critique of the prevailing human rights discourse'. According to Falk, their advocacy

took shape against a background (and foreground) of exclusion, discrimination, and persecution, even extermination, assimilation, and marginalisation – all factors expressive of confusing admixtures of arrogance, racism, and ignorance.²¹⁵

The historical legacy of racial discrimination against Indigenous peoples is acknowledged within the United Nations system as a root cause of contemporary Indigenous problems. It has led to dispossession of lands and resources, forced assimilation, marginalisation and genocide. CERD recognised this continuing racial discrimination in its General Recommendation:

Indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardised.²¹⁶

The acknowledgement of the destructive impact of racial discrimination upon Indigenous peoples necessitated the Cobo study. As such it informs the continuing work of the United Nations Working Group on Indigenous Populations, the Commission on Human Rights (CHR) Working Group on Indigenous Populations, the Permanent Forum on Indigenous Issues and the Special Rapporteur on Indigenous Issues. Professor Erica-Irene Daes, former Chair of the Working Group on Indigenous Populations, published a United Nations Sub-Commission Working Paper on Discrimination Against Indigenous Peoples. The report identified discrimination and racism as the core of contemporary Indigenous problems that manifested in the

reluctance of many states to recognize the right of self-determination of Indigenous peoples ... or in the insistence by the dominant world that Indigenous peoples do not have their own long-established and dynamic systems of knowledge and law.²¹⁷

Contemporary manifestations of historical and continuing racism are not only reflected in the failure of states to establish governance mechanisms or accommodate systems of law but it can also be seen in the statistics on the state of Indigenous health and poverty. A United Nations working paper in 2001 reported that the causes of Indigenous poverty in many situations come from 'direct discrimination and exclusion from society'.²¹⁸ Experts at a United Nations seminar on the effects of racism and racial discrimination on the social and economic relations between Indigenous peoples and states viewed racial discrimination against Indigenous peoples as

a long historical process of conquest, penetration and marginalisation, accompanied by attitudes of superiority and by a projection of what is Indigenous as 'primitive' and 'inferior'. The discrimination is of a dual nature: on the one hand, gradual destruction of the material and spiritual conditions [needed] for the maintenance of their [way of life], on the other hand attitudes and behaviour signifying exclusion or negative discrimination when Indigenous peoples seek to participate in the dominant society.²¹⁹

The United Nations also recognised that Indigenous peoples continue to be the victims of racism and racial discrimination.²²⁰ This informs the extensive framework of Indigenous specific mechanisms within the United Nations system that seeks to address the consequences of both the legacy of and the ongoing impact of racial discrimination upon the capacity of Indigenous peoples to enjoy fundamental rights and freedoms.

214. Ibid, Add 4 379, 381.

215. Falk RA, *Human Rights Horizons* (New York: Routledge, 2000) 151.

216. Committee on the Elimination of Racial Discrimination, General Recommendation XXIII on the Rights of Indigenous Peoples, UN Doc HR1/GEN/1/Rev.5, 26 April 2001, [3].

217. Daes EI, *Working Paper on Discrimination Against Indigenous Peoples*, UN Doc 1999/20 E/CN.4/Sub.2/2001/2, 18 August 2001, [11].

218. Working Group on Indigenous Populations, Note by the Secretariat, 'Principle Theme: Indigenous Peoples and the Right to Development, Including their Right to Participate in Development Affecting Them', E/CN.4/Sub.2/AC.4/2001/2, 20 June 2001 [11].

219. Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States, UN Doc E/CN.4/1989/22, HUMAN RIGHTS/PUB/89/5 (1989) 5.

220. Ibid.

Indigenous peoples and the United Nations

The success of Indigenous advocacy to date is evident in the approval by the General Assembly of a second United Nations International Decade of the World's Indigenous Peoples.²²¹ There are four United Nations mechanisms specifically dedicated to Indigenous issues:

- (i) the Sub-Commission Working Group on Indigenous Populations (WGIP);²²²
- (ii) a CHR open-ended, inter-sessional working group elaborating a Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration);²²³
- (iii) the Permanent Forum on Indigenous Issues (Permanent Forum);²²⁴ and
- (iv) a Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples.²²⁵

(i) The Working Group on Indigenous Populations

The mandate established by the Sub-Commission on the Promotion and Protection of Human Rights in 1982 has enabled the WGIP to be instrumental in the development of indigenous peoples' rights. The WGIP can review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations, and can give special attention to the evolution of standards concerning the rights of such populations.²²⁶ The review of developments enables Indigenous peoples to report to the Working Group human rights violations and other developments within the state that may assist the Working Group. The standard setting mandate has been a very powerful tool for Indigenous peoples and integral to the purpose of the WGIP. It was in the WGIP that the United Nations Draft Declaration was conceived and elaborated upon, establishing for the first time in UN history a draft Declaration on the rights of Indigenous Peoples. The WGIP continues to be a popular and well attended mechanism for Indigenous peoples to engage with the United Nations:

The broad mandate and democratic process of the United Nations Working Group on Indigenous Populations has nurtured the development of hundreds of experts and practitioners on Indigenous peoples' human rights from the United Nations, governments, Indigenous peoples, academia and NGOs. Indeed in its 20 years life, it has become a centre for authoritative international discourse on the rights of Indigenous peoples, informing and educating many scholars and activists alike. Moreover, the meetings of the UNWGIP have provided opportunities for Indigenous peoples and other participants to meet and deepen concrete partnerships and projects.²²⁷

(ii) United Nations Draft Declaration on the Rights of Indigenous People

Since 1995, the CHR working group on the United Nations Draft Declaration on the Rights of Indigenous Peoples has been negotiating text for a Declaration. The fundamental principle of the Declaration is the right of self-determination for Indigenous peoples. For Indigenous peoples self-determination is the bottom line from which all negotiations are based. The Draft Declaration begins by providing for the Indigenous right to self-determination with provisions elaborating on what self-determination means. A significant aspect of the Draft Declaration is the importance of Indigenous customs and traditional practices and the right of Indigenous peoples to continue their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards. The working group has been hampered by state objections to the right to self-determination, collective rights and rights to land and resources. Nevertheless, the Draft Declaration is a significant document because it was conceived by Indigenous peoples in the WGIP. Indigenous peoples were consulted on its drafting and continue to negotiate with states on the text. The Draft Declaration is a widely used document in international human rights law and within the United Nations system. Many Indigenous peoples argue that aspects of the Draft Declaration have significant normative value in international law:

While the Draft Declaration has floundered in the Government controlled Working Group on the Draft Declaration, it has already been of great normative value. The consistent elaboration of Indigenous peoples' claims, particularly in

221. This follows the end of the first official United Nations International Decade of the World's Indigenous peoples (1995–2004). United Nations General Assembly Resolution, 48/163, 21 December 1993; see also United Nations General Assembly Resolution 50/157, 21 December 1995, Annex: Programme of activities for the International Decade of the World's Indigenous People.

222. United Nations Economic and Social Council resolution 1982/34.

223. United Nations Doc E/CN.4/Sub.2/1994/2/Add.1.

224. United Nations Economic and Social Council resolution 2000/22.

225. United Nations Commission on Human Rights resolution 2001/57.

226. United Nations Economic and Social Council resolution 1982/34.

227. Indigenous Caucus Statement, Working Group on Indigenous Populations, 20th session 22–26 July 2002 (Agenda item 4(a), the UNWGIP: Achievements in the United Nations System and a Vision for the Future, [2], cited in Joint Submission to Office of the High Commissioner for Human Rights, 'Assessing the International Decade: urgent need to renew mandate and improve the UN standard-setting process on Indigenous peoples human rights' (14 May 2004) 5.

relation to cultural identity, self-determination, informed consent and self-identification, has influenced the policy approaches of international agencies such as the World Bank, UNESCO, UNDP and World Health Organisation [and] was a major influence in the International Labour Organisation's decision to revise ILO Convention 107 and develop ILO Convention 169, titled Convention concerning Indigenous and tribal peoples in independent countries, in 1989.²²⁸

(iii) The United Nations Permanent Forum on Indigenous Issues

The Permanent Forum on Indigenous Issues is the most recently established body dedicated solely to Indigenous peoples' issues.²²⁹ The Permanent Forum is an advisory body to the Economic and Social Council (ECOSOC). The membership of the Forum includes sixteen independent experts, eight of whom are nominated by governments and eight of whom are appointed by the President of the ECOSOC. Members serve the Permanent Forum for a three-year period and there is an option for renewal of membership for an additional year.²³⁰ The primary mandate of the Forum is to discuss Indigenous peoples' issues in the areas of economic and social development, culture, environment, education, health and human rights. The Forum members are expected to provide expert advice and recommendations on Indigenous issues to ECOSOC as well as on programmes, funds and agencies of the United Nations through the Council. Its role is also to raise awareness and promote the integration and coordination of activities on Indigenous issues within the United Nations system. The Forum is mandated to meet once a year for ten working days and submit an annual report to the Council on its activities, including any recommendations for approval. The report, once approved, is distributed to relevant United Nations organs, funds, programmes and agencies.

(iv) The Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples

The Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples was a position established by the CHR.²³¹ The Special Rapporteur, currently Rudolfo Stavenhagen, is to collate and exchange information with relevant sources such as governments, Indigenous communities and non-governmental organisations on the human rights situation of Indigenous peoples. The Special Rapporteur formulates proposals and recommendations to the CHR for appropriate measures to be taken by the United Nations in remedying and improving the status of Indigenous peoples, their freedoms and human rights.

Indigenous peoples' rights in international law

The advocacy for Indigenous specific rights has been hampered by a legal system that has traditionally prioritised the rights of the individual.²³² The major international human rights instruments enumerate the rights of individuals which is problematic because the 'collective nature of Indigenous objectives is at odds with the traditional focus on the individual in international human rights law and the dichotomy of the individual versus the state promoted by the post-Westphalian concept of the law of nations'.²³³

The group rights that do exist, such as Article 27 of the ICCPR, are viewed by human rights jurisprudence as the right of an individual to engage in group activity free from discrimination or prejudice. They remain individual rights.

Protection of group identity, whether involving religion, culture, or gender, has generally been approached as a matter of individual freedom to engage in group activity.²³⁴

Therefore, the claims of Indigenous peoples challenge the historically individual nature of Western human rights discourse. The rights of the individual are paramount to human rights law that is inconsistent with the collective nature of Indigenous society.²³⁵ Collective rights are, however, recognised in numerous international human rights law instruments including CERD,²³⁶ the ILO Convention 169 which used the term 'Indigenous peoples' throughout the Convention; the *African Charter on Human and Peoples Rights* which provides recognition of Indigenous peoples claims to collective rights;²³⁷

228. Human Rights and Equal Opportunity Commission, Comments by the Aboriginal and Torres Strait Islander Social Justice Commissioner on various mechanism and programmes within the United Nations system on Indigenous issue submitted to the Office of the High Commissioner for Human Rights (Geneva, December 2002), cited in Joint Submission to Office of the High Commissioner for Human Rights, 'Assessing the International Decade: Urgent Need to Renew Mandate and Improve the UN Standard-setting Process on Indigenous Peoples Human Rights' (6 March 2004).

229. United Nations Economic and Social Council Resolution 2000/22.

230. See Carey J & Wiessner S, 'A New United Nations Subsidiary Organ: The Permanent Forum on Indigenous Issues' *American Society of International Law Insights* (April 2001).

231. United Nations Commission on Human Rights Resolution 2001/57.

232. Falk, above n 215, 128; See also Sunstein C, 'Rights and Their Critics' (1995) 70 *Notre Dame Law Review* 727, 730.

233. Ketley H, 'Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples' (2001) 8 *International Journal on Minority and Group Rights* 331, 335.

234. Falk, above n 215, 127.

235. See generally, Charlesworth H, *Writing in Rights: Australia and The Protection of Human Rights* (Sydney: UNSW Press, 2001).

236. Arts 1(a), 2, 4(a) and 14.

237. Arts 19, 20, 21, 22, 23 and 24.

the 1978 United Nations Education, Science and Culture Organisation (UNESCO) Declaration on Race and Racial Prejudice; the 2001 UNESCO Declaration on Cultural Diversity; and the *Convention on Biological Diversity*.²³⁸ Collective rights of Indigenous peoples have been recognised by the Inter-American Court of Human Rights in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*:

Among Indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community.²³⁹

The Australian legal system recognises collective rights under the *Native Title Act 1993* (Cth). Collective rights are recognised in other legal systems such as in New Zealand where collective rights are embedded in the legal system by virtue of the Treaty of Waitangi.²⁴⁰ The *Native Title Act 1993* (Cth) creates collective rights in the Australian legal system. Section 223(1) defines the expressions 'native title' and 'native title rights and interests' as 'the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to lands or waters.'

Right of Indigenous peoples to self-determination

Indigenous peoples' advocacy in international law is predicated upon the fundamental right of self-determination. The right of self-determination is enumerated in common Article 1 of the ICCPR, the ICESCR and the *United Nations Charter 1945*:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The *United Nations Draft Declaration on the Rights of Indigenous Peoples* provides for Indigenous peoples' right to self-determination in Article 3:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The claim to self-determination was integral to Indigenous demands at the working group. A declaration of principles elaborated by a number of global Indigenous groups, including the National Aboriginal and Islander Legal Service, stated that:

All Indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religion and cultural development, and determine their own membership and/or citizenship, without external interference.²⁴¹

In international law, self-determination is a right that is interlinked with the emerging right to democratic governance:

[S]elf-determination is the oldest aspect of the democratic entitlement ... Self-determination postulates the right of a people organised in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement.²⁴²

It is the most fundamental of all human rights and is a principle that has arguably reached the status of *jus cogens* in international law.²⁴³ The notion of 'all peoples' is regarded as referring to

any people irrespective of the international political status of the territory it inhabits. It applies, then, not only to the peoples of territories that have not yet attained independence, but also to those of independent and sovereign states.²⁴⁴

238. Art 6(1).

239. *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] IACHR 9 (31 August 2001).

240. Treaty of Waitangi (1840), Aotearoa/New Zealand (English Version) Art 2; See *Alexkor Ltd v Richtersveld Community* CCT 19/03 Constitutional Court of South Africa 14 October 2003 [63]; *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *R v Sparrow* [1990] 1 SCR 1075, 1078.

241. Draft declaration of principles proposed by the Indian Law Resource Center, Four Directions Council, National Aboriginal and Islander Legal Service, National Indian Youth Council, Inuit Circumpolar Conference and the International Indian Treaty Council: see UN Doc E/CN.4/Sub.2/1985/22, Annex IV.

242. Franck TM, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46, 52.

243. See eg Doehring K, 'Self-determination' in Simma B (ed), *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) 56, 70; 'No one can challenge the fact that, in light of contemporary international realities, the principle of self-determination necessarily possesses the character of jus cogens': Gros Espiell, H Special Rapporteur, *The Right to Self-determination: Implementation of United Nations Resolutions*, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities (1980) UN Doc. E/CN.4/Sub.2/405/Rev.1.

244. Cassese A, 'The Self-determination of Peoples', in Henkin L (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 92, 94.

Nevertheless, some states oppose the extension of the right to self-determination to Indigenous peoples. Such opposition is informed by the principle of territorial integrity and state concerns about secession. The genesis of states' fear of secession is often based upon decolonisation:

Self-determination as understood in the particular context of decolonisation accounts for governments' concerns that recognising a group's right to self-determination may legitimise secession.²⁴⁵

Indigenous peoples repudiate states' arguments about secession. They argue that it implies that Indigenous peoples have relinquished their sovereignty from the outset and submitted to colonisation. To counter secession concerns that frequently arise at CHR working groups, Indigenous peoples refer to the safeguard clause from the 1970 *Declaration on Principles of international Law Concerning Friendly Relations and Cooperation Among States*:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.²⁴⁶

This purview of territorial integrity from the Friendly Relations Declaration is to assuage states' fears about secession. Indigenous people assert that the democratic entitlement of the right to self-determination, as stated by Franck,²⁴⁷ is truncated by states' denial of self-determination to Indigenous peoples, such 'denial of self-determination is essentially incompatible with true democracy'.²⁴⁸ As the Australian Indigenous delegation from ATSIC stated at the third Working Group:

To proclaim self-determination as a right of all peoples, and at the same time to deny or seek to limit its application to Indigenous peoples, surely offends the prohibition of racial discrimination. The guarantee of racial discrimination is a norm of customary international law, on many accounts a peremptory norm from which no derogation is permitted.²⁴⁹

The right of self-determination is exercised in many different configurations and 'in the case of Indigenous peoples, these forms will vary in accordance with particular customs, needs and aspirations'.²⁵⁰ This is reflected in Aboriginal law, as some customs, needs and aspirations are embodied in community justice mechanisms while other communities involve the practice of more traditional elements of Aboriginal law. Article 13 of the Draft Declaration states that:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain protect and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

The key to self-determination is control and consent. State parties' consultation with Aboriginal communities on Aboriginal law is fundamental to the right to self-determination.

Is recognition of Aboriginal law consistent with international human rights law?

International human rights law has not specifically dealt with Aboriginal law in Australia and its potential conflict with human rights.

While it is clear that there are cases internationally where women's individual human rights and minority rights are in conflict, international human rights law has yet to consider this issue in relation to Aboriginal Customary Law.²⁵¹

There has been an Australian complaint to a United Nations body; however, it was not considered because of the failure to exhaust domestic remedies. There is only one Australian example of the failure to recognise Aboriginal law being the subject of a complaint to a United Nations body. The author of the communication to the HRC in 1993 was referred to as 'X', a member of the Wiradjuri Aboriginal Nation of New South Wales and an initiated man of the Arrrente Nation of

245. Foster C, 'Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples' (2001) 12 *European Journal of International Law* 145.

246. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among states in accordance with the Charter of the UN Resolution 2625 (XXV). For a comprehensive guide to the Draft Declaration on Indigenous Rights, see: Pritchard S, *An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples* (ATSIC, March 1999).

247. See Franck, above n 242.

248. See Stavenhagen R, 'Self-determination: Right or Demon?' in Clark D & Williamson R (eds) *Self-determination: International Perspectives* (London: Macmillan Press, 1996).

249. Aboriginal and Torres Strait Islander Commission, Foundation for Aboriginal and Islander Research Action, Indigenous Woman Aboriginal Corporation, National Aboriginal and Islander Legal Services Secretariat, New South Wales Aboriginal Land Council and Tasmanian Aboriginal Centre, Joint Statement on Art 3 (Geneva, 30 October 1997).

250. Ibid.

251. Sex Discrimination Commissioner, above n 15.

Central Australia. X's communication was based upon a violation of Articles 14(1), 18(1) and (4), 23(1), 26 and 27 of the ICCPR.²⁵² X's complaint was that, in the course of custody proceedings before the Family Court' evidence regarding the significance of X's children's Aboriginality was struck out on the basis of irrelevant evidence in determining the best interest of a child. X argued that this was a denial of his right to a fair hearing. X also argued that the Family Court ruling striking out evidence regarding the importance of education in Aboriginal culture violated the right to adopt and manifest one's beliefs under Article 18(1). Further it was alleged that the Family Court judge 'made disparaging comments about the initiation ceremony' and that in having to explain the entire initiation ceremony to the judge, X had to disclose sacred knowledge to the public. X complained that the striking out of information about Aboriginal family kinship structures violated Article 23(1) of the ICCPR.

Australia submitted to the HRC that the communication was inadmissible because X failed to exhaust domestic remedies. X withdrew his appeal to the Full Court of the Family Court. Before the HRC can determine a complaint it must determine the admissibility of a complaint. In X's case, the HRC deemed that he had failed to exhaust domestic remedies and, therefore, the communication was inadmissible by virtue of Article 5(2)(b) of the Optional Protocol.

Even though the complaint was precluded from being considered by HRC, the communication did lead to a change in the law. After this complaint, the *Family Law Reform Act 1995* (Cth) inserted a new provision that required the court to consider, in relation to the child's best interest, the child's Aboriginality and the need to maintain a connection with Aboriginal life.

Notwithstanding the lack of international jurisprudence there are a number of applicable human rights standards. Of particular significance is the *United Nations Draft Declaration on the Rights of Indigenous Peoples* that makes specific provision for distinctive Indigenous tradition and custom in Article 33:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards.

In the drafting of the declaration, the recognition of the laws and customs of Indigenous peoples as a source of law within domestic legal systems was an important right for the Indigenous representatives from around the world. The Inuit Circumpolar Conference, for example, believed that:

It would be beneficial to specify that the judicial system of a country shall accommodate the justice system of Indigenous peoples and shall fully consider the usages, customs and perspectives of such peoples. Where possible, the local system of justice should be controlled by the Indigenous peoples themselves.²⁵³

It is also important to note that Article 33 is expressly subject to internationally recognised human rights standards. This is an important fact because the text agreed by the Sub-Commission is the original text which many Indigenous groups continue to defend at the United Nations. It was agreed by all Indigenous groups, including Indigenous Australian groups, that Article 33 must be made subject to human rights standards.

Article 33 is drafted similar to a provision in ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries. ILO Convention 169 is quite extensive in its enumeration of Aboriginal law. Article 8(2) provides that:

[Indigenous peoples] shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.

Furthermore Article 9(1) of ILO Convention 169 states that 'the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.'

The methods empowered above must be consistent with the fundamental human rights defined by the national legal system and international human rights law. Some Australian commentators have lamented Australia's failure to ratify ILO Convention 169 as a lost opportunity for Aboriginal self-determination and in particular recognition of Aboriginal customary law in the Australian legal system.²⁵⁴

252. United Nations Human Rights Committee – Australia, Communication CCPR/C/57/D/557/1993 [1996] UNHRC 15 (1 August 1996).

253. United Nations Doc E/CN.4/Sub.2/AC.4/1988/5.

254. Humphry A, 'An Opportunity Lost for Aboriginal Self-determination: Australia's Compliance with ILO 169' *E-Law – Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw.txt>>.

The Sub-Commission has remarked, of the obligation to protect culture, that:

In applying national laws and regulations to Indigenous peoples, States should pay due regard to their customs or customary law and should respect the methods customarily practised by Indigenous peoples in dealing with offences, including criminal offences, committed by their members. They should also take into account the economic, social and cultural characteristics of Indigenous peoples when imposing penalties laid down by general law.²⁵⁵

Article 27 of the ICCPR is binding upon Australia and reads:

In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The HRC has stated that Article 27 of the ICCPR provides a positive obligation on states to protect such cultures:

[T]he Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.²⁵⁶

The shortfall of Article 27 is that it refers to minorities rather than peoples. Indigenous peoples insist that their status is different to that of minorities who have an ethnic status integrated within the state. Nevertheless, Indigenous peoples appreciate the protection that arises from Article 27.

International practice has not endorsed such a formal dichotomy, but rather has tended to treat Indigenous peoples and minorities as distinct but overlapping categories subject to common normative considerations. The specific focus on Indigenous peoples through international organizations indicates that groups within this rubric are acknowledged to have distinguishing concerns and characteristics that warrant treating them apart from ... minority populations of Western Europe. At the same time, Indigenous and minority rights issues intersect substantially in related concerns of non-discrimination and cultural integrity.²⁵⁷

Jurisprudence suggests that Article 27 protects persons belonging to a minority rather than a minority as a whole. Nevertheless, it is a right that can only be exercised in conjunction with other members of a minority. If the positive legal measures taken by the state, as suggested by the HRC, are taken to remedy the conditions that impair the capacity of an individual to enjoy the inherently collective nature of Article 27 then such measures are deemed to constitute a legitimate differentiation if they are reasonable and objective. The HRC also cautions that the recognition of such rights must not violate other rights enshrined in the Covenant: '[N]one of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant'.²⁵⁸

Thus, in the context of Aboriginal law, Article 27 cultural rights must not infringe, for example, the right to equality between men and women (Article 3); the inherent right to life (Article 6); the right to be free from torture or cruel, inhuman or degrading treatment (Article 7); and free and informed consent for marriage (Article 23). In particular, the Committee is aware of potential violations of women's rights.

The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religious do not authorise any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.²⁵⁹

For example, the HRC has already considered Article 3, the right to equality between men and women, in the context of traditional practices that marginalise and impede women's capacity to enjoy human rights.

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes ... State parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights.²⁶⁰

255. E/CN.4/Sub.2/AC.4/2004/6 [65].

256. United Nations Human Rights Commission, *The Rights of Minorities*, 50th session (1994) CCPR General Comment No 23.

257. Anaya SJ, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State' (2004) 21 *Arizona Journal of International & Comparative Law* 13, 21.

258. United Nations Human Rights Commission, above n 256.

259. *Equality of Rights Between Men and Women*, CCPR/C/21/Rev.1/Add.10, CCPR General Comment No 28 (29 March 2000) [32].

260. *Ibid* [5].

In recognising that it may be necessary for states to establish measures designed to protect the culture and identity of Indigenous peoples and that such measures may constitute a legitimate, non-discriminatory differentiation of treatment, the committee is cognisant of cultural attitudes that violate women's enjoyment of civil and political rights. The HRC discussed this further in General Comment 23(50) concerning ethnic, religious and linguistic minorities:

The enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article—for example, to enjoy a particular culture—may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of Indigenous communities constituting a minority.²⁶¹

The Committee concludes that Article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.²⁶²

States' parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.²⁶³

The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.²⁶⁴

The other significant recommendation noting a positive obligation to take measures to protect Indigenous culture is the general recommendation of the Committee on the Elimination of Racial Discrimination. The Committee noted a positive obligation on states to 'recognise and respect Indigenous distinct culture' and 'ensure that Indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs'.²⁶⁵ In taking positive measures to facilitate this, the committee also stated that it was important that Indigenous communities are consulted and 'that no decisions directly relating to their rights and interests are taken without their informed consent'.²⁶⁶

The applicability of article 27 to Indigenous peoples

In *Lovelace v Canada*²⁶⁷ the HRC found that Sandra Lovelace, a registered Maliseet Indian, had been denied her right of access to her Indigenous culture and language with other members of her group. Section 12(1)(b) of the *Canadian Indian Act* empowered the rescission of her membership upon marriage to a non-Indian yet the Act provided no such rescission for an Indian man who marries a non-Indian. The committee found that the Act violated the ICCPR because it excluded a certain class of Indian women from government-controlled recognition of Indian bands. *Lovelace* affirmed the right of an individual within a group 'to have access to her native culture and language "in community with the other members" of her group'.²⁶⁸ *Lovelace* is significant because the interference with her membership denied her Article 27 rights. The HRC found that no legal impediments should prevent a member of a minority from associating with any other group. Any legal impediment must have a 'reasonable and objective justification'.²⁶⁹

On the other hand, *Kitok v Sweden*²⁷⁰ is a decision that deems interference with a person's membership as legitimate if it is justified and necessary. In *Kitok* the HRC emphasised the significance of protecting group rights in the interests of the survival of culture. The committee held that a restriction placed upon the right of any member of a group must be shown to have a reasonable and objective justification and be considered necessary for the continued viability and welfare of the group as a whole.²⁷¹ The facts of *Kitok* were that Ivan Kitok, a Saami man, alleged that the *Swedish Reindeer Husbandry Act* was discriminatory because it exclusively reserved the right to reindeer herd to members of Saami villages. Even though Ivan Kitok was a Saami, he had lost his membership to his ancestral village because he had found employment elsewhere and was, therefore, prohibited from reviving his membership. As reindeer husbandry

261. Ibid, General Comment No 23(50), [3.2].

262. Ibid [9].

263. United Nations Human Rights Committee, General Comment No 23(50).

264. United Nations Human Rights Committee, General Comment No 3(13), Art 2, UN Doc HRI/GEN/1/Rev.2 (1996).

265. United Nations CERD General Recommendation No XXIII: Indigenous Peoples, UN Doc CERD/C/51/misc13/Rev 4 (1997).

266. Ibid [4(d)].

267. *Lovelace v Canada*, Communication No R.6/24, Report of the Human Rights Committee, UN GOAR, 36th Session, Supp No 40 at 166 UN Doc A/36/40, Annex 18 (1977) (views adopted 29 December 1977).

268. Ibid [15].

269. Ibid [16].

270. United Nations Human Rights Committee, Communication No 197/1985: Sweden (*Kitok*), UN Doc: CCPR/C/33/D/197/1985, 10 August 1988.

271. Ibid [9.2], [9.3], [9.8].

was deemed integral to the practice of the Saami culture and the control of reindeer herding vital to environmental conservation, the HRC found that in restricting Kitok's rights, the Act did not violate Article 27 as protected by the ICCPR. The Committee considered that the Act was a means to ensure the continuation, viability and welfare of the Saami people as a whole.²⁷²

For Indigenous peoples to be able to enjoy their individual human rights they must be able to practise those rights collectively and, therefore, such rights are not divisible but interdependent. The importance of these decisions of the HRC under Article 27 is significant because of the Committee's determination not to consider Indigenous peoples under Article 1. In *Chief Ominayak v Canada*, the Committee decided not to consider the question of whether the Lubicon Lake Band could be classified as 'peoples' under Article 1 of the ICCPR because the Optional Protocol is an individual complaint mechanism. In this case, the HRC decided to consider the complaint under Article 27 and indeed found a violation of the article stating that:

[T]he rights protected by Article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.²⁷³

The other decision to consider in the context of Article 27 is jurisprudence as it relates to Indigenous peoples. In *Lansman v Finland*,²⁷⁴ Lansman was a Saami reindeer herder who objected to a commercial decision to grant a contract to permit quarrying on a Saami sacred site. Lansman and the other complainants argued that the contract would be disruptive of the environment and interfere with their reindeer herding. In this case the Committee found that, on the basis of the facts, reindeer herding would not be sufficiently impacted to constitute a violation of Article 27. A significant element of the committee's determination was the fact that the relevant Saami group had been consulted on the decision; consultation with Indigenous peoples being an important aspect of the reconciliation of Aboriginal rights and international human rights obligations.

Non-discrimination and equality before the law

The most significant challenge to recognition of Aboriginal law is that recognition would violate the principle of non-discrimination and equality before the law. While such concerns are understandable, given the popular meanings of discrimination and equality before the law, international law actually permits states to treat unequally that which is unequal.

Non-discrimination is a fundamental principle of international law. It is not only the cornerstone of the international human rights law system but also the key principle of the international trade law system. In international human rights law, the principle of non-discrimination 'is directed towards protecting the weak and vulnerable and removing the structural barriers to achieving greater equality in society' and is regarded by many as *jus cogens*.²⁷⁵ The non-discrimination principle was enshrined in the purposes and principles of the *Charter of the United Nations*, encouraging states to respect human rights and 'fundamental freedoms for all without distinction as to race, sex, language or religion'.²⁷⁶

Non-discrimination is a central underpinning of ICERD and CEDAW and is also enumerated in the ICESCR.²⁷⁷ Article 1(1) of ICERD defines racial discrimination as constituting

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

CEDAW defines discrimination against women as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

272. See United Nations Human Rights Commission, above n 256, Art 27.

273. *Chief Ominayak v Canada*, Communication No 167/1984 UN Doc A/45/40 (1990), [32.2].

274. Communication No 511/1992 UN Doc CCPR/C/52/D/511/1992 (8 November 1994) [2.1], [3.1], [9.3], [9.7].

275. High Commissioner for Human Rights, 'Analytical Study on the Fundamental Principle of Non-discrimination in the Context of Globalisation', 60th Session of the Commission on Human Rights (Geneva, 29 March 2004) 18.

276. *Charter of the United Nations* 1945, Art 1(3).

277. Arts 2(3) and 3.

ICERD and CEDAW clearly deal with non-discrimination in specific contexts, race and gender. Alternatively, the ICCPR deals with discrimination in a more general context; therefore, the HRC defines discrimination for the purpose of the ICCPR as implying

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, by all persons, on an equal footing, of all rights and freedoms.²⁷⁸

ICERD, in particular, has become the international community's primary tool in combating racial discrimination. ICERD has a reporting mechanism under which state parties must submit periodic reports on the measures that are taken by them to implement the provisions of the Convention. It has become an important method for monitoring state parties' commitments to the Convention.²⁷⁹ ICERD is Indigenous peoples' primary advocacy tool and a benchmark by which they can engage their state and measure their conduct according to internationally agreed minimum standards. This was illustrated by Australian Indigenous peoples who resort to CERD because of a lack of meaningful consultation with the state on amendments to the *Native Title Act 1993* (Cth).

Inextricably linked with the principle of non-discrimination is the principle of equality before the law. Equality before the law is clearly enumerated in the *Universal Declaration on Human Rights*²⁸⁰ and in Article 26 of the ICCPR.

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

Article 26 provides equality before the law and equal protection of the law to all citizens as well as prohibiting discrimination under the law.

These definitions of what may constitute discrimination before the law accord with popular notions of discrimination. In the context of Aboriginal law, many would argue that providing an excuse for sexual assault, based on evidence of Aboriginal law, gives an advantage to one class of people on the basis of race. While Aboriginal people can admit particular evidence to prove the assertion, non-Aboriginal people are not permitted to admit similar evidence to the court. In this case, the exception excludes all persons who do not belong to that class of people. Moreover, the debates about the content of Aboriginal law and the spectre of distorted customary law may also contribute to the argument that the distinction is arbitrary. Therefore, the most logical conclusion to such reasoning would be that the recognition of Aboriginal law, in whatever configuration, is discriminatory and violates the principle of equality before the law. The reasoning at international law, however, moves beyond such a conclusion that non-discrimination and equality before the law require the same treatment for all people in all circumstances.²⁸¹ It is accepted in international law that the principle of equality

[d]oes not require absolute equality or identity of treatment but recognizes relative equality ie different treatment proportionate to concrete individual circumstances. In order to be legitimate, different treatment must be reasonable and not arbitrary and the onus of showing that particular distinctions are justifiable is on those who make them.²⁸²

The HRC stated that the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance.²⁸³ In the International Court of Justice decision in *South West Africa Cases (Second Phase)*, Judge Tanaka held that:

[T]he principle of equality before the law does not mean absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal ... To treat unequal matters differently according to their inequality is not only permitted but required.²⁸⁴

278. United Nations Human Rights Committee, General Comment No 18 (37) (Art 26) UN Doc HR/GEN/1/Rev.2 (1996), [7].

279. Art 9.

280. Art 7: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.

281. There are positive and negative statements of equality and non-discrimination: Bayefsky A, 'The Principle of Equality or Non-discrimination in International Law' (1990) 11 *Human Rights Law Journal* 1, 5.

282. McKean W, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983) 82.

283. United Nations Human Rights Commission, above n 278, [8], [10].

284. *South West Africa Cases (Second Phase)* [1966] ICJ Rep 305 (Tanaka J).

This raises the dichotomy of formal equality and substantive equality. Formal equality is the principle that all people should be treated identically in all circumstances. Substantive equality holds that all people are not equal and consequently it is permitted to unequally treat that which is unequal. International law advocates and permits the substantive equality approach because it acknowledges that there are situations where concrete circumstances may necessitate unequal treatment for unequal matters. These circumstances permit distinctions to be made if those distinctions are reasonable and proportionate. In the context of Aboriginal law, if the evidence to the inquiry suggests that an overwhelming inequality exists between Aboriginal people and non-Aboriginal citizens—one of those reasons being the irresolution of the relationship between Aboriginal law and the Australian legal system—then these concrete circumstances permit and require different treatment. HRC General Comment No 18 explains the obligation upon states to take positive action to address inequality:

[T]he principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.²⁸⁵

The concept that states may take action for a period of time to correct discrimination is also enshrined in ICERD and incorporated into the Australian legal system through the *Racial Discrimination Act 1975* (Cth). Entrenched in the Convention is this understanding in international law that it is permissible to treat unequally that which is unequal. This understanding permits Aboriginal and Torres Strait Islanders to be treated differently to non-Indigenous Australians because of the pre-existing inequality between these two groups. The attainment of equality in a society may warrant and legitimise differentiation of treatment.

There are two ways in which this can be done legally – special measures and actions that legitimately recognise cultural difference. Special measures are motivated by the need to remedy the impact of racial discrimination upon on a community. Special measures are incorporated into the Australian legal system by ICERD. Article 1(4) of ICERD states:

Special measures taken for the sole purposes of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

This article also protects special measures from constituting racial discrimination. Section 8 of the *Racial Discrimination Act 1975* (Cth) incorporates Article 1(4) of ICERD. Furthermore Article 2(2) of the Convention calls upon states to take action to address racial inequality:

State parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

According to CERD, the intention of Article 2(2) is to recognise that state parties have minority groups such as Indigenous populations and that as a consequence of this

[a]ttention must be paid to the socio-economic and political situation of these groups in order to ensure that their development in the social, economic and cultural spheres takes place on an equal footing with that of the general population.²⁸⁶

It is necessary to countenance that special measures are temporary measures. The measures cease to be permissible once the objective of their employment is achieved. The High Court decision in *Gerhardy v Brown* is significant because it dealt with the concept of special measures in Australian law:

^{285.} Above n 278, [12], [10].

^{286.} United Nations Manual on Human Rights Reporting Under Six Major International Human Rights Instruments (1997) HR/PUB/91/1 (Rev. 1) 277.

[I]t has long been recognised that formal equality before the law is insufficient to eliminate all forms of racial discrimination ... Formal equality must yield on occasions to achieve ... 'effective, genuine equality'.²⁸⁷

Gerhardy involved the lands of the Pitjantjara tribe, which were protected by the *Pitjantjara Land Rights Act 1981* (SA) that gave Pitjantjara members unrestricted access to their lands but required non-Pitjantjara people to seek permission. The defendant, Brown, was a non-Pitjantjara man who entered the lands without the required permission and was charged with unlawful entry. Brown challenged the prosecution on the grounds that the relevant provisions of the Act were prohibited by the *Racial Discrimination Act 1975* (Cth). The High Court found that the Act was permitted by s 8(1) of the *Racial Discrimination Act 1975* (Cth). The court employed a criterion for the lawful establishment of special measures:

- The special measure must confer a benefit on some or all members of a class;
- Membership of this class must be based on race, colour, descent or national or ethnic origin;
- The special measure must be for the sole purpose of securing adequate advancement of the beneficiaries so that they may enjoy and exercise equally with others their human rights and fundamental freedoms; and
- The protection given by special measures must be necessary so that its beneficiaries may enjoy and exercise equally with others, their human rights and fundamental freedoms.²⁸⁸

Examples of special measures taken in Australia include statutory restrictions combating alcohol abuse in remote Aboriginal communities, such as a two-kilometre law restricting consumption of alcohol within two kilometres of a liquor outlet;²⁸⁹ laws permitting police to take into protective custody any person in a public place when they have reasonable grounds to believe that the person is intoxicated with alcohol;²⁹⁰ or s 122 of the *Liquor Act 1978* (NT) which makes it an offence to serve alcohol to certain declared persons. These examples would, on the basis of popular notions of discrimination and equality before the law, potentially infringe the *Racial Discrimination Act 1975* (Cth). In fact, these measures such as alcohol restrictions are justified as special measures under the Act. Further important elements to the legality of special measures are the wishes of the members of the particular group. In referring to a report conducted by HREOC on alcohol in Aboriginal communities referred to as the *Alcohol Report*,²⁹¹ Brennan J stated that: 'The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement'.²⁹²

In the *Alcohol Report*, Commissioner Antonios concluded: 'Alcohol restrictions imposed upon Aboriginal groups as a result of government policies which are incompatible with the policy of the community will not be special measures'.²⁹³

The High Court's reasoning in *Gerhardy v Brown*²⁹⁴ has been widely criticised because of the temporary nature of special measures. Such an approach could not be sustained because of the permanency of Aboriginal law as a facet of Aboriginal culture.

Special measures are the means to achieving equal enjoyment of rights. Distinguishing special measures from rights can in no way justify an approach to special measures which permits governments to implement policy or legislative changes on the basis that special measures are a gift to one segment of society. Successive governments have failed to explicitly identify the obligation to redress Indigenous disadvantage as a human rights obligation.²⁹⁵

The concern with the temporary nature of special measures under CERD, or indeed the impermanence of measures implicit in the HRC comment above, is that Aboriginal law is not a transitory or temporary system but like all systems permanent and evolving. Therefore, the preferred option for the recognition of Aboriginal law would be actions that legitimately recognise cultural difference empowered by Article 1(4) of ICERD. Such an action could be viewed as a legitimate differentiation of treatment under ss 9 or 10 of the *Racial Discrimination Act 1975* (Cth). This would involve recognising Aboriginal peoples as distinct peoples entitled to differential treatment rather than temporary special measures. This distinction is not only significant in law but symbolically would be an enormous development in Australian law.

Recognition of customary law as an original part of the Australian legal system is not equivalent to being sensitive to or making allowances in the Australian legal process for the cultural differences of the various ethnic groups now making up multicultural Australia. In the post-*Mabo* era it is important to understand that legislative and community

287. (1985) 159 CLR 70, 128–29 (Brennan J).

288. Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 6.

289. *Summary Offences Act 1923* (NT) s 45D.

290. *Police Administration Act 1978* (NT) s 128.

291. Race Discrimination Commissioner, *Alcohol Report* (Canberra: AGPS, 1995).

292. *Gerhardy v Brown*, above n 287, [37].

293. Race Discrimination Commissioner, above n 291, 141.

294. Above n 287.

295. Jonas WI & Donaldson M, 'The Legitimacy of Special Measures' in S Garkawe, L Kelly and W Fisher (eds) *Indigenous Human Rights* (Sydney: Institute of Criminology, 2001) 18.

recognition of customary laws is because those laws are the laws of Aborigines and Torres Strait Islanders as the first people of this country.²⁹⁶

In the context of the native title decision of *Western Australia v Commonwealth*,²⁹⁷ the High Court indicated a favourable approach to substantive equality.²⁹⁸

One of the most frequent objections to recognition of Aboriginal law will always be that to take account of Aboriginal law is discriminatory and violates equality before the law. For example, the judiciary's use of Aboriginal custom in assigning guilt may be viewed by the Western Australian public as Aboriginal people drawing upon a source of law that procedurally other non-Indigenous offenders cannot. These perceptions are assuaged by international law if recognition is viewed as necessary and justified to achieve greater procedural justice for Aboriginal people. The ALRC supported this very fundamental proposition in its inquiry on Aboriginal customary law.

[T]he need for consistency with fundamental values of non-discrimination, equality and other basic human rights does not preclude the recognition of Aboriginal customary laws. On the contrary, these values themselves support appropriate forms of recognition of cultural identity of Aboriginal people.²⁹⁹

The greatest challenge in Australia is the pejorative nature in which discrimination is viewed and that the concept of non-discrimination and equality before the law is not widely considered in its international context. Notions of formal equality dominate public debate on Indigenous policy and substantive equality is not as commonly regarded. The notion of formal equality remains the language of Northern Territory politicians even after a significant inquiry into Aboriginal law. However, clearly it is consistent with international law, particularly ICERD as implemented by the *Racial Discrimination Act 1975* (Cth) for states to recognise Aboriginal law whether through the less preferable special measures or actions that legitimately recognise cultural difference. The key issue is that the measures that are taken are reasonable and proportionate, and, in the case of special measures that they cease to continue after their objectives have been achieved.

Aboriginal law and traditions and harmful practices under international human rights law

The analysis of whether Aboriginal law conflicts with Australia's human rights obligations is difficult to ascertain in the abstract because of the diversity and complexity of the content of Aboriginal law. For example, payback and promised marriages are elements of Aboriginal law that are disproportionately focused upon in relation to human rights obligations as opposed to community justice mechanisms. Nevertheless, it is useful to measure aspects of Aboriginal law against the various comments of United Nations treaty bodies or agencies. The determination of whether a particular act may conflict with Australia's human rights obligations requires consideration of the relevant instrument as a whole, rather than selective articles cited in the abstract. Thus, those acts popularly regarded as Aboriginal law, such as promised marriage and payback, must be viewed in the context of an entire covenant. This is because articles in human rights instruments are, like statutes, often unclear or ambiguous in their intention and human rights instruments require interpretative rules such as the principle that specific provisions prevail over more general provisions. Furthermore, the determination of an act's inconsistency with an instrument requires comprehension of the context in which the act is committed. In interpreting the intention of human rights instruments, the circumstance such as promised marriage or payback spearing would, in the interests of fairness, require consideration of the cultural context such as an understanding of the cultural practice or cultural belief as protected under Article 27. Nevertheless, whether an act conflicts with an obligation will utterly depend upon the facts of the case. This explains why whole-scale prohibition would arguably violate Australia's limited obligation to protect culture but certainly its obligation to consult.

Harmful practices

While it has already been established that treaty bodies have not provided any specific comment on the practice of Aboriginal customary law in Australia, there exists numerous comments and recommendations by treaty bodies and United Nations agencies about harmful cultural practices and traditions that impact upon women and children.

296. Rose A, 'Recognition of Indigenous Customary Law: The Way Ahead' (Speech delivered at the Forum on Indigenous Customary Law, Canberra, 18 October 1995).

297. (1995) 183 CLR 37, 483–84: 'If there were any discrepancy in the operation of the two Acts, the *Native Title Act* can be regarded either as a special measure under s 8 of the *Racial Discrimination Act* or as a law, which, though it makes racial distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the ICERD'.

298. McCrae et al, above n 179, 446.

299. Australian Law Reform Commission, above n 1, Summary Report, [37].

There are two elements to the Committee's concern about harmful cultural practices. The first is that some cultural practices have a harmful impact upon women and children. Those practices conflict with the human rights obligations of state parties. The second element is that, despite these practices, all cultures are fluid and constantly change; therefore, they have the capacity to evolve consistent with international human rights law.

The impact of cultural and religious traditions and practices upon women and children is only a relatively recent concern for international law:

Of the several blind spots in the early development of the human rights movement none is as striking as that movement's failure to give to violations of women's (human) rights the attention and in some respects the priority that they require.³⁰⁰

The first significant step in addressing gender discrimination was the adoption by the General Assembly in 1967 of the *Declaration on the Elimination of All Forms of Discrimination Against Women*. The Declaration was followed in 1979 by CEDAW. It was not until the United Nations World Conference on Human Rights in 1993 that the awareness of the extent of women's human rights violations became a global issue. One of the outcomes of the conference was the General Assembly's adoption of a *Declaration on the Elimination of Violence Against Women*. In 1994, the CHR established the position of a Special Rapporteur on Violence Against Women, whose role is to receive information about violence and recommend to the United Nations how to address gender discrimination. During the 1995 United Nations World Conference on Women, the Beijing Platform for Action emerged as a significant outcome. The platform included initiatives such as gender mainstreaming within the United Nations system. The Platform was reaffirmed in June 2000 – Beijing +5.

This increased awareness of gender discrimination and the widespread violation of women's rights have influenced broader public international law. One example of this is the Statute of the International Criminal Court that specifically targets gender based crimes. Another example is the amendment of CERD reporting procedure to allow CERD to request information from state parties on women in the context of racial discrimination.

The continuance of cultural practices and traditions that harm women or children has been the subject of increased scrutiny. The United Nations Office of the High Commissioner for Human Rights has identified the problem:

Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are harmful to a specific group, such as women. These harmful traditional practices include female genital mutilation; forced feeding of women; early marriage; the various taboos or practices which prevent women from controlling their own fertility; nutritional taboos and traditional birth practices; son preference and its implications for the status of the girl child; female infanticide; early pregnancy; and dowry price.³⁰¹

Female genital mutilation was the subject of a major United Nations education project in which public awareness was raised about its impact upon women in those communities that practise it. The Special Rapporteur on Violence Against Women also expressed concern:

Certain customary practices and some aspects of tradition are often the cause of violence against women. Besides female genital mutilation, a whole host of practices violate female dignity. Foot binding, male preference, early marriage, virginity tests, dowry deaths, sati, female infanticide and malnutrition are among the many practices which violate a woman's human rights. Blind adherence to these practices and State inaction with regard to these customs and traditions have made possible large-scale violence against women.³⁰²

The HRC issued a general comment in the context of the ICCPR urging states to ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and equal enjoyment of all Covenant rights.³⁰³ The United Nations CHR also called upon states to

eliminate violence against women in public and private life ... the elimination of gender bias in the administration of justice and the eradication of the harmful effects of certain traditional or customary practices [and] cultural prejudices.³⁰⁴

300. Steiner & Alston, above n 130, 158.

301. Office of the High Commissioner for Human Rights, *Harmful Traditional Practices Affecting the Health of Women and Children*, Fact Sheet No 23 (1995). Similarly, the Beijing Platform for Action defines violence against women to include traditional practices that are harmful to women: Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women, A/CONF.177/20/Add.1 (15 September 1995) [113(a)].

302. Special Rapporteur on Violence Against Women *Preliminary Report to the Commission on Human Rights*, E/CN.4/1995, 42, 22 November 1994, [67].

303. General Comment No 28.

304. United Nations Commission on Human Rights, 'Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women': Resolution 1994/45.

The most active in the area of modifying and abolishing harmful practices has been CEDAW. General Recommendation 19 of CEDAW states that:

Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities.³⁰⁵

This recommendation requires state parties to report, under Article 5, attitudes, customs and practices that perpetuate violence against women and equally the types of violence that are the consequence of these attitudes, customs and practices. Additionally state parties are requested to report on those effective measures that they are implementing to overcome these attitudes and practices. The importance of this recommendation is the definition of gender-based violence, which is violence committed against a woman by public authorities and also private acts because she is a woman and is deemed discriminated by virtue of Article 1 of the Convention. The recommendation holds that states may be responsible for private acts if they fail to prevent such violence. The existence of these positive obligations is for states 'to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.³⁰⁶ The committee requests state parties to take measures to effect protection of women against gender-based violence. These measures include:

- (i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace.
- (ii) Preventive measures, including public information and education programs to change attitudes concerning the roles and status of men and women.
- (iii) Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.³⁰⁷

In regard to gender-based violence derived from tradition and culture based attitudes, the committee has also questioned a number of existing cultural practices that potentially infringe Article 1 of CEDAW. The committee has found that practices such as forced marriages would breach Articles 2(f), 5 and 10 (c) of the Convention.

Corollary to these concerns is that the potential of cultures to adapt and evolve is also acknowledged. The United National Development Fund for Women explains this potential:

Historically, religion and culture have proven extraordinarily adaptive; most belief systems have been revised over time to accommodate new understandings and new values that emerge in human society.... Numerous cultures offer examples of traditions, including customs harmful to women, that have changed or died out. For generations, women (and some men) in Sudan endured mutilation to acquire face marks, a traditional sign of beauty as well as an indicator of tribal affiliation. In recent years, this tradition has rapidly disappeared. The binding of women's feet in China is another example of a nearly universal custom that is no longer practised.³⁰⁸

This principal is incorporated into CEDAW requiring state parties to take measures to facilitate the modification of traditional cultural practices in the realisation of women's human rights:

States Parties shall take all appropriate measures ... to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.³⁰⁹

The notion of modifying culture is an important consideration if aspects of Aboriginal law are deemed to conflict with Australia's human rights obligations. Payback is a traditional practice that is commonly regarded as traditional Aboriginal law and frequently regarded as breaching Australia's human rights obligations. The Northern Territory

305. CEDAW General Recommendation No 19.

306. Art 2(f); see also Arts 5, 11, 12 and 16.

307. CEDAW General Recommendation No 19, Art 24(f).

308. United Nations Development Fund for Women, 'Women, Culture and Traditional Practices' *CEDAW Advocacy Kit*.

309. CEDAW Art 5(a).

inquiry into Aboriginal customary law raised the issue based upon its submissions that despite the commonly regarded physical nature of payback, it also involves other non-physical punishments that do not potentially violate Australia's human rights obligations.³¹⁰ Nevertheless, there are a number of concerns that arise with respect to the practice of payback.

Could not one describe spearing required in some payback punishments as an act of torture or inhuman punishment forbidden by Articles 21 and 22 of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*?³¹¹

The form that payback takes, such as spearing, may give rise to potential breaches of *International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. This depends on how a state jurisdiction views the right to practise culture and constitutes the rights of Indigenous peoples as a distinct cultural group. Payback certainly raises questions about double jeopardy. In the Australian legal system, no one can be tried or punished twice for an offence in which they have been acquitted or convicted. Frequently situations do arise where the existence of customary punishment may result in Aboriginal offenders being tried and punished for the same crime. The issue of avoiding tribal punishment arose in the case of *R v Desmond Gorey*, when Gallop J stated:

I take account of the fact that you have brought great shame upon you family and that you feel that shame. I take account of the fact that probably you will have to present yourself for punishment after you have served the gaol sentence which I propose to impose upon you.³¹²

In this context the courts are cognisant of the role that such punishment facilitates in the Aboriginal legal system and may be central to a dispute resolution system.

Similarly the practice of promised marriages has been the subject of debate regarding its potential conflict with human rights. In some circumstances arranged marriages are recognised under Aboriginal law (and it certainly is important to gauge formally the extent of the practice). As the *Hales v Jamilmira*³¹³ controversy illustrated, the practice may involve young girls under the legal age of consent to marriage as well as the legal age to consent to sexual intercourse. Under the *Marriage Act 1961* (Cth) the age of consent is 18 years.³¹⁴ The Act does provide for a person to apply to a judge or magistrate for permission to marry on reaching the age of 16 years.³¹⁵

There is only one international agreement pertaining to marriage – the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*.³¹⁶ Australia is not party to this agreement. Its preamble reaffirms Article 16 of the Universal Declaration of Human Rights that:

Men and women of full age ... have the right to marry and to found a family. They are entitled to equal rights as to marriage [and] marriage shall be entered into only with the free and full consent of the intending spouses.

Certainly this convention, and indeed Australian law, emphasises the notion of choice and consent. However, the practice of promised marriage and the potential for conflict with Australia's human rights obligations must be considered in its cultural context. This is because the resolution of any conflict cannot be achieved without the participation of those that would be affected by potential legislative measures.

When the Northern Territory amended its legislation to prohibit traditional marriage as a legal defence to sexual assault following the controversy, both the CLP and Galarrwuy Yunupingu objected to the lack of consultation with Aboriginal communities on the decision. Yunupingu argued that the Northern Territory failed in its human rights obligations to Aboriginal peoples to adequately consult Aboriginal people.³¹⁷ According to Yunupingu, 'child abuse and traditional marriage are not the same thing, and he takes offence at suggestions that underage brides are necessarily exploited'.³¹⁸ In the Pascoe case, the Court called upon Pascoe to explain how 'A' was his 'promised wife' and how the system worked:

310. NTLRC, above n 1, 3.15.

311. Sarre R, 'Cross Currents: Internationalism, National Identity and Law' (Speech delivered at 50th Anniversary Conference of the Australasian Law Teachers Association, 1995).

312. *R v Desmond Gorey* (Unreported, Supreme Court of the Northern Territory, 20 June 1978); see also *Jadurin v The Queen* (1982) 44 ALR 424.

313. Above n 71.

314. 'Subject to s 12, a person is of marriageable age if the person has attained the age of 18 years': *Marriage Act 1961* (Cth) s 11.

315. In s 12 (1) it states that: 'A person who has attained the age of 16 years but has not attained the age of 18 years may apply to a Judge or magistrate in a State or Territory for an order authorising him or her to marry a particular person or marriageable age despite the fact that the applicant has not attained the age of 18 years'.

316. 521 UNTS 231, entered into force 9 December 1964.

317. See generally, ABC Radio 'Aboriginal leader attacks NT laws affecting traditional marriage' PM, 10 December 2003.

318. Ibid.

This is very complicated and I can't do it within say 15 minutes or an hour ... It's so complicated ... Anyway I'll try. When a poison cousin has a daughter, she automatically promises this girl to a poison cousin in which case cousin like her mother. A's mother promised A to poison cousin here and when she's grew up, she start to know him, you know, until she reach puberty. When she reach puberty, when she's about 14 to 15 years old, and that's when can get married.³¹⁹

Pascoe's explanation, though arguably not comprehensible in the abstract, highlighted the complexity of the Aboriginal laws regulating customary marriages. They are not, as the Gordon Inquiry agreed:

[T]he simple domestic arrangements between two people, but involve the character of male accomplishment, and negotiation between a man and his prospective wife's relatives.³²⁰

Similarly Joan Kimm observed that:

In Aboriginal law promised marriage 'was an integral part of classical Aboriginal society' and while 'it can be viewed as being quite inimical to women's rights', some commentators regard its suppression as 'equally inimical to the continuation of Aboriginal culture'.³²¹

The overwhelming emphasis at international law is to protect the human rights of the girl child from cultural practices that remove the right to choose and to consent. The Committee on the Rights of the Child, in its consideration of the girl child, has noted that:

[H]istory had clearly shown that it was essential to focus on the girl child in order to break down the cycle of harmful traditions and prejudices against women.³²²

Legislative measures send a formal message that traditions and customs contrary to the rights of the child will no longer be accepted, create a meaningful deterrent and clearly contribute to changing attitudes.³²³

Also instructive is a CEDAW General Recommendation relating to 'equality in marriage and family relations', which notes that, while states report that their constitutions and laws comply with the provisions of the Convention, 'custom, tradition and failure to enforce these laws in reality contravene the Convention'. The General Recommendation states that:

A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties' reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages.... Subject to reasonable restrictions based for example on a woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced at law.³²⁴

To this end the Committee suggested that state parties require the registration of all marriages whether civil or customary in order to monitor compliance with the Convention. Of significance also is the *Convention on the Rights of the Child*. Article 24 calls upon state parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. State parties are required to report on measures such as legislative provisions or education campaigns that are taken to prohibit such practices. States are also expected to report on the extent to which members of that specific group are involved in the campaign. Therefore, the state must consult with Indigenous communities on any legislative or educative measures that may be taken. Article 24 was emphasised by the final document of the World Conference on Human Rights, calling upon state parties to eliminate customs and practices that harm in particular the girl child.

In weighing up a cultural practice with human rights obligations, such as in the example of customary marriage, it is important to consider that there is competing evidence to suggest that customary marriage is 'weakening'.³²⁵ Such evidence supports the importance of a contextual approach to reconciling the conflict with international human rights law. Using the current example, it is clear that contemporary expectations of human rights standards do not accord with customary marriage that involves children under the legal age of consent. Particularly with evidence of growing

319. *Pascoe v Hales* (Unreported, Supreme Court of the Northern Territory, JA 49 of 2002, Gallop AJ, 8 October 2002).

320. Gordon Report, above n 61, 69, quoting Merlan F. 'Gender in Aboriginal Social Life: A Review', in RM Berndt and R Tonkinson (eds), *Social Anthropology and Australian Aboriginal Studies: A Contemporary Overview* (Canberra: Aboriginal Studies Press, 1988).

321. Kimm, above n 134, 62.

322. 'The Girl Child' United Nations Committee on the Rights of the Child CRC/C/38, 8th Session, 21 January 1995, [284].

323. *Ibid* [292].

324. CEDAW General Recommendation 21, [16].

325. See generally, 'The "Promise": Customary Law Marriage' in Kimm, above n 134, 62.

ambivalence of Aboriginal women toward its practice, it may be prudent to speculate in the abstract that the culture is evolving to accord with the changing expectations of members of the community. Nevertheless, the role of the state is to determine the extent of the practice of promised marriages and also determine the attitudes of women toward the practice and whether the practice is 'weakening'.

Resolving conflict

To resolve any potential conflict between Australia's human rights obligations and Aboriginal law, the notion of 'conflict' must also be resolved. This invites the universalist/cultural relativist arguments that have already been visited in this paper. Similarly, Dianne Bell observed that:

It is a delicate line we walk between cultural sensitivity and protecting women from exploitation. What is the standard of universality against which women's rights are to be tested? At first glance, Aboriginal customary marriages are in conflict with human rights provisions, for they involve 'promised marriage' and 'infant bestowal'. The cultural context within such marriages were contracted, however, binds kin in a web of reciprocal obligations, rights, and responsibilities that have implications for land ownership and ceremonial duties: in short, they were part and parcel of the survival of the culture.³²⁶

Alternatively, international human rights jurist Makau Mutua argued that:

It is my argument that the most fundamental of all human rights is that of self-determination and that no other right overrides it. Without this fundamental group or individual right, no other human rights could be secured, since the group would be unable to determine for its individual members under what political, social, cultural, economic, and legal order they would live. Any right which directly conflicts with this right ought to be void to the extent of that conflict.³²⁷

International feminist jurist, Christine Chinkin, has also canvassed cultural relativism in the context of conflicting rights and has concluded that:

Human rights discourse has given insufficient attention both to the resolution of conflicting rights and to the challenge of ensuring adequate protection against abuses committed by non-state actors. Since both are essential components of ensuring women's human rights ... these deficiencies seriously weaken the effectiveness of human rights legal discourse for the protection of women.³²⁸

Clearly there are a number of international instruments that would be applicable to Aboriginal law in relevant circumstances. The strongest instrument, CEDAW for example, states that there is a clear and unambiguous obligation upon states to modify or abolish the practice of custom. Yet the ICCPR contains a protection for minority rights while simultaneously guaranteeing many other rights that may conflict with the practice of Aboriginal law. Given that the ICCPR will not consider group complaints, then the prospect of it finding the practice of custom as an aspect of self-determination under Article 27 is negated.

It is also widely acknowledged that there are

significant practical difficulties associated with international human rights treaty bodies applying human rights to Indigenous customary practices, thereby undermining their utility in addressing problems of discriminatory Indigenous custom.³²⁹

These difficulties involve some of the criticisms the Australian government levelled at CERD in relation to its understanding of the native title amendments, such as the capacity of CEDAW to 'appreciate the nuances' of cultural practice.³³⁰

As Claire Charters argued:

Were CEDAW or the Human Rights Committee to recommend the abolition of an Indigenous custom that is only discriminatory when viewed through a Western lens, for example, the custom would be attacked not only by the very

326. Bell D, 'Considering Gender: Are Human Rights for Women Too? An Australian Case' in An-Naim AA (ed) *Human Rights in Cross-cultural Perspective: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 349.

327. Mutua MW, 'Limitations on Religious Rights: Problematising Religious Freedom in the African Context' in an der Vyver JD & Witte J (eds) *Religious Human Rights in Global Perspective: Legal Perspectives* (Dordrecht: Martinus Nijhoff Publisher, 1996) 417.

328. Chinkin C, 'Cultural Relativism and International Law' in Howland C (ed), *Religious Fundamentalisms and the Human Rights of Women* (New York: Palgrave, 1999) ch 6, 55–67.

329. Charters C, 'The Utility of International Human Rights Law and Treaty Bodies to Resolve Disputes Involving Discriminatory Indigenous Custom' (Paper presented at the Australian New Zealand Society of International Law Annual Conference, Wellington, 4–6 July 2003).

330. *Ibid.*

fact of the application of human rights to a non-Western culture but, also, by the way in which the human rights are applied.³³¹

The reality of universal rights is that they will conflict with cultural and religious minorities and, when there is a conflict, an appropriate balance must be achieved between the right to practise culture and other rights that may conflict. The fundamental and applicable human right standard, essential in devising an approach to balancing conflicting rights, is consultation. Such a claim may appear straightforward or simple but the history of race relations between the Australian state and Indigenous Australians clearly illustrate that consultation has not been a fundamental value defining relations between the two. This was confirmed by CERD in its decision on Australia's negotiations for native title amendments.

A second important approach is that, for those elements of Aboriginal law that conflict with community expectations of human rights, appreciation for the evolution of all cultures is the most appropriate approach. If, as has been discussed earlier, Indigenous women are becoming increasingly ambivalent or antagonistic to certain cultural practices, then this is clear evidence of the evolution of aspects of Aboriginal law. This information can only be determined, not through public sentiment or anecdotal evidence, but through a measured consultation with those people who are affected by the cultural practice. Such an approach is rightly shared by the HREOC Sex Discrimination Commissioner who determined that:

Measures to recognise Aboriginal Customary Law are often hybrid models that have been adapted to meet the needs of Aboriginal people and the mainstream law. The emphasis in these models is to put Aboriginal Customary Law principles into practice and to increase Aboriginal communities' access to self-determination. HREOC considers that in situations where women's human rights are at risk, Aboriginal communities should be encouraged to develop their own solutions to these problems and to adapt traditional practices to ensure women's human rights.³³²

Similarly Penelope Andrews argued that:

Women engaged in feminist struggles must move beyond the quagmire of the universalist aspirations of feminism and its human rights vision, versus the continuing recognition of cultural difference, now incorporated in post-modern discourse.³³³

Importantly, Andrews noted that Aboriginal women are developing local programs that are modelled on traditional indigenous structures to 'locate culturally appropriate methods of redressing violence'.³³⁴

6. Conclusion: 'race' the unspoken barrier to recognition

Resolving the relationship between Aboriginal law and the Western Australian legal system need not be such a challenging task for a liberal democracy like Australia. To date it remains beyond the imagination of all Australian political institutions to accommodate the needs and interests of Indigenous communities. It would be wrong to suggest that the recognition of Aboriginal customary law and the continued practice of Aboriginal law violate human rights standards. Aboriginal law is diverse and complex, and traverses a wide range of classifications of law. Aboriginal culture, like all cultures, evolves and it is important to establish the value that any practice involving the violation of the fundamental rights and freedoms of women cannot be tolerated. Such an exercise is not assisted by attitudes displayed by some members of the judiciary that derogate Aboriginal women's rights and accord them a position lower than other Australians within the legal system. Equally deplorable are the attitudes of Aboriginal men and legal counsel who have deliberately distorted custom to violate the rights of Aboriginal women employing 'bullshit law'.

Yet the issue of Aboriginal customary law raises interesting contradictions in Australia. The application of international human rights law in Australia has been a source of speculation and dispute in public debates about asylum seekers and the detention of non-combatants. In these debates the complexity of international law is appreciated. The reality of the ambiguity of most public international law is stark because the voices of alternative interpretations of law are given public space. Furthermore, international law's interaction with the domestic legal system is apparent. In the context of Aboriginal customary law, conflict with international law and Australia's 'obligations' is so clearly uncontested and comprehended by the community. Kimm, for example, typified the problem when she broadly argued that:

331. Ibid.

332. Sex Discrimination Commissioner, above n 15.

333. Andrews, above n 187, 936.

334. Ibid 939.

International declarations which are in potential conflict and the dates on which they were entered into force for Australia are: CERD 1975, ICCPR 1976, ICESCR 1976 and CEDAW 1979.³³⁵

It would appear sufficient simply to cite all human rights instruments to establish a conflict between Aboriginal law and international human rights law. Such absolutism discharges any responsibility to be mindful of the ambiguity of human rights instruments, the interpretive methods required to understand the agreements, the complex and legitimate debate regarding cultural relativism/universalist approaches to human rights, or the jurisprudence explaining the articles. During the Tampa controversy,³³⁶ it was not sufficient for commentators on either side of the debate to simply cite the *1951 Refugee Convention* or the *Law of the Sea Treaty* in the abstract. The debate required technical knowledge of the provisions of the treaties and their interaction with the Australian legal system. This reference provides an opportunity to instigate, within Western Australia and indirectly the Australian nation, a measured discussion that is cognisant of the required nuances of international law and Aboriginal law.

Apart from these barriers to recognition that have been canvassed in this Paper, there are major political factors that perennially hamper law reform in the context of Indigenous Australians. Prime Minister John Howard best reflected this in a statement he made during the *Wik* native title debate: 'We have clung tenaciously to the principle that no group in the Australian community should have rights that are not enjoyed by another group'.³³⁷

This statement enunciates the prevailing tenor of Australian political debate on issues of Indigenous policy. It represents a formal equality approach to non-discrimination, that equal treatment is paramount regardless of any exigent social or economic state that may necessitate differential treatment. This view is pervasive in the community and despite the decision in *Mabo*,³³⁸ Indigenous peoples have made little ground in forging an identity as a distinct cultural group beyond categorisation as a minority group. For Indigenous peoples to make such ground, mechanisms established to address inequality must find their genesis not in temporary special measures but in rights. The perception of Indigenous specific mechanisms or rights as special 'concessions' or special treatment permeates public debate on Indigenous issues and no doubt informs contemporary inertia that exists in resolving the relationship between Aboriginal law and the municipal legal system. Indeed since the ALRC handed down its recommendations on Recognition of Customary Law in 1986,³³⁹ not a single recommendation has been implemented, reflecting the importance of Indigenous peoples within the Australian polity.

The tendency to categorise Indigenous peoples as one of many minority groups clamouring for power is typical in liberal democracies and it has become an obstacle to much needed law reform intended to remedy Indigenous disadvantage and dysfunction. The concern about special treatment may be attributed to a number of historical realities; for example, there was no treaty signed between any Aboriginal group and the British colonisers. The existence of a treaty has been significant for Aboriginal peoples in other common law jurisdictions particularly in the context of economic development, land title and legal systems. In Australia there was no constitutional or preambular recognition of Indigenous peoples as the first peoples of Australia. Indeed, in Indigenous communities today, it is widely known that the Australian Constitution's race power could be used to discriminate against Aboriginal people on the basis of race. This was an argument supported by the Commonwealth during *Kartinyeri*.³⁴⁰ *Mabo* failed to deliver Indigenous Australians any significant element of sovereignty. Therefore, there is a limited legal status from which Indigenous peoples can successfully assert special Indigenous rights politically or legally without offending the notion of formal equality with the Australian state. However, the power of the rhetoric of formal equality cannot obviate the significance of the narrative of *Mabo* for recognition of Aboriginal customary law.

The ongoing failure of the Australian polity and the Australian people to understand the culture of Indigenous Australians prolongs the racial tension that defines the relationship between Indigenous and non-Indigenous Australia. The failure of the national reconciliation movement, another initiative subject to the political tenor of the day, illustrates this.

The underlying issues confronting Australia regarding its race relations between Indigenous and non-Indigenous people will not go away. Many people thought that when half a million Australians marched across the bridge in support of reconciliation the momentum for substantive change was unstoppable. Since 2000, much of the wind has gone out of its sails.³⁴¹

335. Kimm, above n 134, 137.

336. In August 2001, 433 asylum seekers rescued by a Norwegian ship were refused permission to enter Australia.

337. 'Racing Towards an Election' *Sydney Morning Herald*, 11 April 1998, cited in Behrendt, above n 22, 3.

338. Above n 98.

339. Australian Law Reform Commission, above n 1.

340. *Kartinyeri v Commonwealth*, above n 115.

341. Brennan S, 'Reconciliation in Australia: The Relationship Between Indigenous Peoples and the Wider Community' (2004) 11 *Brown Journal of World Affairs* 149.

The recent race riots in Redfern, the recently publicised systemic racism in the armed forces, and the abolition of ATSIC are just examples of the serious and unresolved business of race in Australia. One of the perennial victims of this has been the recognition of Aboriginal customary law. The position at international law is clear. International law and domestic law permit Aboriginal law being taken into account. However, the extent and degree to which Aboriginal law is taken into account is equally confined by international law and Australia's human rights obligations.

It is conceivable that there will be circumstances where customary law will be recognised yet other circumstances where recognition may be prohibited on the basis of international human rights law; for example, child brides as in the Northern Territory. Ultimately recognition must be accorded in a contextual framework, based upon real factual situations. The necessity of a case-by-case approach renders it difficult to predict in the abstract what courts may decide.

The importance of this particular reference is that, as a state, Western Australia is in the position to implement those human rights obligations that the Commonwealth and indeed other states have failed to do. International human rights law appreciates the difficulties of implementing rights in a federal system. The ICCPR calls upon states' parties to ensure that members of the federation implement human rights obligations. Moreover, in the *National Report on Human Rights*, the Australian government conceded that it is 'not always an efficient means of giving effect to Australia's international human rights obligations'. The National Plan highlights the role of the states as 'responsible for key areas of social policy and public infrastructure within Australia [and therefore] the Australian government must often rely on the states and territories to give domestic effect to international treaties'.³⁴²

Balancing the rights of Aboriginal people to practise Aboriginal law with Australia's human rights obligations will be a challenging task for Western Australia given some jurisdictions, particularly the Commonwealth, have been ambivalent and inert to the need for law reform. This also provides an opportunity for Western Australia to achieve what other states and territories and indeed the Commonwealth has failed to do and that is to realise the emancipatory potential of liberal democracies. As Steiner and Alston observed of liberal democracies:

[T]he liberal state is hardly hostile to groups as such. It is not blind to the influence of groups (religious, cultural, ethnic) or of group and cultural identity in shaping the individual. Indeed the political life of modern liberal democracies is largely constituted by the interaction, lobbying and other political participation of groups, some of which are natural in their defining characteristic (race, sex, elderly citizens), some formed out of shared interests (labour unions, business associations, environmental groups). The liberal states, by definition committed to pluralism must accommodate different types of groups and maintain the framework of rights which they can struggle for recognition, power and survival.³⁴³

Johnathan Quong also agreed with the power of liberal democracies to accommodate this debate. Quong argued that claiming public/political values, such as gender equality, trumped all other considerations and failed to be an 'impartial, publicly justifiable method of resolution':

[I]f there is reasonable disagreement the problem cannot be solved by claiming that one public value obviously trumps another in all such cases. Disputed ... cultural practices ... are defined by the fact that they cannot be neatly resolved by appeals to gender equality or group autonomy. A justifiable method of resolution will have to find public reasons that are unrelated to arguments about the 'rightness' or 'wrongness' of the beliefs of the group ... This is the right way to determine the scope of reasonable pluralism in a liberal, deliberative democracy.³⁴⁴

The reality is that Aboriginal law has already been accommodated to a certain extent within the Australian legal system, most significantly by the common law. Nevertheless, there is a need to formalise aspects of the reception of Aboriginal law because of the nascent concern of 'bullshit law' and because of other clear injustices such as the inequity of intellectual property laws that exclude much Indigenous creativity and ingenuity from legal protection. The recognition of Aboriginal law, with the benchmark being consistency with international human rights law, would not only 'help bring Australia into line with our international undertakings under several United Nations human rights conventions and covenants',³⁴⁵ but most importantly it would benefit Aboriginal communities. It would contribute to the correction of those conditions many Indigenous communities endure in Australia that are in breach of Australia's human rights obligations. In particular, it would benefit Aboriginal women whose human rights are being violated by Aboriginal men and disregarded by lawyers and the judiciary as encouraged by an adversarial legal system. The

342. Australian Government, *Australia's National Framework for Human Rights: National Action Plan* (December 2004) 17.

343. Steiner & Alston, above n 130, 365; see also Deveau M, 'Conflicting Equalities? Cultural Group Rights and Sex Equality' (2000) 48 *Political Studies* 522–39.

344. Quong J, 'Disputed Practices and Reasonable Pluralism' (2004) 10 *Res Publica* 43, 66–67.

345. Sarre, above n 311.

conclusion of most Indigenous jurists is that international human rights law is a vehicle for the evolution of culture, if indigenous peoples are adequately consulted.

One of the best means to achieve freedom from discrimination for Indigenous women, and affirmation of Indigenous custom, is an evolution of Indigenous custom. International human rights law and treaty bodies can play a meaningful, role on the periphery of the development of Indigenous peoples customary laws. They can provide a catalyst for customary law to adapt to provide for the protection of Indigenous women from discrimination.³⁴⁶

The only way for this evolution of culture to be successful is through education. Education is integral to the work of the United Nations and state parties are viewed as the primary vehicles for such education campaigns. But this extends beyond just education of human rights in Aboriginal communities. It also requires education of the Australian community about the importance of Aboriginal law to Aboriginal communities, as well as the importance of human rights. It is vital to establish that recognition does not automatically render a conflict with Australia's human rights obligations and that conversely failure to recognise may place Australia in breach of its human rights obligations. By keeping this dichotomy in mind, the Western Australian reference into Aboriginal customary law is well equipped to facilitate meaningful consultations with Aboriginal communities. From such an authoritative basis it may lead the nation in determining how Aboriginal law may be accommodated in the Western Australian legal system. It may also manifest in education and consultation, providing a catalyst to the evolution of certain practices within Aboriginal law so they are consistent with Australia's obligations under international human rights law. Moreover, from such a consultative basis it will be able to go some way to remedying the ongoing injustice of the irresolution of Aboriginal law that is inconsistent with Australia's human rights obligations. The irresolution of Aboriginal law in the Australian legal systems is, after all, not informed by an inability to find a solution to the problem, but rather is informed by the one unspoken barrier that continues to define contemporary Australia's relationship with its first peoples – race.

³⁴⁶. Charters, above n 329.

background paper 11

Customary law, human rights and international law: some conceptual issues

Chris Cunneen* and Melanie Schwartz**

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1. Introduction

The argument presented in this paper is relatively simple. The concept of 'customary law' is flawed, and relies on basic colonialist assumptions about the nature of law in Indigenous communities. As a result, the discussion about recognition of customary law functions within and reproduces a paradigm that assumes the centrality of non-Indigenous law and legal institutions. Such a paradigm (and the processes likely to flow from it) will in all likelihood remain unsatisfactory to Indigenous people.

A more appropriate starting point is recognition of Indigenous rights in relation to self-determination. Such recognition will entail basic self-governing and law-making powers. The question of whether those laws are 'customary' or not becomes irrelevant. The limits set on those law-making powers would derive from the negotiated relationship between the relevant non-Indigenous political authority and the Indigenous political entity, as well as from the need to comply with internationally recognised human rights standards. This line of thinking has support both within Australia and elsewhere. As the recent *Cape York Justice Study* noted:

In Canada a growing body of literature is moving away from attraction with mainstreaming Aboriginal legal norms towards the belief that the right of self-determination must encompass the authority of Aboriginal communities to establish their own justice systems.¹

2. The concept of customary law

It is argued in this paper that the initial question should not be how do we 'recognise' customary law, but rather there should be a series of prior questions about the meaning and nature of the concept of customary law:

- What do we mean when we speak of the concept of 'customary' law?
- How is it defined and what is it defined against?
- Is customary law essentially an 'imperialist' concept to construct and delimit the law of the other as lesser than the laws of the colonial state?
- Does the concept of 'legal pluralism' provide an adequate vehicle for recognising Indigenous rights?

It can be argued that the concept of customary law inevitably forces attention towards the specific content of the 'laws, traditions and customs' of Indigenous people, rather than encouraging a focus on the rights of Indigenous peoples to govern and make law. The concept of customary law is by its very nature retrospective and backward-looking. It forces us into a process of describing what 'traditional' Aboriginal law was, rather than focusing on what Aboriginal law might become. There are other problematic definitional issues attached to customary law, as well as there being potential flaws in the drive for legal pluralism in Australia. These are issues that look to the very structure of the examination of the place of customary law in the dominant legal system. Though such an examination of customary law might be undertaken in good faith, it is arguable that these issues render the project of 'recognising customary law' flawed at a fundamental level. This is a dynamic that requires serious attention.

In addition, the concept of customary law implies a strong focus on the specific content of particular customary law practices which in itself can create a range of subsidiary problems:

- Who defines customary law: Indigenous people or non-Indigenous experts?
- What evidence can be heard in the determination of customary laws: oral evidence or is documentary evidence privileged?
- Does the validity of customary law require continuous practice from colonisation to be recognised as valid?
- When has customary law been 'washed away' by the tide of history?

These problems are inherent to the use of the notion of customary law, and to the failure to link the discussion to rights of self-determination. The issue of Indigenous self-determination will be considered later in this paper, but we flag it here as the most important context in which any discussion of Aboriginal law might occur.

The meaning of customary law

It is important to question what we mean by the concept of customary law, and to consider how customary law is defined and what it is defined against.

1. State of Queensland, *Cape York Justice Study* (Advanced Copy, November 2001) vol 2, 112.

The debate about whether 'law' exists in societies which do not have written laws, law courts and judges is an old one. Anthropologists now generally accept that all human societies have 'law', in the sense of principles and processes.²

The purpose of this paper is not to engage in an 'old debate' about whether law exists in Indigenous societies, but rather to explore the problems associated with the categorisation of that law as 'customary'.

The Law Commission of New Zealand notes that the phrase 'custom law' is used in a variety of ways.

At the most basic level, the term 'custom law' is used in a legalistic and narrow manner to refer to particular customs and laws derived from England, and indigenous and aboriginal laws and customs that have met particular legal tests and thus are enforceable in the courts. In a broader sense, it is used to describe the body of rules developed by indigenous societies to govern themselves, whether or not such rules can be said to constitute 'custom law' in the former sense.³

In the broadest sense, we can understand customary law as the rules developed by Indigenous societies to govern themselves.⁴ The necessary link between recognition of law and recognition of a right of governance is a basic point which underpins our discussion. We argue that it is not possible to consider Aboriginal law separate from Aboriginal governance. The New South Wales Aboriginal Justice Advisory Committee has defined Aboriginal customary law in the following manner:

Aboriginal customary law is fundamentally a means of dispute resolution based on traditional spiritual beliefs and cultural traditions that provide sanction against those actions which are harmful to the community. In a criminal context fundamentally customary law is simply a means of a community establishing its set of basic values and providing a means to punish those who transgress against established community laws. It also provides a means where an aggrieved victim of an offence can have recompense, where any existing family or community tension resulting from the offence can be resolved quickly and a means to ensure that disputes within communities and between sections of communities do not fester and lead to greater ongoing tension and conflict. Customary law is fundamentally a means of maintaining social order, where local Aboriginal communities act to solve their own problems and resolve their own disputes.⁵

For our argument the importance of the Aboriginal Justice Advisory Committee's definition is not their use of term 'customary' but rather their linking of Aboriginal law with basic questions of social order and governance.

Historically, customary laws which were not seen as 'repugnant' to common law values and which had not been replaced by statute were recognised by colonial courts and the Privy Council in many parts of the British empire.⁶ Australia, in general, proved an exception to the rule.⁷

Despite this limited recognition by British colonialists, customary law as a legal tradition has historically been viewed disparagingly by colonial law systems. Ironically, this was an attitude adopted despite the fact that it is 'custom' that is at the heart of common law itself.⁸ In this context,

the historical debate as to whether or not the tribes, in various parts of the far-flung British empire, had a legal system, or whether they were controlled 'merely' by custom, is indicative of myopic thinking of the worst order, or a lack of knowledge of the historical development of the law, or a deliberate denigration of the societies – or a combination of these factors.⁹

Thus, despite the central place of custom in the common law, colonial approaches to customary law have been denigratory and superior.

James Zion has commented in the American context that 'it is unfortunate that the term 'custom' implies something that is somehow less or of lower degree than 'law'. There are connotations that a 'custom' is somehow outside the 'law' of government, which is powerful and binding'.¹⁰ The New Zealand Law Commission notes that legal positivism,

2. New Zealand Law Commission, *Maori Custom and Values in New Zealand Law*, Study Paper No 9 (March 2001) 17.

3. Ibid 1 (footnotes omitted).

4. 'Customary law consists of rules and customs of a particular group or community', South African Law Commission, *The Harmonisation of the Common Law and the Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders*, Discussion Paper No 82 (May 1999) [2.1.3].

5. Thomas B, *Strengthening Community Justice: Some Issues in the Recognition of Aboriginal Customary Law in New South Wales* (Sydney: New South Wales Aboriginal Justice Advisory Council, 2003) 3–4.

6. Reynolds notes that legal pluralism was common throughout the Empire and discusses India, Penang and New Zealand in this context: Reynolds H, *Aboriginal Sovereignty* (Sydney: Allen and Unwin, 1996) 78–80. See also the New Zealand Law Commission, above n 2, 8.

7. See Reynolds, *ibid* ch 4.

8. See Sheleff L, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London: Frank Cass, 1999) 79–90.

9. Ibid 83.

10. Zion JW, 'Searching for Indian Common Law' in Morse BW & Woodman GR (eds) *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988) 121, 123–24. See also Northern Territory Law Reform Committee, *Report on Aboriginal Customary Law* (2003) 11.

'as the dominant jurisprudential tendency in the English legal system', has reinforced this view that 'law' is inherently linked with the modern political state.¹¹ A similar point has been made by Leon Sheleff who argues that both ethnocentrism and the effects of 'a narrow positivistic doctrine of jurisprudence' have served to denigrate customary law and to ignore that custom is at the basis of the common law.¹² The language of 'custom' thus skews the discussion of Indigenous law from the outset.

Historically, the general approach to Indigenous customary law was to treat it 'as analogous to particular customs in England or foreign law'.¹³ In the same vein, the Northern Territory Law Reform Committee noted that the common law has always recognised the existence of certain customs as the valid local law of certain parts of England. The criteria for acceptance of such custom as valid, however, required that it be, inter alia:

- certain;
- exercised since 'time immemorial' without interruption;
- reasonable and not oppressive at the time of its inception;
- not inconsistent with any statute law.¹⁴

These criteria make clear how the 'customary' law discussion is weighted in a certain way, whereby common law criteria are applied as to what the parameters and content of such law should be. Such criteria are certainly not imposed on state law in determining its validity. This highlights the fact that in conceptually identifying Indigenous law as 'customary' law, the state does not approach Indigenous law on equal terms. It requires Indigenous law to meet validity thresholds that it does not require of itself, making its legality subject to consistency with the dominant system. Linguistically and conceptually, then, the common law eclipses a notion of Indigenous law as a current, responsive and legitimately evolving system of governance.

Many of the practical problems of applying the criteria referred to above have been commented upon previously. The New Zealand Law Commission has noted that difficulties have arisen for courts trying to find and apply relevant customary law because of:

- the multiplicity of different tribal laws;
- the uncertainty regarding the limits of the operation of customary law;
- the fluid nature of customary law;
- the problems of applying tests of reasonableness, morality and public policy to different cultures and religions; and
- the artificiality of particular tests.¹⁵

The state, then, does not recognise customary law as a freestanding political/legal construct grounded in Indigenous law. Rather, it is seen in relation to the processes and interests of colonial law, defined in a way which rejects the sovereign nature of Indigenous law and limits its functioning to areas manageable within the colonial legal status quo.¹⁶

This skewed power dynamic is reflected in the summary of recommendations of the Northern Territory Law Reform Committee's *Report on Aboriginal Customary Law*. Its first point is that:

Australian law does not recognise traditional law as 'law'. Traditional law can be recognised by judges and government decision makers where relevant as long as it does not conflict with Australian law.¹⁷

Likewise, the Committee's report notes that:

There is only one legal system in Australia, and only one 'law' and that is Australian law ... Aboriginal law can only be recognised if Australian law says so.¹⁸

Not surprisingly, the Northern Territory Law Reform Committee concluded that 'whether or not Aboriginal law exists, the courts can legally ignore it' unless a specific law says that it is required to take it into account.¹⁹ Thus, the colonial (and post-colonial) validation of Aboriginal law has taken place entirely subject to the criteria of the imposed legal system and in relation to it. This has occurred independent of the factual existence of Aboriginal law which, of course,

11. New Zealand Law Commission, above n 2, 18.

12. Sheleff, above n 8, 83.

13. New Zealand Law Commission, above n 2, 8.

14. Northern Territory Law Reform Committee, *The Recognition of Aboriginal Law as Law*, Background Paper No 2 (2003) 18.

15. New Zealand Law Commission, above n 2, 8–9. In relation to the artificiality of tests, the requirement of custom being practiced since 'time immemorial' was interpreted as dating from the first year of the reign of Richard I.

16. Jackson M, 'Changing Realities: Unchanging Truths' (1994) 10 *Australian Journal of Law and Society* 115, 123.

17. Northern Territory Law Reform Committee, above n 10, 6 (emphasis in original).

18. Northern Territory Law Reform Committee, above n 14, 9, citing *Mason v Tritton* (1994) 34 NSWLR 572, 578 (Kirby P).

19. Ibid 11 (emphasis in original).

does not rely on external validation for its relevance to Indigenous communities. Yet in the eyes of state law, the validity of Indigenous law has been and is dependent on recognition by the imposed law of the colonisers.

3. Customary law as an imperialist concept

The discussion introduces the argument that, despite the common law's ability to incorporate aspects of customary law, the idea of customary law is essentially an imperialist concept which has been used to construct and delimit Indigenous law as lesser. The delegitimisation of Indigenous law was part of the 'civilising' process which was deemed to bring the superior political and legal institutions of the West to the native.

On colonisation, Indigenous society was considered 'possessed only of lore and custom, which needed to be suppressed and destroyed in order that the monist ideas of 'one (English) law for all' should prevail.²⁰ If necessary, the process of unification could draw upon elements of customary law, 'but only as part of a process of building a national legal system which would apply equally and identically to everyone'.²¹

With this history in mind, Moanna Jackson states that considerations of Indigenous people and the law are best addressed by acknowledging the dialectic of colonisation. Any debate which fails to acknowledge that dialectic will inevitably seek only to describe the operations and biases of the imposed law. It will not address the measures necessary to being about the structural change which will enable indigenous people to seek their own explanations ... and their own solutions.²²

Jackson has identified several consequences of the process of legal colonisation which resonates through the discussion of the contemporary recognition of customary law. First, it has meant the continued subjection of Indigenous peoples to legal processes that are systematically biased. Secondly, it has led to an equation of justice—both in general public consciousness and within Indigenous communities themselves—with the operations of the law of the colonising power.²³ It is clear that the result of a state recognition of customary law can be seen, in continuation of this process, as entrenching the idea that Indigenous people 'no longer source their right to do anything in the rules of their own law'.²⁴ Rather, they have their rights defined by the colonial system and have to seek permission to exercise their law from that system. Speaking of the situation of Indigenous Hawaiians, Haunani-Kay Trask comments that 'by entering legalistic discussions wholly internal to the American system, Natives participate in their own mental colonisation'.²⁵ Moana Jackson makes a similar point when he notes that Maori may be compelled into

seeking a culturally 'sensitive' process within an ideological framework that actually forces them into adopting the very consciousness which they wish to transform, and which maintains the illusion that law (and hence justice) is isolated from issues of political power.²⁶

South Africa's colonists similarly recognised customary law not to acknowledge a right of self-determination, but because it was necessary in the colonial process to maintain order and through that order their own power.²⁷ The size of the Indigenous population was a factor in this recognition (as was the belief that English law was too advanced to be applied to the Indigenous peoples). In any event, recognition was considered not a right, but a privilege that could be easily taken away.²⁸

What emerges here is that in acknowledging customary law, colonial power is further consolidated at the same time that it encourages Indigenous acceptance of the good faith and efficacy of colonial institutions.²⁹ The discussion about recognition of customary law becomes part of the continuing story of colonisation. The dominant power captures Indigenous concepts with the result of freezing Indigenous cultural and political expression within parameters that the state finds acceptable.³⁰ As Mark Findlay confirms:

20. Jackson, above n 16, 117, speaking of the Maori experience.

21. McLachlan C, 'The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm – A Review Article' (1988) 37 *International and Comparative Law Quarterly* 368, 382.

22. Jackson M, 'Justice and Political Power: Reasserting Maori Legal Processes' in Hazlehurst KM (ed), *Legal Pluralism and the Colonial Legacy* (Sydney: Avebury, 1995) 262.

23. Jackson, above n 16, 117–18.

24. Ibid 127. See also McLachlan, above n 21, 382.

25. Quoted in Watson I, 'There is No Possibility of Rights Without Law: So Until Then, Don't Thumb Print or Sign Anything!' (2000) 5(1) *Indigenous Law Bulletin* 4, 5. Haunani-Kay Trask continues with the further comment that 'once indigenous peoples begin to use terms like language 'rights' and burial 'rights', they are moving away from their cultural universe'.

26. Jackson, above n 16, 118.

27. Ludsin H, 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law' (2003) 21 *Berkeley Journal of International Law* 62, 65–66. See also du Bois F, 'The Past and Present of South African Law' (2004) 32 *International Journal of Legal Information* 217.

28. Ludsin, ibid 66. Ludsin also notes that 'today there are two types of customary law practices in South Africa: (1) official customary law, and (2) living customary law. Official customary law is customary law that has been recognised in anthropological studies, court judgments, restatements and in legal codes. Living customary law, in contrast, denotes the practices and customs of the people in their day-to-day lives': at 71.

29. Jackson, above n 16, 126.

30. Jackson, ibid 127; Jackson, above n 22, 254.

The colonisation of customary ceremonies and resolutions may be more about the securing of the hegemony of introduced systems of justice, rather than the reassertion and recognition of custom-based alternatives.³¹

Instead of destroying culture through direct rejection or denigration, the state attempts to 'imprison it within a perception of its worth that is determined from the outside'.³²

In such a context, the meaning of self-determination with respect to Indigenous peoples is 'affected by eurocentrism, global politics, global conflict and the increasing paranoia of states to protect 'their' territorial integrity'.³³

4. Legal pluralism and customary law

A further question that needs to be asked is whether legal pluralism provides an adequate vehicle for recognising Indigenous rights. It has been argued that 'legal pluralism, as a concept, is inherently assimilative and racist'.³⁴ This is because what must flow from the recognition of Indigenous law—which is ultimately the recognition of a right to *make* law—is an acknowledgement of Indigenous legal sovereignty. And yet the idea of Indigenous sovereignty remains political anathema and is kept out of discussions and off the negotiating table. Ultimately, legal pluralism 'enables the imposed status quo to mask that anathema in a guise of sensitivity and good faith'.³⁵ An attempt is made to incorporate Indigenous law without addressing the question thus begged – that of the impliedly recognised Indigenous sovereignty to make those laws.³⁶ Legal pluralism seeks to 'incorporate and redefine indigenous legal concepts to maintain the overall control of its own processes. It thus perpetuates the same assimilative and racist base of colonisation, which it purports to abhor',³⁷ denying Indigenous peoples the justice which it proclaims to strive towards at the same time that it prides itself in its ability to act in good faith towards its Aboriginal 'partner'.³⁸

Speaking of the process of recognition of Indigenous law in New Zealand, Jackson concludes that in 'redefining the base of Maori aspiration and by seeking to co-opt Maori legal and cultural processes, the law maintains its place as a colonising leviathan that can choose which norms of the oppressed will be validated and which will be dismissed'.³⁹ Colonial powers 'examine which part of indigenous law they can splice and incorporate into the colonial system of laws and which unsavoury, uncivilised parts are best left out'.⁴⁰ This process may be influenced and limited by the fact that the colonialist legal order 'began with their own image of customary society as, above all, unchanging and hierarchical', drawing, amongst other things, on the noble savage tradition.⁴¹

Clearly, to presume the content of Indigenous law on these or any grounds is to utterly compromise the right to self-determination. Yet the propensity for such an approach is noted by the Northern Territory Law Reform Committee. The Committee states that in looking for customary law,

there has been a tendency to treat law as divinely inspired revelations and not rules deriving their content and form from social needs; to treat law as religious rules, and not as dispute resolution mechanisms.⁴²

On this approach, contemporary recognition of customary law is riddled with continued colonial relations of power. There is, however, another point of view on the potentialities of the recognition of incorporating Indigenous law. Campbell McLachlan argues that legal pluralism provides a negotiating space for Indigenous law to interact with the colonial legal order. This is expressed in the belief that the road to legal pluralism is inevitably an 'ongoing process of conflict and compromise ... a dialectic in which state law must continuously re-evaluate its own limits in relation to the separate sphere of indigenous customary law'.⁴³ From this position, the 1986 Australian Law Reform Commission report on the recognition of Aboriginal customary law can be understood as covering new ground in seeking to provide a 'principled response to legal and cultural diversity',⁴⁴ rather than attempting to provide just another government

31. Findlay M, 'Decolonising Restoration and Justice' (1998) 10 *Current Issues in Criminal Justice* 85. See also Blagg H, 'A Just Measure of Shame?: Aboriginal Youth and Conferencing in Australia' (1997) 37 *British Journal of Criminology* 481; Blagg H, 'Restorative Visions and Restorative Justice Practice' (1998) 10 *Current Issues in Criminal Justice* 5.

32. Jackson, above n 16, 127; Jackson, above n 22, 254.

33. Watson I, 'Indigenous Peoples' Law-Ways: Survival Against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 55.

34. Jackson, above n 16, 116.

35. *Ibid* 118.

36. This dynamic is recognised by the Northern Territory Law Reform Committee, above n 14, 16. It is this very model that was proposed by the Northern Territory Statehood Convention (March–April 1998).

37. Jackson, above n 16, 118.

38. *Ibid* 125.

39. *Ibid*.

40. Watson, above n 33, 58.

41. McLachlan, above n 21, 380–81.

42. Northern Territory Law Reform Committee, above n 14, 12.

43. McLachlan, above n 21, 368–69.

44. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* Report No 31 (May 1986) [1037], quoted in McLachlan, *ibid* 372. The Northern Territory Law Reform Committee framed its inquiry in the same post-colonial context: see Northern Territory Law Reform Committee, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 4–5.

'service' to Indigenous people. Here, the aim of law reform projects is not to define and delimit customary law, but rather to reflect on the general legal system and on its proper role, functions and limits in relation to the Aboriginal community.⁴⁵ On this approach, law reform initiatives must recognise that the real issue is not the codification of Indigenous law, but rather the problem of interaction between customary law and the general legal system.⁴⁶

Characteristics of the 1986 Australian Law Reform Commission inquiry, which are said to distinguish it as transcending the colonial paradigm, include that:

- It does not conceive customary law as something immutable and rooted in pre-colonial times, recognising that the patterns of Aboriginal living have changed;
- It does not attempt to co-opt Aboriginal institutions to serve the end of the state but respects the separate and independent sphere of customary law;
- It does not take a monolithic approach to identifying Aboriginal aspirations;
- It does not predetermine the legal spheres in which customary law might operate or be recognised;
- It does not envisage an eventual withering away of customary law.⁴⁷

In these ways, McLachlan argues, the state recognises that its proper role is not to codify customary law but to 'take account of its existence and adjust itself accordingly'.⁴⁸

It should be noted that the 1986 Australian Law Reform Commission report states that a better approach than theirs is to look at the customary law issue in the context of a wider negotiation for self-determination. The report identifies this as the only way that 'elements of ethnocentricity' can be avoided.⁴⁹ This is essentially the argument we wish to develop in this Background Paper: unless the debate is rephrased as one of Aboriginal law (rather than customary law) and in the context of the recognition of autonomy rights of Indigenous peoples to make law (rather than have their law 'recognised'), then inevitably the result will be biased, partial and reflect the interests of the dominant colonial state.

Some commentators such as McLachlan disagree with the argument concerning the primacy of self-determination or autonomy, and alternatively stress that 'self-determination is not wholly, or even principally, about customary law'. That is because it is not customary law,⁵⁰ but recognition of the right of Indigenous people to self-determine, which is the principle issue. Since, according to McLachlan, questions of self-determination are, to some degree, political questions, the role of a Law Reform Commission in progressing them is limited at best.⁵¹

Distinct from this approach, our argument is that it is not possible to adhere to a concept of customary law separate from a discussion about Aboriginal law and law-making power. The attempt to maintain a position for customary law separate from discussions of self-determination is ultimately untenable,⁵² because self-determination is fundamentally about governance, which includes law-making power. We argue that it becomes irrelevant whether those laws are deemed 'customary' or not. At the end of the day, Indigenous communities may choose to adopt state law as their preferred method of legal governance, and that is a matter for them alone. Indeed we might reasonably expect a hybridity of law to develop, incorporating a range of influences. The crucial point is that communities should have the opportunity to meaningfully exercise choice in relation to these questions on their own terms. Far from a limited role of Law Reform Commissions in progressing these issues as suggested by McLachlan, we would see a fundamental role in developing options for governance and law-making powers.⁵³

The link between self-determination, governance and Aboriginal law has been made by others. For example, the former Aboriginal and Torres Strait Islander Social Justice Commissioner notes that:

Customary law should be treated by the Government as integral to attempts to develop and maintain functional self-determining Aboriginal communities. Customary law is therefore more than a mitigating factor in sentencing processes

45. McLachlan, *ibid* 372. The Northern Territory Law Reform Committee took a similar stand in refusing to attempt to codify customary law: see Northern Territory Law Reform Committee, above n 10, 11–12.

46. McLachlan, *ibid*, 372.

47. *Ibid* 385.

48. *Ibid* 386.

49. Australian Law Reform Commission, above n 44, [1035], quoted in McLachlan, *ibid* 376.

50. McLachlan, *ibid* 377.

51. *Ibid*.

52. McLachlan suggests that the Australian Law Reform Commission was perhaps aware of this, 'having been made to put the cart before horse by considering the recognition of customary law before any negotiation between Aboriginal people and the Australian government on self-determination, but that does not invalidate the exercise': *ibid*.

53. In this regard see the Queensland Legislation Review Committee, *Inquiry into Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland*, Final Report (Cairns, 1991). See also subsequent community governance project reports: Office of Aboriginal and Torres Strait Islander Affairs, *Local Justice Initiatives Program* (Brisbane: Department of Families, Youth and Community Care, 1996); Office of Aboriginal and Torres Strait Islander Affairs, *Alternative Governing Structures Program* (Brisbane: Department of Families, Youth and Community Care, 1996).

before the courts. It is about providing recognition to Aboriginal customary processes for healing communities, resolving disputes and restoring law and order.⁵⁴

We are in broad agreement with the position argued by the Aboriginal and Torres Strait Islander Social Justice Commissioner. However, we would distinguish our argument on the basis that the reference to Aboriginal customary law serves no useful purpose. The link between self-determination and governance rests on the recognition, development and observance of Aboriginal law. Whether it can be characterised as customary or not is irrelevant.

5. Customary law as a 'recognition concept'

In addressing the limitations of the concept of customary law, we turn now to the idea of customary law as a 'recognition concept'. That is, as a notion that creates a space between Aboriginal law and Anglo-Australian law, as a way of bridging the two. The idea of a 'recognition concept' derives from a discussion of native title by Noel Pearson.⁵⁵

Pearson has argued that native title is a bridging concept between Aboriginal law and common law real property title. It is not a legal title in itself. It is neither a part of Aboriginal law nor common law property, but is 'the space between two systems, where there is recognition'.⁵⁶ Native title becomes the means through which the common law can configure Aboriginal law. Pearson's discussion of native title from this perspective, set out below, is translatable to the discussion of the concept of customary law. This is because customary law may be understood as analogous to native title as being neither common law nor Aboriginal law, but rather a space between where Anglo-Australian law might recognise some aspects of Aboriginal law. It is also instructive to review the way that the courts have conceived of and dealt with native title, since it stands as the major example of the state's attempt to come to grips with an aspect of Indigenous law. This may give some indication of the way that a court might approach issues of customary law.

Pearson has noted that 'our inability to clearly articulate the concept of native title has implications therefore for our understanding of its recognition, its extinguishment and its content'.⁵⁷ Equally, there have been problems in articulating the concept of customary law, particularly in the context of seeing *Aboriginal* law separate from custom and as an ongoing, changing and adaptive process of Aboriginal law-making rather than a static set of relationships indicative of a pre-modern society.

There is a range of problems in thinking about native title as a recognition concept, arising out of its 'configuration' by the colonial system. These problems include that:

- There is no universal right to Aboriginal law title to land;
- Aboriginal claimants must satisfy the requirements of proof established by Anglo-Australian law;
- Claims are assessed on a case-by-case basis;
- There is a high susceptibility to extinguishment;
- There is no defence against extinguishment by grant of an inconsistent interest. Thus native title is relegated 'to the bottom of the hierarchy of title that characterises Anglo-Australian land law'.⁵⁸
- Extinguishment can also occur where the courts decline to recognise native title 'in fact'. That is, the courts are required to make a determination as to the existence of, and content of, native title.

The effect of these problems is that the concept of native title serves to essentialise Aboriginality. It requires 'authenticity' to be demonstrated, requiring that Aboriginal relations be made comprehensible to the court. French J has commented on some of these issues in relation to the High Court's decision in *Western Australia v Ward* where the emphasis was placed on Aboriginal use of land in customary practices, rather than cultural knowledge. French J noted that:

The confinement of native title by its statutory definition means that it is a pale reflection of the reality of the connection to country. Indeed the joint judgment [in *Ward*] acknowledges the difficulty of expressing, solely in terms of rights and interests, the essentially spiritual relationship between an Aboriginal community and its country, which imposes responsibilities as well as conferring rights.⁵⁹

In *Ward* the High Court noted that the *Native Title Act 1993* (Cth) required that:

54. Jonas W, 'Recognising Aboriginal Customary Law and Developments in Community Justice Mechanisms' Background Paper No 26 (presented at the Expert Seminar on Indigenous Peoples and the Administration of Justice, Madrid, 12–14 November 2003) 2.

55. Pearson N, 'The Concept of Native Title at Common Law', in G Yuninpingu (ed), *Our Land is Our Life* (Brisbane: University of Queensland Press, 1997) 154.

56. Ibid.

57. Ibid 151.

58. Bhuta N, 'Mabo, Wik and the Art of Paradigm Management' (1998) 22 *Melbourne University Law Review* 36.

59. French R, '*Western Australia v Ward*: Devil (and Angels) in the Detail' (Paper presented at the Native Title Conference, Geraldton, 3 September 2002) 5.

[T]he spiritual and religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.⁶⁰

French J has characterised the decision in *Ward* as foreshadowing the limited development of the common law of native title and according the provisions of the *Native Title Act 1993* (Cth) primary importance in identifying the content of native title. The judgment 'eshews analysis of the metaphors of 'recognition' and 'extinguishment' which lie at the heart of the common law of native title' and favours a statute-based characterisation of native title as a bundle of rights which may be extinguished in part or incrementally.⁶¹

It is possible that similar problems would arise in a 'recognition concept' approach to customary law. The very notion of a bridging concept presupposes that one paradigm needs to be altered in order for it to be rendered comprehensible to the other in the other's terms. The requirements imposed upon Indigenous law to translate it into the colonial paradigm, and its essentialisation in that process, result in violence being done to Indigenous law in order to make it intelligible to the state. Some specific ways that this has occurred in relation to native title are now examined for their relevance to customary law.

Tradition

Under s 223(a) of the *Native Title Act 1993* (Cth), native title is recognised where 'the rights and interests are possessed under traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'. The High Court in *Yorta Yorta* understood 'traditional' as based on a 'normative system'.⁶² This means that the origin of the traditional customs and laws must be found in normative rules, which must have existed before the assertion of sovereignty to be considered traditional customs or laws.

Further, this normative system which existed prior to the assertion of sovereignty, and under which the traditional law existed, must have had a continuous existence and vitality since sovereignty. It was on this latter point that the *Yorta Yorta*'s claim failed. The High Court upheld the trial judge's finding that there was a lack of continuity in observing traditional law and customs. Lavery has argued that the main implications of the normative systems approach is that only those Indigenous rights and interests that survived the intersection of the normative systems of the common law and the pre-colonial Indigenous system can be recognised and styled as 'native title'. Further the concept of tradition which is used is narrow and constrictively defined.⁶³

This shows how the forcing of an Indigenous law concept into a non-Indigenous legal paradigm can serve to limit Indigenous law. Such an approach can be problematic when a concept of 'customary' law clearly demands some type of connection to tradition.

Continuity

In native title matters the courts have preferred the written evidence of colonialists over the oral testimony of Aboriginal people. Further, there has been no presumption of continuity of native title. This is further compounded by the fact that the burden of proof falls on the Aboriginal claimants to demonstrate the existence of native title.⁶⁴ In *Yorta Yorta*, continuing physical presence and customs of Aboriginal people were not adequate to demonstrate native title. In Olney J's turn of phrase, European settlement disturbed Aboriginal practices, languages and customs and 'the tide of history' washed away Aboriginal evidence of their native title. Bartlett has been critical of this approach because it makes the establishment of native title in settled regions of Australia almost impossible.⁶⁵

There is a danger that similar shortcomings will result from the state legal position on customary law. In its discussion of customary law, the New Zealand Law Commission noted that:

The common law doctrine of aboriginal rights is based largely on the presumption of continuity ... In the colonisation context, this means that aboriginal rights and titles are continued as a matter of law after a declaration of sovereignty

60. *Western Australia v Ward* (2002) 191 ALR 1, 15–16 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

61. French, above n 59, 1.

62. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 553 (Gleeson CJ, Gummow and Hayne JJ).

63. Lavery D, 'A Greater Source of Tradition: The Implications of the Normative System Principles in *Yorta Yorta* for Native Title Determinations' (2003) 10(4) *E-Law* <<http://www.murdoch.edu.au/elaw/>>.

64. *Yorta Yorta v Victoria* [1998] 1606 FCA (18 December 1998).

65. Bartlett R, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31 *University of Western Australian Law Review* 35–46.

and the imposition of English law throughout a particular territory. The presumption applies regardless of whether the new territory was acquired by conquest, cession or settlement.⁶⁶

The presumption of continuity was a principle which gave rise to '[t]he potential for the common law to be flexible in its treatment of indigenous customary laws'.⁶⁷ While the Law Commission noted that during the 19th century many judges refused to accept that Indigenous laws could be recognised by the common law because they were 'barbarous' and 'uncivilised', such rules of 'discontinuity' are 'now regarded as a detour from proper common law principles'.⁶⁸ Yet in the Australian context and the *Yorta Yorta* decision, the 'rule of discontinuity' seems to hold sway.

Oral testimony

A particular problem in native title determinations, which may have ramifications for customary law, is the weight given to written testimony and the view that oral evidence is *inherently* unreliable. In the High Court decision in *Yorta Yorta*, Callinan J observed that:

[T]he lack of a written language and the absence therefore of any Indigenous contemporaneous documents, the need to rely extensively upon the spoken word of their forebears, which, human experience knows, is at risk of being influenced and distorted in transmission through the generations, by, for example, fragility of recollection, intentional and unintentional exaggeration, embellishment, wishful thinking, justifiable sense of grievance, embroidery and self-interest.⁶⁹

The Chief Justice noted that 'the conclusion the primary judge reached did not begin from the impermissible premise that written evidence about a subject is inherently better or more reliable than oral testimony on the same subject'.⁷⁰

The result of this is the difficulty Indigenous people will experience in having their oral testimonies of history and culture accepted in court, particularly if there are colonialist written narratives which differ or contradict their testimony. The impact of these difficulties for the determination of the existence of customary law is clear.

The possibility of revival

One interesting and potentially important part of Pearson's discussion on native title as a recognition concept revolves around the question of whether native title might be revived. According to Pearson, if the extinguishment of native title is merely the extinguishment of recognition and not the extinguishment of the fact or reality of Aboriginal law and its connection to land, then, should the inconsistency which gave rise to extinguishment be lifted, native title might be revived.

There may be parallels in this thinking with Aboriginal law more generally. Although customary law might not be recognised by Anglo-Australian law, this says nothing about the existence or otherwise of Aboriginal law. The courts have generally assumed the extinguishment of Aboriginal law relating to criminal matters on the assertion of British sovereignty and via subsequent English statutes.⁷¹ For example, in *Walker v New South Wales* the Chief Justice of the High Court noted the following:

It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle ... even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it is extinguished by the passage of criminal statutes of general application.⁷²

Mason CJ went on to state that there was no analogy between the finding of native title and the survival of Indigenous criminal law. 'English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it'.⁷³ Leaving aside the possible errors in the Chief Justice's reasoning,⁷⁴ if Pearson's argument is followed then a reappraisal of the extinguishment thesis could allow for the revival of Aboriginal law. The possibility of future revival, despite present extinguishment, is perhaps the most useful aspect of the 'recognition

66. New Zealand Law Commission, above n 2, 11.

67. Ibid 10.

68. Ibid 11.

69. *Yorta Yorta* above n 62, [190] (Callinan J).

70. Ibid [63] (Gleeson CJ).

71. See Reynolds, above n 6, ch 4. See also Lofgren N, 'Aboriginal Community Participation in Sentencing' (1997) 21 *Criminal Law Journal* 127.

72. *Walker v New South Wales*, (1994) 182 CLR 45, 49 (Mason CJ).

73. Ibid 50.

74. See Lofgren, above n 71.

concept' approach. If such revival was possible in the native title context, it would be likely to apply equally to customary law.

A recognition concept

The point of this discussion on native title as a 'recognition concept' is to demonstrate the potential problems in the use of a concept of customary law in this way. If we see the concept of 'customary law' as a recognition concept between Aboriginal law and Anglo-Australian law, then the problems outlined above in relation to native title are also likely to become evident.

In particular we can foresee that a range of evidentiary problems around proof of authenticity will be manifest, and that ultimately, customary law will be separated from any intrinsic connection to Aboriginal governance. The link between law and governance, which we have argued is a crucial one, is now discussed in the international law context.

6. Self-determination and international human rights

Our discussion will now move to a consideration of the frameworks in which Indigenous law—as distinct from customary law—can be recognised, and in which the right to self-determination may be actualised. It is not the purpose of this paper to discuss all aspects of international human rights law relating to Indigenous peoples. These have been detailed elsewhere.⁷⁵ Rather the point is to consider those aspects of international human rights law which relate specifically to questions of self-determination, autonomy, self-governing powers and the recognition of Aboriginal law. We do this in order to advance the argument that the site of real progress will concern self-determination and governance, on the terms of Indigenous communities themselves, rather than focussing on notions of customary law recognition. In the international law treatment of Indigenous issues, support is found for this point of view.

In the following discussion, some mention is made of the *International Covenant on Civil and Political Rights* (ICCPR)⁷⁶ and *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169).⁷⁷ However, most discussion centres on the *Draft Declaration of the Rights of Indigenous Peoples* for two reasons: it provides a comprehensive approach to Indigenous rights, and it is widely recognised as an aspirational document of what Indigenous people see as their fundamental rights.

International Covenant on Civil and Political Rights

The ICCPR recognises a wide range of human rights and prohibits discrimination on a number of grounds, including race. Of importance to the current discussion is Article 1 on the right of self-determination, and Article 27 on the right of minorities to enjoyment of their own culture

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

While there is debate over whether Indigenous peoples are 'peoples' in the international law sense of the term, it is clear that Indigenous peoples see themselves as such and demand the right to self-determination.⁷⁸ Article 27 recognises a right to enjoyment of culture for minorities, an integral part of which, it might be argued, is the enjoyment by Aboriginal peoples of recognition of Aboriginal law. It is important to note that while Article 27 creates a positive obligation on states to protect minorities, limits have been imposed on what can be recognised and protected. Importantly, the Human Rights Committee notes that none of the rights protected under Article 27 may be legitimately

75. Northern Territory Law Reform Committee, *International Law, Human Rights and Aboriginal Customary Law*, Background Paper No 4 (2003); Pritchard S & Heindow-Dolman C, 'Indigenous Peoples and International Law: A Critical Overview' (1998) 3 *Australian Indigenous Law Reporter* 473; McRae H, Nettheim G, Beacroft L & McNamara L, *Indigenous Legal Issues* (Sydney: Thomson Law Book Co, 3rd ed., 2003).

76. [1980] ATS 23.

77. Australia is not a party to the ILO Convention 169 (entered into force 15 September 1991).

78. See discussion below pp 442–43.

exercised in a manner or to an extent inconsistent with other provisions of the ICCPR.⁷⁹ In other words, minority cultural practices must accord with international human rights standards.

Convention Concerning Indigenous and Tribal Peoples in Independent Countries

ILO Convention 169 has been ratified by few governments. However, it is referred to by major international funding agencies such as the World Bank and Regional Development Banks as the framework for their policies and programs in relation to Indigenous and tribal peoples. James Anaya has suggested that the Convention reflects an emergent minimum body of customary international law on indigenous rights.⁸⁰

The ILO Convention 169 affirms the equality of Indigenous peoples and their cultures, and it proposes general rights of autonomy (see Article 7). The convention places affirmative duties on states to advance Indigenous cultural integrity, uphold land and resource rights, and secure non-discrimination in social welfare spheres.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.

Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 8 states that Indigenous peoples should have the right to retain their own customs and institutions. It makes the same point as that discussed above in relation to Article 27 of the ICCPR, which is that maintenance of these customs and institutions should take place 'where these are not incompatible with other fundamental rights defined by the national legal system and with internationally recognised human rights'. While these articles do not overcome the issues discussed earlier in this paper regarding the use of the concept of 'customary law', they establish a principle of recognition of Indigenous law in relationship to principles of self-determination.

The Draft Declaration on the Rights of Indigenous Peoples

The greatest single impetus to the international recognition of Indigenous rights has been the development of the *Draft Declaration on the Rights of Indigenous Peoples*, drafted by the Working Group on Indigenous Populations (WGIP). Members of the WGIP expressed confidence that the Draft Declaration was 'comprehensive and reflected the legitimate aspirations of indigenous peoples as a whole, as well as a number of suggestions and concerns advanced by Observer Governments'.⁸¹

Part I: Fundamental rights

Part I sets out fundamental rights of Indigenous peoples. It states that Indigenous peoples have the same rights as other peoples including the right of self-determination and the right to keep their distinct characteristics. Indigenous peoples base their claims to self-determination on the fact that they were the first peoples in their territories. Self-determination means the right of Indigenous peoples to choose their political status and to make decisions about their own development.

Article 3 (Self-determination)

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

79. Jonas, above n 54.

80. Anaya J., *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996).

81. Pritchard S., *Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous Peoples and the First Six Sessions of the Commission on Human Rights Working Group* (Canberra: ATSIC, 2001) 8.

Article 4 (Distinct characteristics)

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 4 is relevant to the discussion on the right of acknowledgement of Indigenous law. Its language makes clear that maintaining and strengthening the distinct characteristics of Indigenous peoples includes a right to specific legal systems. There is nothing which specifies that these legal systems should be 'customary'.

Part II: Life and security

Part II sets out the right of indigenous peoples to exist as distinct peoples.

Article 7 (Cultural integrity)

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures.

Article 7 is a prohibition against ethnocide and cultural genocide. Article 7(d) is of particular relevance because it prohibits imposed assimilation or integration. Arguably the denial of recognition of Aboriginal law and the imposed requirements, terms and conditions of non-Indigenous legal systems is a fundamental process of assimilation and integration.

Part III: Culture, religion and language

Part III affirms that Indigenous people have a right to their cultural tradition and customs, their spiritual and religious traditions, their histories, languages and oral traditions. Article 13 specifically refers to a right to practice and develop 'traditions, customs and ceremonies'.

Article 13 (Spiritual and religious traditions)

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

The recognition of the right to 'develop' tradition is worth noting. This is significant language because it acknowledges that Indigenous practice will not remain static and may rightly be expected to change over time. As has been argued throughout this paper, this is a much better construction than one that requires contemporary Indigenous practice to stay close to pre-colonial custom – a construction that is, as discussed above, implied in the notion of customary law.

Part VII: Self-government and Indigenous laws

Part VII sets out guidelines for the exercise of self-determination through self-government. It recognises the right of Indigenous peoples to determine their citizenship and their own laws and customs. As with the instruments discussed above, international human rights standards provide the context of the recognition of Indigenous laws and customs. It recognises the right to maintain relations with other peoples across borders, and to treaties and agreements with governments.

Article 31 (Self-government)

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 32 (Indigenous citizenship)

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33 (Indigenous laws and customs)

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Self-determination: The right to law and governance

The Draft Declaration contains a number of basic principles, including self-determination, which directly impact on the development of law and governance structures. It affirms 'the right of Indigenous people to control matters affecting them' including the right of self-determination.⁸² We argue that the establishment of the general right to law and governance is more important than the subsidiary references to custom or tradition (ie, 'customary law'). The question of custom and tradition is really a subset of the right to establish law-making powers and to (re)negotiate a suitable political relationship between Indigenous people and the state.

Article 3 of the Draft Declaration describes the right of self-determination as involving the free choice of political status and the freedom to pursue economic, social and cultural development. Article 4 provides for the right of Indigenous peoples to maintain and strengthen distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining the right to participate fully, if they choose, in the political, economic, social and cultural life of the state. Article 31 sets out the extent of self-governing powers of Indigenous peoples – the right to autonomy or self-government in matters relating to their internal and local affairs.

Taken together, it is clear that Articles 3, 4 and 31 provide a basis for Indigenous people to maintain cultural integrity and exercise legal jurisdiction over a range of economic, social, cultural activities and other matters, if they so choose. The form which self-determination might take in Australia, or elsewhere, is something that will be worked out through negotiation and over time, and will no doubt vary from place to place. The Draft Declaration is not prescriptive. Furthermore, self-determination is not a single act but rather a political process. Self-determination is not pre-determined in form or outcome.

At the same time, the provisions provide for the right of Indigenous people to participate fully, if they choose, in the political, economic, social and cultural life of the state. The principle of non-discrimination is also paramount. In other words, the Draft Declaration provides for the full exercise of citizenship rights within existing states.

Erica-Irene Daes, the chairperson of the WGIP, has referred to the requirements of self-determination as a form of 'belated state-building ... This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the state, on agreed terms'.⁸³ In this context it can be argued that Draft Declaration is fundamental to the decolonisation of existing state institutions and the reconstitution of new institutions that are inclusionary. Integral to this process will be a working out of the place for Indigenous law.

Much of the debate between Indigenous people and states over the formulation of the Draft Declaration has concerned the issue of self-determination. Indigenous organisations have maintained that the right is fundamental to all other rights articulated in the Draft Declaration. State concerns have centred around whether the right implies the right to secession.

Australia's position, as it was articulated in 1995, was that self-determination was not a static concept,

but rather an evolving right which includes equal rights, the continuing right of peoples to decide how they should be governed, the right of people as individuals to participate fully in the political process (particularly by way of periodic free and fair elections) and the right of distinct people within a state to make decisions and administer their own affairs.⁸⁴

82. Coulter, R 'The Draft UN Declaration on the Rights of Indigenous Peoples: What is it? What does it mean?' (1995) 13 *Netherlands Quarterly of Human Rights* 128.

83. Daes EI, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN 4/Sub 2/1993/26/Add 1 (12 June 1993) 6.

84. Australian Delegation to the UN Inter-Sessional Working Group on a Draft Declaration, *Self-Determination: The Australian Position*, Position Paper, UN Doc E/CN 4/1995/WG 15/2/Add 2 (10 October 1995) 8.

Only in the most exceptional circumstances would self-determination equate to a right of secession, and must in general be exercised in ways which are consistent with the territorial integrity of the state.

Australia's position has now moved to oppose self-determination. However, a majority of states involved in the development of the Draft Declaration have supported the principle of self-determination of Indigenous peoples, without prejudice to the territorial integrity and sovereignty of the state. This involves a division between 'external' and 'internal' self-determination. The 'internal' right could include a continuing right of self-government but would not normally include a right of secession or separation. Exceptional circumstances would arise where a state is not representative. Daes has stated that 'the right of self-determination of Indigenous people should ordinarily be interpreted as their right to freely negotiate their status and representation in the State in which they live'.⁸⁵ Peoples are only likely to be able to justify creating a new state for their security and safety when the existing political system is so exclusive and non-democratic that it fails to represent the whole people.

Indigenous organisations have made it clear that they do not wish to 'dismember' existing states. However, they do wish to renegotiate their relationship with those states. Seeking to establish a dichotomy between 'internal' and 'external' self-determination can be misleading and was opposed by many Indigenous delegates to the WGIP. Further, the concept of secession implies that Indigenous people were once submitted to the sovereignty of the colonising state and now wish to withdraw. Yet Indigenous people point out that generally they were not part of state-building and that their dispossession occurred by force and without consent. Indigenous people now seek to renegotiate their political status as part of the constitutive process of state building. The development of Indigenous law in this context may be seen as fundamental to developing this new relationship between Indigenous people and the state within a postcolonial framework.

Such state-building may also involve changing or discarding constitutional doctrines that were at the heart of the original dispossession. A priori limitation of sovereignty to 'internal' self-government may prejudice this state-building function and relegate Indigenous rights to an inferior status compared to other colonised peoples.⁸⁶

Pritchard has argued that equating external self-determination with secession obscures the fact that the external dimension of self-determination will address opportunities for Indigenous peoples to enjoy independent relationships in the international sphere. These include possible international supervision of decisions by Indigenous peoples about their political status, the provision of assistance to Indigenous peoples, assistance in the provision of procedures outside of national constitutional and legal systems for the resolution of disputes, and for the enforcement of treaties and other agreements between Indigenous peoples and states.⁸⁷

It is also argued that the international law on self-determination already limits the conditions under which independent statehood can be achieved. Article 45 of the Draft Declaration provides that it cannot be used to engage in any activity or perform any act contrary to the *Charter of the United Nations 1945*. The United Nations *Friendly Relations Declaration 1970* provides for the inviolability of territorial integrity for states 'conducting themselves in accordance with the principles of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.

Populations, people or peoples

Early United Nations discussions on Indigenous peoples used the word 'population', so as not to imply that Indigenous peoples were 'peoples' within the meaning of international law. This is significant because international law recognises self-determination as a right of all *peoples*. Hence, the WGIP was established as the Working Group on Indigenous Populations. Current debate tends to be over the question of Indigenous 'people' versus 'peoples', with the abiding view being that the use of the singular 'people' does not imply the international law rights of 'peoples'.

A 'people' is a group which has an objectively distinct identity with ethnic, linguistic, cultural or historical characteristics and subjectively perceives itself as such. Daes describes Indigenous peoples as united by histories as distinct societies, by languages, laws, traditions and unique spiritual and economic relationships with the territories in which they have lived. Indigenous peoples are, according to Daes, 'unquestionably' peoples, 'in every political, social, cultural and ethnological meaning of this term [and] it is neither logical nor scientific to treat them as the same 'peoples' as their neighbours, who obviously have different languages, histories and cultures'.⁸⁸

^{85.} Daes, above n 83.
^{86.} Pritchard, above n 81, 85.
^{87.} Ibid 86.
^{88.} Daes, above n 83, 6.

There is a strong argument for seeing Indigenous peoples as *peoples*, as Daes argues. It is also clear that self-determination is a key aspirational human right for Indigenous peoples, and the right to self-determination is to a large extent predicated on the view of Indigenous peoples as peoples. However, there is also a more minimalist argument for autonomy rights for Indigenous people that has been accepted without agreeing that Indigenous peoples are peoples within an international law framework. This is the position taken in ILO Convention 169 where the use of the term 'peoples' is deemed to have no implications in international law. In this sense, there is a strong argument for the right of Indigenous people to a form of autonomy and law-making power independently of a position on the 'peoples' question.

Commission on Human Rights

An Expert Seminar on Indigenous Peoples and the Administration of Justice was convened by the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people. Its conclusions and recommendations were reported to the United Nations Commission on Human Rights.⁸⁹

Among these conclusions was the concern that Indigenous peoples were the victims of discrimination and racism in the administration of justice. This discrimination and racism was said to be caused by, *inter alia*,

- (f) The weakening or destruction of indigenous legal systems as a result of acculturation;
- (g) The criminalisation of indigenous cultural and legal practices;
- (h) The lack of official recognition for indigenous law and jurisdiction, including indigenous customary law;
- (i) The subordination of indigenous law and jurisdiction to national or federal jurisdiction, and restricting indigenous authorities to hear minor cases;
- (j) The failure to introduce adequate mechanisms and procedures that would allow indigenous legal systems to be recognized and to complement national systems of justice;
- (l) The non-recognition of indigenous law, culture and legal traditions by judges and other judicial officers.⁹⁰

Among the recommendations it was noted that, *inter alia*,

- 17. States should help to restore indigenous legal practices, in cooperation with indigenous legal experts, where these might contribute to the development of an impartial system of justice that is in full compliance with international human rights law, particularly in relation to women's rights.
- 23. States should recognize indigenous peoples' own systems of justice and develop mechanisms to allow these systems to function effectively in cooperation with the official national systems. These mechanisms should be based on constructive arrangements with the peoples concerned.
- 24. Both states and indigenous peoples should incorporate internationally recognized human and indigenous rights into their systems of justice.
- 25. States should take into account the mechanisms used by indigenous peoples to settle disputes, their regulatory and legal capacity and their authority to develop their own procedures without outside interference.
- 26. National legal systems should incorporate the use of the relevant indigenous customs, traditions, symbols and customary law in cases involving indigenous peoples or individuals. This can be achieved by means of special procedures involving indigenous leaders and dispute settlement methods.
- 28. States should establish a separate indigenous juvenile justice system.
- 30. In applying national laws and regulations to indigenous peoples, States should pay due regard to their customs or customary law and should respect the methods customarily practiced by indigenous peoples in dealing with offences.⁹¹

The conclusions and recommendations from the meeting again reinforce the importance of recognition of Indigenous legal systems and law by states. An overarching context for both Indigenous and state law and practice is respect for international human rights.

Conflicting rights

It has been recognised both internationally and domestically that there may be conflict between 'customary practices' and individual human rights.⁹² For example, in addressing the potential for conflict between customary practices and women's rights, the Office of the High Commissioner for Human Rights has stated that:

89. *Conclusions and Recommendations of the Expert Seminar in Indigenous Peoples and the Administration of Justice*, E/CN.4/2004/80/Add.4 (Madrid, November 2003).

90. *Ibid* 5–6.

91. *Ibid* 7–8.

92. For a discussion of these issues, see Northern Territory Law Reform Committee, above n 75, 16–28; Davis M & McGlade H, *International Law, Human Rights Law and Aboriginal Law*, LRCWA Background Paper No 10, above pp 381, 392–94; Goward P, Sex Discrimination Commissioner, 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).

Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are harmful to a specific group, such as women. These harmful traditional practices include female genital mutilation (FGM); forced feeding of women; early marriage; the various taboos or practices which prevent women from controlling their own fertility; nutritional taboos and traditional birth practices; son preferences and its implications for the status of the girl child; female infanticide; early pregnancy; and dowry price.⁹³

Some aspects of Aboriginal law could conflict with rights and protections established, for example, in the *Universal Declaration of Human Rights*,⁹⁴ the ICCPR, the *Convention on the Elimination of All Forms of Racial Discrimination Against Women*,⁹⁵ the *Convention on the Rights of the Child*⁹⁶ and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.⁹⁷

It is not the purpose of this paper to itemise possible areas of conflict. To a large extent this has been done elsewhere.⁹⁸ It is important, however, to reiterate the point that both Article 33 of the *Draft Declaration on the Rights of Indigenous Peoples* and Article 8 of the ILO Convention 169 establish the requirement that Indigenous juridical customs, traditions, procedures and practices comply with international human rights standards. The Human Rights Committee has noted that none of the rights protected under Article 27 of the ICCPR can be exercised in a manner inconsistent with other rights in the Covenant. The former Aboriginal and Torres Strait Islander Social Justice Commissioner has confirmed that 'all proposals for the recognition of Aboriginal customary law have taken as their starting point that any such recognition must be consistent with human rights standards'.⁹⁹

Similarly, in her submission to the Northern Territory Law Reform Committee's Inquiry into the Recognition of Aboriginal Customary Law, the federal Sex Discrimination Commissioner noted that women's individual human rights must ultimately prevail in any conflict with customary law:

While all attempts should be made to reconcile women's individual human rights with the minority rights of Indigenous peoples to retain and enjoy their culture, HREOC considers that women's individual human rights must ultimately prevail. Particularly in the context of this Inquiry, HREOC considers that the recognition of Aboriginal Customary Law must also take active steps to ensure women's right to individual safety and freedom from violence.¹⁰⁰

Both the Federal Sex Discrimination Commissioner and the former Aboriginal and Torres Strait Islander Social Justice Commissioner have noted that conflicts can be worked out on a case-by-case basis.¹⁰¹ Importantly, the former Social Justice Commissioner noted that 'the potential for conflict should not be used by government as an excuse to avoid the recognition of Aboriginal customary law or by Aboriginal communities to condone breaches of human rights'.¹⁰² While the discussion above has been framed in the context of 'customary' law, we would hold that the same argument is valid for potential conflict between Indigenous law and human rights standards. Internationally recognised human rights standards should prevail over inconsistent Indigenous or non-Indigenous law.

7. Thinking through the process of self-determination – *Bringing Them Home*

The *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*¹⁰³ spent considerable time discussing self-determination and related processes applicable to the contemporary removal of Indigenous children. We discuss the recommendations of the Inquiry as an example of a recent attempt to create a space for Indigenous self-determination and governance in relation to Indigenous families and children. The recommendations of the Inquiry provide a practical example of how Aboriginal law might be 'recognised' within a negotiated framework and consistent with international human rights standards.

The Inquiry found that existing non-Indigenous systems of juvenile justice and child welfare have failed miserably to solve the problems facing Indigenous families, children and young people. Nowhere is this failure more profoundly

93. Office of the High Commissioner for Human Rights, 'Harmful Traditional Practices Affecting the Health of Women and Children' (Fact Sheet No 23), cited in Goward, *ibid*.

94. GA Res 217A(III), 10 December 1948.

95. [1975] ATS 40.

96. [1991] ATS 23.

97. [1989] ATS 21.

98. See, eg, Northern Territory Law Reform Committee above n 75, 16–28; Davis & McGlade, above n 92, 390–96.

99. Jonas, above n 54.

100. Goward, above n 9.

101. *Ibid*; Jonas, above n 54.

102. Jonas, *ibid*.

103. Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney, 1997).

reflected than in the inability of states to reduce the number of Indigenous children placed in care, held in police cells and sentenced to detention centres. The Inquiry argued for a new framework which respects the right to self-determination for Indigenous people while complying with other international obligations for the treatment of children and young people. It advocates a two tiered approach – national framework legislation for negotiation and self-determination in areas (including juvenile justice and welfare) that affect the wellbeing of Indigenous children and young people, and the development of national minimum standards applicable to juvenile justice and welfare interventions.

Self-determination

The Inquiry considered in detail the *Draft Declaration on the Rights of Indigenous Peoples* in relation to the emerging human rights norms that reflect the aspirations of Indigenous people. The Inquiry also noted the widespread desire of Indigenous people in Australia to exercise far greater control over matters affecting young people as reflected in many written submissions and evidence presented at hearings. It found that self-determination could take many forms, from self-government to regional authorities, regional agreements or community constitutions. Some communities or regions may see the transfer of jurisdiction over juvenile justice matters as essential to the exercise of self-determination. Other communities may wish to work with an existing modified structure which provides greater control in decision-making for Indigenous organisations. The overarching guiding principle is that the level of responsibility to be exercised by Indigenous communities must be negotiated with the communities themselves.¹⁰⁴

The recommendations from the Inquiry stress the importance of self-determination, as well as of greater controls over decision making in the juvenile justice system, and matters relating to welfare. Recommendation 43 is the key recommendation pertaining to self-determination. It requires that national legislation be negotiated and adopted between Australian governments and key Indigenous organisations to establish a framework of negotiations for the implementation of self-determination. The suggested national framework legislation would adopt principles which

- (a) bind Australian governments to the Act;
- (b) allow Indigenous communities to formulate and negotiate an agreement on measures best suited to their needs in respect of their children and young people;
- (c) make available adequate funding and resources to support the measures adopted by the community; and
- (d) ensure the human rights of Indigenous children.

Part (c) of Recommendation 43 advocates negotiations for the complete transfer of juvenile justice and/or welfare jurisdictions to Indigenous control, the transfer of policing, judicial and/or departmental functions or the development of shared jurisdiction where this is the desire of the community.¹⁰⁵

Recommendation 43 significantly advances the discussion of self-determination in Australia. It provides the framework for transfer of jurisdiction to Indigenous communities in situations where those communities see the development of self-government powers as an appropriate response to ensuring the wellbeing of Indigenous children and young people.

National minimum standards

Recommendation 44 of the Inquiry is concerned with the development of national legislation which establishes minimum standards for the treatment of all Indigenous children and young people, irrespective of whether those children are dealt with by government or by Indigenous communities and organisations. This legislation is to be negotiated by the Council of Australian Governments and key Indigenous peak bodies. Recommendation 45 requires a framework for the accreditation of Indigenous organisations that perform functions prescribed by the standards.

The Inquiry sets out a number of minimum standards which provide the benchmark for future developments in the treatment of Indigenous children and young people. Standards 1–3 consider principles relating to the best interest of the child. Standard 4 sets out the requirement for consultation with accredited Indigenous organisations thoroughly and in good faith when decisions are being made about an Indigenous young person. In juvenile justice matters this includes decisions about pre-trial diversion, bail and other matters. Standard 5 requires that in any judicial matter the child be separately represented by a representative of the child's choosing or appropriate accredited Indigenous organisation where the child is incapable of choosing.

104. Ibid 575–76.

105. Ibid 580.

Standard 8 of Recommendation 53 deals specifically with matters relating to juvenile justice. There are 15 rules established within the standard. Rules 1 and 2 seek to minimise the use of arrest and maximise the use of summons and attendance notices. Rule 3 requires notification of an accredited Indigenous organisation whenever an Indigenous young person has been arrested or detained. Rule 4 requires consultation with the accredited organisation before any further decisions are made. Rules 5 to 8 provide protection during the interrogation process. Rules 9–12 ensure that Indigenous young people are not denied bail and that detention in police cells is eliminated except in truly exceptional circumstances. Rule 13 prioritises the use of Indigenous-run community-based sanctions. Rule 14 establishes the sentencing factors which need to be considered. Rule 15 requires that custodial sentences be for the shortest possible period, and that reasons must be stated in writing.

In summary, *Bringing Them Home* adopted an approach designed to create a legislative and political space where Indigenous decision-making might occur. In the context of the recognition of Aboriginal law, the approach advocated here is one where Indigenous law might exist within a framework developed through negotiation with state, territory and federal governments and in consistency with broader human rights standards.

8. Aboriginal justice institutions

The development of Aboriginal justice programs, mechanisms and processes are one way of facilitating the development of Indigenous self-determination in the criminal justice arena. It provides the opportunity to open a space in which Aboriginal law can function. It is not perfect because these mechanisms operate, by and large, within the broader parameters of non-Indigenous state law. But perhaps we can also see them operating in the interstices between Anglo-Australian law and Aboriginal law, as a hybridisation that will facilitate the development of both systems of law. In this sense it can be argued that Aboriginal justice programs provide an avenue for the development and operationalisation of Aboriginal law. It is not suggested that this be a haphazard approach. As the recommendations from the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* indicate, there is a need for a negotiated political and legal framework to provide form, certainty and legitimacy to these changes.

Our argument here is that the development of Aboriginal justice programs is perhaps better understood as the facilitation and development of 'Aboriginal justice institutions'. This emphasises the important governance aspect of self-determination, and stresses that modern Indigenous justice institutions are not primarily about the 'recognition of Aboriginal customary law', but rather present a process through which Aboriginal communities are empowered to apply their own laws and legal processes within a negotiated relationship to state legal institutions. These institutions are fundamentally about the process of governance within a negotiated political and legal space.

The linking of Aboriginal law, governance and dispute resolution has been made by many Indigenous leaders, lawyers and activists. The New South Wales Aboriginal Justice Advisory Committee notes that:

One direct way to recognise and support Aboriginal customary practices is to provide a greater role for Aboriginal community involvement in the administration of justice. Particularly the administration of justice locally within Aboriginal communities. In recent years there have been a number of examples where local Indigenous communities have been allowed to have a direct decision making role in local justice administration and where justice processes have been adapted to incorporate local Indigenous views and needs.

These examples show that a greater flexibility in justice administration can allow for Aboriginal customary law to be recognised and provide a role for a local Aboriginal community and its culture to play. Further what we do know is that where this has been done, and local Indigenous communities have had a direct role in justice administration, where procedures and punishments are designed and delivered according to local culture and need, that the greatest impact on rates of offending/re-offending are achieved.¹⁰⁶

While agreeing with the statement above by the New South Wales Aboriginal Justice Advisory Committee, we would omit the reference to 'customary' law. In practice one of the significant developments initiated in New South Wales by the committee has been circle sentencing – a practice derived from Canada and not specifically associated with 'traditional' Aboriginal practices in Australia.

Mark Harris has made a similar argument in relation to the recent development of Aboriginal courts as a potentially transformative process:

^{106.} Thomas, above n 5, 9.

While the recognition of Aboriginal law may remain an unattainable goal in certain parts of Australia, the task remains to ensure that the momentum of the Aboriginal courts transforms the relationships that exist between Indigenous and non-Indigenous Australians both in the criminal justice system and also in the broader context of society itself. Failure to do so will perpetuate the cycle of over-representation of Aboriginal offenders in the nation's gaols and will certainly spell the end of any dreams of reconciliation.¹⁰⁷

Paul Chantrill has made similar comments in relation to the development of Aboriginal community justice groups in Queensland:

The achievements at these communities centre on increasing emphasis on community development strategies designed to improve opportunities for young people, the re-establishment of community authority and discipline based on the authority of community elders as well as efforts to improve the community's relationship with community and external justice agencies – the police, children's services and juvenile justice, corrective services and visiting magistrates.¹⁰⁸

It is not the purpose of this paper to review the nature or content of existing Aboriginal justice mechanisms. Nor is it our purpose to comment on how these processes might be further developed and enhanced. It should be noted that considerable literature already exists relating to these initiatives, including their establishment, processes and evaluation.¹⁰⁹ Our purpose is to argue more broadly that a wide range of Aboriginal justice institutions exist and should play an integral and practical role in providing a bridge between self-determination, governance and Aboriginal law on the one side and the non-Indigenous legal system on the other. In brief, the following are noted as perhaps the major current developments nationally.

Aboriginal courts

Aboriginal courts (Koori Courts, Murri Courts and Nunga Courts) have been established for both adult and juvenile offenders in Victoria, Queensland and South Australia over the last few years. The courts involve an Aboriginal Elder or justice officer sitting on the bench with a magistrate. The Elder can provide advice to the magistrate on the offender to be sentenced and about cultural and community issues. Offenders could receive customary punishments or community service orders as an alternative to prison. Aboriginal courts may sit on a specific day designated to sentence Aboriginal offenders who have pled guilty to an offence. The Court setting may be different to the traditional sittings. The offender may have a relative present at the sitting, with the offender, his/her relative and the offender's lawyer sitting at the bar table. The magistrate may ask questions of the offender, the victim (if present) and members of the family and community in assisting with sentencing options. The Port Adelaide Nunga Court has increased the rate of attendance by Aboriginal people (80%) as compared to attendance in other courts (less than 50%).¹¹⁰

Circle sentencing

Circle sentencing, or circle courts, began in Canada in early 1992 following a Supreme Court decision of the Yukon in the case of *R v Moses*.¹¹¹ Circle courts are based on traditional Indigenous forms of dispute resolution and have been adopted by a number of more traditionally oriented first nations people in Canada, but have subsequently been adopted in Canadian urban settings and are also now used in the United States and Australia. Pilot circle sentencing began in Nowra, New South Wales in February 2002 and the program has subsequently been expanded to other areas such as Dubbo and Brewarrina. The Nowra trial was evaluated by the New South Wales Aboriginal Justice Advisory Committee and the New South Wales Judicial Commission. The evaluation found, among other things, that circle sentencing:

- helps to break the cycle of recidivism;
- introduces more relevant and meaningful sentencing options for Aboriginal offenders;
- reduces the barriers that currently exist between the courts and Aboriginal people with the help of respected community members;
- leads to improvements in the level of support for Aboriginal offenders;

107. Harris M, 'From Australian Courts to Aboriginal Courts in Australia: Bridging the Gap?' (2004) 16 *Current Issues in Criminal Justice* 39.

108. Chantrill P, 'Community Justice in Indigenous Communities in Queensland: Prospects for Keeping Young People Out of Detention' (1998) 3 *Australia Indigenous Law Reporter* 163.

109. For an overview, see Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Crime Prevention Division and Aboriginal Justice Advisory Council, 2001); *Aboriginal Justice Plan*, Discussion Paper (Sydney: Aboriginal Justice Advisory Council, 2002).

110. Harris, above n 107; Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues*; Cunneen, *Aboriginal Justice Plan*, ibid.

111. *R v Moses* (1992) 11 CT (4th) 357. For further discussion see Green R, *Justice in Aboriginal Communities* (Saskatoon: Purich Publishing, 1998).

- incorporates support for victims and promotes healing and reconciliation; and
- increases the confidence and generally promotes the empowerment of Aboriginal persons in the community.¹¹²

Community justice groups

Different types of Aboriginal Justice Groups have been established in several jurisdictions. Perhaps the most successful and certainly best evaluated have been the Aboriginal Justice Groups in Queensland.

Evaluations of justice groups indicate they can:

- achieve a reduction in juvenile offending and school truanting;
- achieve a reduction in family and community disputes and violence;
- increase the more effective use of police and judicial discretion;
- increase community self-esteem and empowerment;
- provide better support for offender reintegration; and
- generate cost-savings for criminal justice agencies.¹¹³

Aboriginal Community Justice Groups have been established in New South Wales, as have community justice forums. Aboriginal Community Justice Groups can work with police to issue cautions, establish diversionary options, support offenders, assist in access to bail, provide assistance to courts, and develop crime prevention plans. In the Northern Territory there are law and justice groups operating in communities such as Ali Curung and Lajamanu.¹¹⁴

Night patrols

One of the longest running community-controlled initiatives in Indigenous communities has been the 'night patrol'. They are also one of the few types of initiatives that have been evaluated at a more systematic level. Generally the evaluations have been very positive.

Evaluations of night patrols indicate they can achieve:

- a reduction in juvenile crime rates on the nights the patrol operates, including for offences such as malicious damage, motor vehicle theft and street offences;
- enhancement of perceptions of safety;
- minimisation of harm associated with drug and alcohol misuse;
- encouragement of Aboriginal leadership, community management and self-determination; and
- encouragement of partnerships and cultural understanding between Indigenous and non-Indigenous communities.¹¹⁵

Recently, Blagg and Valuri identified over 100 self-policing initiatives operating in Aboriginal communities throughout Australia. They suggest that underpinning these initiatives is 'a commitment to working through consensus and intervening in a culturally appropriate way to divert Indigenous people from a diversity of potential hazards and conflicts'.¹¹⁶

Other initiatives

There are many other Indigenous justice initiatives occurring throughout Australia including:

- diversion programs such as youth conferencing for juveniles, which may have specific Indigenous convenors;
- community support programs such as mentoring (South Australia, Western Australia), the Koori Justice Workers (Victoria), and post release programs aimed at re-integration;
- community supervision of offenders through probation and parole; and

112. Potas I, Smart J, Bignell G, Lawrie R & Thomas B, *Circle Sentencing in New South Wales. A Review and Evaluation* (Sydney: New South Wales Judicial Commission and Aboriginal Justice Advisory Committee, 2003).

113. Chantrill, above n 108; Young UK, *Aboriginal Child Welfare and Juvenile Justice Good Practice Project*, Final Report (Canberra: ATSIIC, 2001); Department of Aboriginal and Torres Strait Islander Policy and Development, *Local Justices Initiatives Program: Interim Assessment of the Community Justice Groups* (Brisbane: Queensland Government, 1999).

114. For discussion of community justice groups in jurisdictions other than Queensland, see Cunneen, *The Impact of Crime Prevention on Aboriginal Communities*, above n 109; Jonas, above n 54.

115. Lui L & Blanchard L, 'Citizenship and Social Justice: Learning from Aboriginal Night Patrols in New South Wales' (2001) 5(5) *Indigenous Law Bulletin*; Hearn L, *Gosnells Community Justice Program Evaluation Report* (Perth: Centre for Police Research, Edith Cowan University, 2000); Centre for Peace and Conflict Studies and Koori Centre, *The Impact of Aboriginal Night Patrols as a Juvenile Crime Prevention Strategy. An Evaluation of four Pilot Programs in New South Wales*, (Sydney: Centre for Peace and Conflict Studies and Koori Centre, University of Sydney, 2000).

116. Blagg H & Valuri G, 'Self-Policing and Community Safety: The Work of Aboriginal Community Patrols in Australia' (2004) 15 *Current Issues in Criminal Justice* 207.

- community operated programs that address offending behaviour (eg Aboriginal family violence programs and alcohol and other drug programs in all jurisdictions).

Some of these programs have been evaluated and the extent to which they are Indigenous-controlled varies significantly.

An area where Australia lags well behind Canada, but where there is now some interest, is the development of Aboriginal community-based and controlled residential 'correctional' centres. Canadian federal sentencing law¹¹⁷ allows for Aboriginal offenders to serve their sentence in Indigenous-operated 'healing lodges'. There has been some discussion in Australia of these types of facilities.¹¹⁸

Taken together, there exist at least in skeletal form the institutional processes for Indigenous justice which operates alongside the Anglo-Australian system. What we need to think about is opening the space for these initiatives to flourish into what Fitzgerald referred to in the *Cape York Justice Study* as 'pods of justice':

There needs to be institutional space or spaces created for the accommodation of Aboriginal law within the broader Australia legal system. There must be institutional design for the administration of a local order by Aboriginal communities. There must be 'pods of justice' distinct in form and function, autonomous but contributing to a federal whole. Authority must be devolved to Aboriginal communities so that they may first determine the law and order issues of their [own].¹¹⁹

9. Conclusion

Concepts like 'customary', 'recognition' and 'extinguishment' are essentially metaphors that attempt to relate Aboriginal law to state law on terms set by the state. The centrality and universality of Anglo-Australian law is assumed. State law, using tests and criteria of its own making, determines whether aspects of Aboriginal law exist or not. There is then a significant gap between this legal positivist pretension and the question of whether Aboriginal law imbues meaning to the social, cultural and religious worlds of Aboriginal peoples. Perhaps a more meaningful metaphor is the one used in the Cape York Justice Study of 'pods of justice', which provides for an understanding of autonomy and diversity.

The argument developed in this Background Paper is straightforward. It advocates a movement away from a discussion of customary law and towards a discussion of Indigenous law, governance and self-determination. This transition has real implications for the way in which the debate over the recognition of customary law might develop.

First, we recommend dropping any reference to Aboriginal 'customary' law and argue for a discussion of Aboriginal law. This would avoid the necessity of defining customary law and its content and all the associated problems that are likely to arise (especially reflecting on the experience with native title). We further argue that the concept of customary law is essentially an imperialist concept which has been used to delimit the law of the native in colonial contexts.

Secondly, we argue for a move away from the 'ad hoc' recognition debate to a consideration of the political/legal processes by which Indigenous people themselves decide on their position, vis-a-viz state law. That is, we see Aboriginal law as fundamentally linked to the question of self-determination and governance by Aboriginal peoples. What becomes important is not 'customary law' per se, but rather the ability of Indigenous people to affect their own laws where they see this as appropriate, within broader negotiated political and legal contexts and boundaries.

Thirdly, we argue that the link between self-determination, governance and Aboriginal law is well-founded in international human rights standards. The recognition of Aboriginal peoples' minority rights and collective rights 'have the capacity to strengthen social structures with Aboriginal communities as well as the observance of law and order'.

Fourthly, we look to the recommendations of the *National Inquiry into the Separation Aboriginal and Torres Strait Islander Children from Their Families* for a practical consideration of how a negotiated political framework and minimum standards can provide a framework for the development of Aboriginal law. We also argue that there is a skeletal framework in place of Indigenous justice institutions which can be significantly enhanced, but note the danger of co-optation and 'indigenisation' unless there is a strong framework for negotiated settlement of justice issues in place.

117. See *Corrections and Conditional Release Act 1992* (Canada) s 81.

118. Cunneen C, 'Residential Alternatives for Indigenous Offenders' (Paper presented at the Australian Institute of Criminology Conference, *Best Practice Interventions in Corrections for Indigenous People*, Sydney, 8–9 October 2001).

119. State of Queensland, above n 1, 113.

background paper 12

Indigenous cultural and intellectual property and customary law

Terri Janke* and Robynne Quiggin**

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Introduction

Indigenous Australians are the Aboriginal and Torres Strait Islander people, the original inhabitants of Australia. Indigenous cultural and intellectual property refers to Indigenous Australians' heritage. It includes items of cultural expression such as the songs, dances and stories; the traditional knowledge of Indigenous people; and the cultural objects, sites, places, human genetic material including DNA and tissue, environmental material including minerals and species of flora and fauna, ancestral remains and documentation of Indigenous peoples' heritage. Indigenous cultural property and intellectual property are connected, as Indigenous people see the intangible aspects linked with tangible things.

Our research focuses on the following components of Indigenous intellectual property:

- (a) Indigenous cultural expression – including songs, stories, dance and other cultural expression.
- (b) Traditional knowledge – including ecological knowledge of biodiversity, medicinal knowledge, environmental management knowledge, and cultural and spiritual knowledge and practices.

Indigenous cultural and intellectual property rights refer to the inherent rights of Indigenous Australian's to ownership and control of their heritage

Indigenous people today still assert rights to the intellectual property aspects of their Indigenous heritage. Indigenous customary law plays a large part in determining the ownership, use and exploitation of aspects of Indigenous heritage. This Background Paper will explore some of the ways in which Indigenous customary laws relating to the ownership, use and exploitation of Indigenous intellectual property are restrained, protected or facilitated by Commonwealth and state laws.

Part I: Indigenous customary law and intellectual property

1. Indigenous customary law

'Indigenous customary law' in Australia is the body of rules, values and traditions that are accepted by the members of an Indigenous community as establishing standards or procedures to be upheld in that community. Indigenous customary laws are central to identity and cultural maintenance. There are customary laws that govern the ownership and dissemination of songs, stories, dances and ceremonies, medicinal knowledge, and knowledge relating to land care and management. Knowledge often belongs collectively to Indigenous people, according to their laws and customs.

Indigenous people have strong connections with the intellectual and cultural property pertaining to their country and heritage. This connection is the heart of Indigenous people's identity. Indigenous customary laws impose certain obligations and responsibilities over Indigenous intellectual and cultural property. In considering this issue, it should be noted that the recognition of these customary laws may vary from community to community and may be practised at different levels of operation depending on the impact of western influence upon Aboriginal cultures, traditions and lifestyles.¹ Protocol, for instance, is one form of recognising Indigenous customary laws within arts and cultural practice.

Indigenous customary laws are not recognised in the western legal system. Third parties outside the relevant Indigenous community have in the past used Indigenous intellectual property without proper respect for Indigenous laws. This includes unauthorised use as well as the derogatory treatment and distortion of the cultural, religious and social interests of Indigenous communities.

In 1974, the Commonwealth Government set up a working party to investigate the protection of Aboriginal folklore. The Working Party on the Protection of Aboriginal Folklore conducted research and consultation of folklore and customary laws. The working party produced a report in 1981.² The main recommendation was the enactment of an Aboriginal

1. Weisbrot D, 'Customary Law' (1981) 1 *Aboriginal Law Bulletin* 3.

2. Findings of the working party are recorded in Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (December 1981). The working party defined 'folklore' as the 'body of traditions, observances, customs and beliefs of Aboriginals as expressed in Aboriginal music, dance, craft, sculpture, painting, theatre and literature'.

Folklore Act which would safeguard against certain uses of Aboriginal arts and cultural material that are offensive to Aboriginal people and their traditions, while at the same time encouraging fair and authorised use of Aboriginal arts and cultural material. The report's recommendations were never followed up and such an Act was neither drafted nor enacted.

To oversee the operation of the Act, the working party proposed the establishment of a Folklore Commission and a Folklore Board made up of Indigenous custodians. In this way, Indigenous custodians would have the power to authorise the use and reproduction of their arts and cultural material and receive payment for such uses.

The report recommended a regime for dealing with Aboriginal folklore that was out of copyright.³ The report also recommended that copyright owners should not be able to stop Indigenous groups from using traditional designs, dance or music. It also recommended that copyright and designs legislation should be altered to allow customary users to exercise their customary rights freely in relation to folklore and not have their rights to use folklore interfered with by other copyright owners.⁴

Further recommendations covered the issues of secret/sacred material. 'Secret/sacred' refers to information that, under customary laws, is made available only to the initiated or information that can be seen only by men or women or particular people within the culture. With respect to non-customary use of secret/sacred materials, the working party recommended that there should be criminal sanctions.⁵

The recommendations of the report were not acted upon. In 1986 the Australian Law Reform Commission (ALRC) released a report,⁶ which recommended that Indigenous customary laws should be recognised in appropriate ways by the Australian legal system to the extent that it is acceptable to the communities and individuals concerned and in such a way that is consistent with fundamental human rights. The ALRC supported specific legislative protection for the use of secret/sacred material other than in accordance with custom; the mutilation, debasement or export of items of folklore; and the use of items of folklore for commercial gain without payment to traditional owners.⁷

Since the above two reports were completed there have been a number of cases in the courts where Indigenous artists have used copyright laws to protect their cultural expression.⁸

In 1994, the then Keating government released an Issues Paper, *Stopping the Rip-Offs*,⁹ seeking comments about the issues that affect the intellectual property protection of Indigenous arts and cultural expression. The paper focussed mainly on the operation of copyright in protecting the ownership and integrity of Indigenous arts and cultural expression. An Inter-Departmental Committee on Indigenous Arts and Cultural Expression (IDC) was established to evaluate the submissions; to consider legislative and policy reform in this area; and to make recommendations to the government. The IDC favoured the enactment of specific legislation; however, it was considered that further consultation with Indigenous Australians was required to gain more insight into the reform needs of Indigenous people. The Howard government took power in 1996 and changed the focus of reform agenda in this area. No report was given by the government in respect of the many submissions received in response to the Issues Paper.

In 1997, the Aboriginal and Torres Strait Islander Commission (ATSIC) established an Indigenous Reference Group on Indigenous Cultural and Intellectual Property (IRG). The IRG, chaired by then Commissioner Ian Delaney, consisted of Indigenous people from around Australia who had expertise and experience regarding cultural and intellectual property. ATSIC also funded the Australian Institute of Aboriginal and Torres Strait Islander Studies to coordinate a project and work with the IRG to develop practical reforms, which would improve protection and ensure recognition of Indigenous cultural and intellectual property. *The Our Culture: Our Future* report¹⁰ was the outcome of that consultancy project. The report outlines Indigenous peoples' desired outcomes of how Indigenous cultural and intellectual property should be protected and recognised at law. The main recommendation was for sui generis legislation to recognise Indigenous peoples' rights to their cultural and intellectual property. The report also sets out a range of reforms, including changes to existing and new laws, administrative changes, and education and awareness.

Since the report there have been increased global calls from Indigenous knowledge holders, for the western laws relating to intellectual property, to recognise the rights of Indigenous knowledge holders and creators of traditional

3. Ibid 37.

4. Ibid 45.

5. Ibid 31.

6. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

7. Ibid, vol 1, [470].

8. *Milpurrru v Indofurn Pty Ltd* (1995) 30 IPR 209 (*Carpets Case*); *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 157 ALR 193.

9. Commonwealth, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Issues Paper (1994).

10. Janke T, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights* (Sydney: ATSIC, 1999).

cultural expression. In 1992 the parties to the Earth Summit adopted the *Convention on Biological Diversity*.¹¹ A number of Articles require the parties to consider the rights of Indigenous peoples. Article 8(j) of the *Convention on Biological Diversity* requires member states, subject to their national legislation, to

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

In 2000, the World Intellectual Property Organisation (WIPO) established an Inter-Governmental Committee (IGC) on Intellectual Property Genetic Resources, Traditional Knowledge and Folklore. In 2003, the IGC extended its mandate for a further three years and is expected to deliver some form of international instrument. Within this framework, several member states and many Indigenous people have argued for greater recognition and use of customary laws and protocols in formulating systems for protection of expressions of folklore and traditional cultural expression. In particular this includes applying customary laws to issues relating to acquiring, maintaining and enforcing traditional cultural expression rights.¹²

2. Indigenous intellectual property: scope and terminology

Terminology

Indigenous Australians view the world they live in as an integrated whole.¹³ The land, cultural sites and objects are interlinked with the knowledge, stories, dances and motifs associated with them. Indigenous intellectual property is entwined with Indigenous cultural property. Cultural property is distinguished from intellectual property in western law and is regarded as being the tangible aspect of culture, whereas intellectual property refers to the intangible aspect.¹⁴ From an Indigenous worldview, both are seen as linked and make up the past and living heritage of Indigenous Australians.

The terminology used in this area includes: 'Indigenous cultural and intellectual property (ICIP)'; 'Indigenous heritage'; 'folklore'; 'Indigenous cultural expression'; and 'traditional knowledge'. In Australia the terms 'Indigenous cultural and intellectual property' and 'Indigenous heritage' are mostly used. This usage stems from the *Our Culture: Our Future* report commissioned in 1997. The following definition appears in that report.

Indigenous cultural and intellectual property refers to Indigenous peoples' rights to their heritage. 'Heritage' consists of the tangible and intangible aspects of the body of cultural practices, resources and knowledge systems that have been developed nurtured and refined (and continue to be developed, nurtured and refined) by Indigenous people and passed on by Indigenous people as part of expressing their cultural identity including:

- Literary, performing and artistic works (including music, dance, song ceremonies, symbols and designs, narratives and poetry);
- Languages;
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and sustainable use of flora and fauna);
- Spiritual knowledge;
- All items of moveable cultural property, as defined by the UNESCO Cultural Property Convention 1970, including burial artefacts;
- Indigenous ancestral remains;
- Indigenous human genetic material (including DNA tissues);
- Cultural environment resources (including minerals and species);
- Immoveable cultural property (including Indigenous sites of significance, sacred sites and burials);
- Documentation of Indigenous people's heritage in all forms of media (including scientific, ethnographic research reports, papers and books, films, sound recordings).

Indigenous heritage is a living one and includes items that may be created in the future based on that heritage.¹⁵

11. [1993] ATS 32 5, June 1992 (entered into force on 29 December 1993).

12. World Intellectual Property Organisation, 'Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options' (Paper prepared by the Secretariat, Inter-Governmental Committee on Intellectual Property Genetic Resources, Traditional Knowledge and Folklore, 6th Session, Geneva, 15–19 March 2004).

13. Janke, *Our Culture: Our Future*, above n 10, 2.

14. Aroha Te Pareake Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific' (Paper presented to the Pacific Regional Workshop on UN Draft Declaration, Suva, Fiji, 4 September 1996) 3.

15. Janke, *Our Culture: Our Future*, above n 10, 11.

This definition follows the international standard developed in 1997 by a worldwide study undertaken by the Chairperson of the United Nations Working Group on Indigenous Populations, Professor Daes.¹⁶ This terminology was also used in the *Our Culture: Our Future* report as its point of reference.¹⁷ 'Indigenous cultural and intellectual property' is also the term used in the *Draft Declaration of the Rights of Indigenous Peoples*.¹⁸

Likewise, in this paper we use the term 'Indigenous cultural and Intellectual property'. However, we note that internationally the terminology in this area is developing given that, since 2000, the WIPO has the international mandate for preparing policy objectives and principles for the protection of traditional knowledge and folklore through the work of the IGC.¹⁹

ICIP rights

The *Our Culture: Our Future* report²⁰ found that Indigenous Australians have a comprehensive view of culture. ICIP includes literary, performing and artistic works; scientific, agricultural and technical knowledge; all items of movable cultural property; human remains; immovable cultural property; and documentation of Indigenous peoples' heritage in archives, films, photographs and all forms of new media.

Within Indigenous Australian groups, there are consistent principles underlying the ownership and control of ICIP relating to communal ownership, cultural integrity and consent procedures. However, the Australian legal framework limits the ability of Indigenous people to adequately protect their ICIP from exploitation by outsiders.

ICIP is commercially sought after by non-Indigenous entities and has applications in a range of industries. The Aboriginal art industry turns over tens of millions of dollars every year. The primary retail sale of Aboriginal art was estimated to be \$18.5 million in 1988.²¹ The secondary sales market has become the stronger sector of the industry in recent years with auction houses such as Sothebys and Deutsche-Menzies recording record sales in Aboriginal art. Additionally, there is a large reproduction market of Aboriginal art. Indigenous motifs and designs appear on a range of products including wine bottles, carpets, t-shirts, aeroplanes and cars. The turnover from licensing of Indigenous art has been estimated by one industry representative to be in the vicinity of \$180 million per annum.

The success of the industry has also generated a large spin-off fake market which produces bogus items of Aboriginal art that are not produced by Indigenous people. Some examples include copyright infringements of art, from text books to making carpets.²² Many rip-offs of Indigenous art are stylised versions of Indigenous art such as the x-ray koala. The x-ray style of art comes from the Arnhem Land region where there are no koalas; therefore, to depict an x-ray style koala is a bastardisation of Aboriginal art.²³

The *National Aboriginal and Torres Strait Islander Rural Industry Strategy* valued the Australian rural industry at \$27 billion each year.²⁴ Indigenous people contribute their knowledge and resources to this industry including wild animal resources, bush foods and traditional medicines.

Within the tourism industry Indigenous stories and traditional knowledge are used by tour operators to relate information about sites and places, as well as to promote bush tucker tours. Research on the subject indicates that international tourists wish to have an Aboriginal experience.²⁵

Indigenous Australians are concerned that, in light of new technology, their cultures may be under threat even further from unauthorised exploitation. For example, digital images of Aboriginal art, MP3 files of Indigenous traditional music or sacred information about cultural heritage sites, or stories on government databases can be used by third party commercial operators from the far corners of the globe without Indigenous people even knowing that the information has been taken or used.

16. Daes EI, *Final Report on the Protection of the Heritage of Indigenous Peoples* Report E/CN.4/Sub.2/1995/26 (1995) and *Supplementary Report: Protection of the Heritage of Indigenous Peoples* Report E/CN.4/Sub.2/1996/22 (1996).

17. Janke, *Our Culture: Our Future*, above n 10.

18. International Work Group for Indigenous Affairs, *Draft Declaration of Indigenous People's Rights* (2004).

19. See <<http://www.wipo.int>> for the papers relating to the work of the Inter-Governmental Committee on Intellectual Property Genetic Resources, Traditional Knowledge and Folklore.

20. Above n 10.

21. Department of Aboriginal Affairs, *The Aboriginal Arts and Crafts Industry: Report of the Review Committee* (1989) (Altman Report).

22. The source of unauthorised copyright for some of the artwork in *Milpurrru v Indofurn* above n 8 was an art portfolio produced by the National Aboriginal Gallery with authority from the artists.

23. Golvan C, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 7 *European Intellectual Property Review* 227, 229.

24. ATSC and Department of Primary Industries and Energy, *National Aboriginal and Torres Strait Islander Rural Industry Strategy* (May 1997) 7.

25. Guldberg HH, *The Arts Economy 1968–1998: Three Decades of Growth in Australia*, Research Report (Sydney: Australia Council, 2000) 55.

The nature of ICIP

There are many different Indigenous Australian groups. Each particular group has ownership of rights over its particular cultural heritage. There may also be some overlap between groups and a number of groups may share certain cultural stories and traditions.

Despite the many different Indigenous groups, the *Our Culture: Our Future* report found that there were consistent principles underlying the ownership and control of ICIP.²⁶

1. Communal ownership and attribution

Indigenous cultural and intellectual property is collectively owned, socially based and evolving continuously. A great number of generations contribute to the ongoing creation of ICIP. Attribution as a group for this contribution is a cultural right.

2. Continuing obligation under Indigenous laws to maintain cultural integrity

Another common factor shared by Indigenous groups is that there are generally well-defined laws within each group governing rights to use and deal with Indigenous cultural and intellectual property. These laws are based on positive obligations toward cultural knowledge and the need to ensure that the culture is maintained and protected so that it can be passed on to future generations. To ensure this, there is often an individual or group who is the custodian or caretaker of a particular item of heritage. The traditional custodian acts as a trustee, whose role it is to pass on the knowledge and ensure that its use conforms to the best interests of the community. This type of relationship was noted in *Milpururru v Indofurn*²⁷ where the court noted that the Indigenous Australian artist, Ms Banduk Marika, had the authority to depict traditional, pre-existing designs in her artworks by virtue of her birth. Whilst she held this right, she held the knowledge embodied in the work on trust for the rest of the clan. In the more recent case of *Bulun Bulun v R & T Textiles*,²⁸ the court held that the Indigenous Australian artist, Johnny Bulun Bulun, owed fiduciary obligations to the traditional custodians of Ganabingu culture, to preserve the integrity of their culture and ritual knowledge.

3. Consent and decision-making procedures

Similarly, consent to share Indigenous cultural knowledge must be given by the group as a collective. Such consent is given through specific decision-making procedures, which differ depending on the nature of the particular cultural item. Consent procedures may differ from group to group. Furthermore, consent is not permanent and may be revoked.

What ICIP rights do Indigenous people want recognised?

In the research and consultation phase for the *Our Culture: Our Future* report,²⁹ over 80 submissions were received in response to a discussion paper that asked a range of questions. One issue concerned what rights Indigenous people want recognised to their ICIP. The final report considered that there are fundamental rights Indigenous people need in order to protect and maintain their cultures including the right to own and control ICIP. Based on the submissions received, the following rights were listed:

- The right to own and control ICIP.
- The right to control the commercial use of ICIP in accordance with traditional customary laws.
- The right to benefit commercially from the authorised use of ICIP.
- The right to full and proper attribution.
- The right to protect sacred and significant sites.
- The right to own, use, control and manage lands, territories and natural resources including biological materials such as minerals and species.³⁰
- The right to prevent derogatory, offensive and fallacious uses of ICIP.

26. Janke, *Our Culture: Our Future*, above n 10, 7–9.

27. Above n 8.

28. Above n 8.

29. Janke, *Our Culture: Our Future*, above n 10.

30. Daes EI, *Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous People's Permanent Sovereignty Over Natural Resources*, E/CN.4/Sub.2/2004/30, 13.

- The right to have a say in the preservation and care, protection, management and control of cultural artefacts, human remains, archaeological and significant traditional sites, traditional food resources, and traditional and contemporary cultural expressions such as rituals, legends, and the designs used in, for instance, art, weaving, dances, songs and stories.
- The right to control use of traditional knowledge of medicinal plants, agricultural biodiversity, environmental management, and the recording of cultural customs and expressions.
- The right to control use of the particular language, which may be intrinsic to cultural identity, knowledge, the skill and teaching of culture.³¹
- The right of permanent sovereignty over natural resources.³²

The rights of Indigenous people are not adequately protected within the Australian legal framework. These will be discussed in the following sections of this Background Paper. The *Our Culture: Our Future* report recommended a range of proposals for recognising these rights including changes to laws; developing sui generis legislation and administrative systems; developing monitoring and collection systems; developing cultural infrastructure; and developing protocols and codes of ethics.

3. Intellectual property laws

'Intellectual property' refers to the bundle of rights that the law grants to individuals for the protection of creative, intellectual, scientific and industrial activity, such as ideas (also in material form) and inventions. Such rights are for the protection of economic investment in novel, inventive and/or creative effort. The *Convention Establishing the World Intellectual Property Organisation* defines 'intellectual property' as:

The rights relating to

- literary, artistic and scientific works,
 - performances of performing artists, phonograms, and broadcasts,
 - inventions in all fields of human endeavour,
 - scientific discoveries,
 - industrial designs,
 - trademarks, service marks, and commercial names and designations,
 - protection against unfair competition,
- and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.³³

Intellectual property rights are designed to inspire creative and innovative efforts by granting specific economic rights to inventive persons as a reward for sharing their contributions and to stimulate further inventive activities. Through international treaties such as the *Berne Convention for the Protection of Literary and Artistic Works*,³⁴ intellectual property rights are enforced internationally in countries that are signatories to such treaties.

In Western Australia the Commonwealth intellectual property laws apply. The *Australian Constitution* gives the Commonwealth power to make special laws regulating 'copyright, patents of inventions and designs, and trade marks'.³⁵ The following Commonwealth laws protect intellectual property:

- *Copyright Act 1968* (Cth)
- *Patents Act 1990* (Cth)
- *Trade Marks Act 1995* (Cth)
- *Designs Act 2003* (Cth)
- *Plant Breeder's Rights Act 1994* (Cth)
- *Circuit Layouts Act 1989* (Cth).

Australian intellectual property laws provide some protection for Indigenous intellectual property where Indigenous people can meet the criteria for protection. To some extent the laws can be used to protect ICIP and Indigenous Australians have used copyright in particular to protect their cultural interests. Despite this, intellectual property laws have limitations in recognising customary laws relating to ICIP.

31. Janke, *Our Culture: Our Future*, above n 10, 8.

32. Daes, above n 30.

33. *Convention Establishing the World Intellectual Property Organisation*, 14 July 1967, Stockholm (entered into force 26 April 1970) Art 2(viii).

34. ATS 1978 No 5, Paris, 24 July 1971 (entered into force 1 March 1978).

35. *Australian Constitution* s 51(xviii).

4. Recognition of ICIP within Australian intellectual property laws

Copyright

What is copyright?

Copyright is a bundle of rights granted by statute to creators of artistic and cultural material. The law protects categories of works under the *Copyright Act 1968* (Cth) (Copyright Act) from unauthorised use and dissemination of:

- literary work,
- dramatic work,
- artistic work, and
- musical work.³⁶

Under Part IV of the Copyright Act, rights are given to subject matter other than works; that is, the makers of:

- sound recordings,³⁷
- cinematograph films,
- television and sound broadcasts, and
- published editions.

Requirements of copyright

Copyright protection does not require registration. Copyright exists in a work as soon as it is made. It protects a sound recording as soon as it is made. It also protects a film when it is made, when the things necessary for the production of the first copy of the film have been completed.³⁸

The following requirements must be met for copyright to exist in a work:

(a) Originality

For copyright to subsist in a work, the work must be original.³⁹ This means that it is not copied from another work in that the creator has put into the work the necessary degree of labour, skill and judgment to produce the work, giving it some quality or character, which the raw material did not possess.

As a continuing expression of culture, many Indigenous people draw from the wealth of their cultural heritage by painting pre-existing clan designs, dancing ceremonies and telling stories which have been handed down from their ancestors. It is this nature of Aboriginal art that has raised the question of whether a new Aboriginal work, based upon or derived from a traditional pre-existing theme, could satisfy the copyright requirement of originality in that its reliance on tradition limits scope for interpretation and individuality.⁴⁰ While the issue depends on the particular facts at hand, von Doussa J in *Milpurruru v Indofurn* stated that 'although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality'.⁴¹

This issue was examined in Australian case law including *Bulun Bulun v Nejlam Investments Pty Ltd*⁴² and in *Milpurruru v Indofurn*.⁴³ Based on the specific facts of these cases, the courts considered that there was sufficient scope for individual artistic interpretation notwithstanding that the Indigenous artworks in question followed pre-existing traditional designs.

(b) Material form

A work must be written down or recorded in some permanent tangible form. Non-permanent forms of cultural expression such as performances of stories, songs and dances will not meet this requirement. The person who records or writes down information, including important cultural material, will be considered to have put it into material form and

36. While the *Copyright Act 1968* (Cth) does not define these terms, s 10 provides guidance on what these categories include.

37. *Copyright Act 1968* (Cth) s 10 defines a sound recording as 'the aggregate of the sounds embodied in a record'.

38. *Copyright Act 1968* (Cth) s 23(4)(a).

39. *Copyright Act 1968* (Cth) s 32.

40. See Banki P, 'Protection of Expressions of Folklore' in World Intellectual Property Organisation *Australian Copyright Program for Asia and the Pacific* (Canberra, 2–13 November 1987) 222.

41. Above n 8, 216.

42. (Unreported settled matter, Federal Court, Darwin, 1989).

43. Above n 8.

is therefore recognised as the author and copyright owner. Copyright law provides protection for the form of expression of ideas rather than the ideas themselves.⁴⁴

Many Indigenous cultural works are oral and are not recorded in material form. Some forms of art are ephemeral such as body painting and sand paintings. These may not be protected under copyright.

As Indigenous oral stories, songs and information are recorded for the first time, the person putting them into material form is recognised as the copyright owner. If the traditional owner writes down an oral story, that individual is recognised as the copyright owner. Problems arise for Indigenous people when someone outside the community or group has recorded an oral story because the recorder or their employer is the copyright owner of the recording. Similar issues arise for Indigenous dances, songs and music.

(c) Identifiable author

There must be an identifiable author for copyright to subsist in a work.⁴⁵ Given the nature of Indigenous arts and cultural expression, an individual person or persons may not always be identifiable. For example, many rock paintings depict important cultural works. There is no identifiable artist; therefore, copyright is never asserted by any individual. The works are being reproduced in an increasing variety of ways including postcards, websites and books. Some uses, especially where the rock art images are altered, are inappropriate and cause offence to the Indigenous custodians.

(d) Meet the connecting factors

The author must be a qualified person when the work is first published; that is, 'an Australian citizen, an Australian protected person or a person resident in Australia'.⁴⁶ Published means supplied or made available to the public.⁴⁷

Expression not style or idea that is protected

It is the expression that is protected and not the underlying idea. For example, copyright protects an Indigenous painting such as Johnny Bulun Bulun's *Maggie Geese and Waterlilies at the Waterhole*. The artist has permission to paint the images and rarrk designs in that painting under Ganalbingu law. The underlying story and images are not protected by copyright. In Western Australia, the situation is the same. Rock art images/styles such as the wandjina can only be reproduced and used according to customary laws. The wandjina has been used and reproduced in art, literature and media in a range of ways without proper customary ties being recognised.

Wandjina surfboard logo

The wandjina is a creative being which is part of the cultural heritage of the Ngarinyin people. In 1996 the wandjina was reproduced as a logo for a surfboard manufacturer. The actual image comes from a cave painting that only initiated men were permitted to visit. According to customary laws only traditionally authorised men are allowed to reproduce the image.⁴⁸ The reproduction of the wandjina on the surfboard angered the Ngarinyin elders. To them, such use was against the cultural laws and undermined their cultural processes. They wanted it stopped.

The surfboard maker alleged to have obtained permission from one member of the clan. According to the other traditional custodians, the particular person did not have authority to authorise reproduction of the image in this way. The traditional custodians could not use copyright laws to stop the reproduction because the image was taken from rock art created many years ago. The communal ownership and reproduction rights under Mowanjum law were not recognised under copyright.⁴⁹ The traditional custodians were able to speak directly with the surfboard maker who, out of respect for their law, stopped using the logo.

Authorship and ownership

Under the Copyright Act, the author of a work is the person who first reduces it to material form.⁵⁰ The general rule is that the author of a work is usually the first owner of copyright in that work.⁵¹ However, there are circumstances that will

44. *Walter v Lane* [1900] AC 539.

45. *Copyright Act 1968* (Cth) s 32.

46. *Copyright Act 1968* (Cth) s 32(4).

47. *Copyright Act 1968* (Cth) s 29(1)(a).

48. Janke T, *Indigenous Arts and Cultural Expression: Cases and Matters Settled Out of Court and Disputes that Never Went to Court* (1996).

49. *Ibid.*

50. Rickertson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Sydney: Law Book Company, 2nd ed., 2002) [14.10].

51. *Copyright Act 1968* (Cth) s 35(2).

vary from this and it is not unusual for the author and the owner of the copyright to be different entities. For example:

(a) Employees' works owned by employers

Employers will own the copyright in works created by their employees in the course of a contract of employment. The work must be created as part of the artist's employment duties.⁵²

(b) Government copyright

The Crown refers to the Commonwealth or state government. Works, films and sound recordings made under the direction and control of the Crown may be asserted to be owned by the government.⁵³

Who owns copyright in films and sound recordings?

The copyright in films and sound recordings is quite distinct from copyright in works. The maker of the sound recording is the owner of copyright in the sound recording.⁵⁴ The owner is the person who owns the master tape at the time it is first recorded. However, where the recording is made for another person and fees are paid, then the copyright in the recording belongs to the person who commissions it.⁵⁵

The maker of a cinematograph film is the owner of any copyright in the resulting film.⁵⁶ However, where films are made for another person and fees are paid, then the copyright in the film belongs to the person who commissioned it.⁵⁷

This is a concern for Indigenous people whose stories and knowledge have been recorded in the past without proper consent. There is no copyright recognised in a performance and the person who made the recording is often the controller of the material. For example, one Indigenous community was concerned about a linguist who had copyright ownership of a tape recording of a deceased elder speaking language. The community wanted access to the tape and to control the dissemination of the information contained on it; however, the linguist asserted copyright in the recording.

Rights of copyright owners

The rights granted to copyright owners under the Copyright Act are:

Literary, dramatic or musical works (such as books, plays or songs)

The exclusive right to:

- reproduce the work in material form,⁵⁸
- publish the work,⁵⁹
- perform the work in public,⁶⁰
- communicate the work to the public,⁶¹ or
- make an adaptation of the work.⁶²

Artistic works (such as paintings, photographs, carvings and jewellery)

The exclusive right to:

- reproduce the work in material form,
- publish the work, or
- communicate the work to the public.⁶³

52. Section 35(6) of the *Copyright Act 1968* (Cth) states that where the work 'is made by the author in pursuance of the terms of his or her employment by another person under contract of service of apprenticeship, that other person is the owner of any copyright subsisting in the work'.

53. *Copyright Act 1968* (Cth) s 176.

54. *Copyright Act 1968* (Cth) s 97(2).

55. *Copyright Act 1968* (Cth) s 97(3).

56. *Copyright Act 1968* (Cth) s 98(2).

57. *Copyright Act 1968* (Cth) s 98(3).

58. *Copyright Act 1968* (Cth) s 31(1)(a)(i).

59. *Copyright Act 1968* (Cth) s 31(1)(a)(ii).

60. *Copyright Act 1968* (Cth) s 31(1)(a)(iii). A public performance refers to any form of presentation to the public, whether visual and aural, or merely even aural. The definition of performance includes not only performances of works encompassed in films, CDs etc, but extends to live performances, speeches, addresses, lectures and sermons, for example. The right to make a public performance or material protected by copyright is a separate right to the right to communicate to the public.

61. *Copyright Act 1968* (Cth) s 31(1)(a)(iv). This is a broad-based, technology-neutral right. Introduced by the *Copyright Digital Amendment Act 2000* (Cth), it replaces the previous technology-specific rights of broadcast and transmission to subscribers of a diffusion network.

62. *Copyright Act 1968* (Cth) s 31(1)(a)(v).

63. *Copyright Act 1968* (Cth) s 31(1)(b).

Sound recordings (such as tapes and CDs)

The exclusive right to:

- make a copy of the sound recording,
- cause the recording to be heard in public,
- communicate the recording to the public, or
- enter into a commercial rental arrangement.⁶⁴

Cinematograph films (such as videos and movies)

The exclusive right to:

- make a copy of the film,
- cause the film to be seen or heard in public, or
- communicate the film to the public.⁶⁵

Duration of copyright

The period for protection of copyright is, generally:

- published artistic, literary, musical and dramatic works – 70 years from the death of the author/creator;⁶⁶
- unpublished artistic, literary, musical and dramatic works – 70 years from the date of publication;⁶⁷ and
- films and sound recordings – 70 years from when they are made.⁶⁸

After the period of copyright protection ends, anyone can copy or make use of that work, film or sound recording without seeking permission from the copyright owner. After the copyright period ends, there is no need for copyright fees to be paid. Moral rights also cease to exist in that work.

The Copyright Act does not recognise any continuing right of the Indigenous custodians to their ICIP after the term of copyright protection has expired. Cultural works remain part of an Indigenous clan's culture and are of great significance to their traditional custodians in perpetuity. The unauthorised use may be against cultural laws and may cause deep offence. For instance, the reproduction of wandjina and mimi figures on commercial products is a concern for Indigenous custodians. These images are copied from rock art, which has no copyright protection; therefore, traditional owners cannot use copyright to stop reproductions of the rock art. There are many types of Indigenous cultural works that do not fit within the legislative scheme of the Copyright Act. For instance, works that were produced a long time ago or where the author cannot be identified accurately and, in any case, has passed away long ago, are not easily protected under the Copyright Act.

The duration periods for protection of copyright were extended to 70 years in accordance with the Australia–United States Free Trade Agreement⁶⁹ to be consistent with United States copyright laws. This extension was effective on 1 January 2005. Any works, films and recordings that expired before 1 January 2005 are out of copyright. This development would extend protection for Indigenous works that meet the requirements of copyright; however, there would still be the problem of works falling into the public domain after the end of the copyright period.

The prominent Indigenous artist, Albert Namatjira died in 1959 and the copyright in his works passed to the Public Trustee for the Northern Territory government who, in 1983, authorised the sale of Namatjira's copyright to Legend Press. Senator Aden Ridgeway proposed that the artworks of Albert Namatjira should be protected in perpetuity and not just for the conventional copyright period. He called on the government to protect the Namatjira legacy by giving it ongoing protection, and to arrange a buy back of the copyright in Namatjira's works to be held in trust for the benefit of his family.⁷⁰ According to Dr Matthew Rimmer, 'there is no scope under the *Copyright Act 1968* (Cth) to extend the duration of copyright beyond its natural term in individual cases'.⁷¹ This is because the idea runs counter to the underlying notion of intellectual property that cultural works should enter the public domain. However, in the United

64. *Copyright Act 1968* (Cth) s 85(1).

65. *Copyright Act 1968* (Cth) s 86.

66. *Copyright Act 1968* (Cth) s 32(2).

67. *Copyright Act 1968* (Cth) s 32(3).

68. *Copyright Act 1968* (Cth) s 93.

69. Signed 18 May 2004.

70. Ridgeway A, Namatjira Exhibition Speech, National Gallery of Australia, 22 November 2002, <http://www.adenridgeway.com/speeches/namatjira_nga.pdf> 7.

71. Dr Rimmer, 'Albert Namatjira: Copyright Estates and Traditional Knowledge', (June 2003) *Incite*, Art 24(6) <www.alia.org.au/publishing/incite/2003/06/albert.namatjira.html>.

Kingdom the famous work 'Peter Pan' is protected under the United Kingdom's copyright law for the benefit of a charitable cause.⁷²

Communal ownership

ICIP is communally owned. Traditional knowledge, songs, stories, dances and resources are held for the benefit of the group as a whole. Copyright provides ownership of a work to the individual creator. But how does this apply to Indigenous material that is created through the process of handing on a song or story and creating over the generations?

There are provisions for joint ownership of copyright for works produced by 'the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors'.⁷³ Each author must have been responsible for reducing the work to a material form rather than having an incidental role or supplying the idea for the work.⁷⁴ The artist must contribute to the work by way of skill and labour. It is not enough to inspire or make suggestions. Hence, the joint ownership of a work does not refer to the handing down of Indigenous knowledge over the generations.⁷⁵ The following example illustrates this.

Magabala Books is an Indigenous publishing house based in Broome, Western Australia. Magabala Books publishes traditional stories. These stories will be protected by copyright. The author is the person who has written the story and he or she is the copyright owner of his or her expression. The rights of the community to the story are not protected under copyright; however, the role of customary laws and communal ownership of stories are recognised by Magabala Books in terms of the protocols and management practices.

Recent copyright case law has commented on the role of Indigenous customary laws and communal ownership. In *Bulun Bulun v R & T Textiles*,⁷⁶ the applicant claimed that the rights to paint and permit the reproduction of the artistic work are native title rights. The court found that such rights were not native title rights. Firstly, on the grounds that certain statutory procedures regarding determinations of native title rights were not followed; and secondly, there was a larger conceptual barrier. Von Doussa J stated:

The principle that ownership of land and ownership of artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as 'skeletal' and stand in the road of acceptance of the foreshadowed argument.⁷⁷

However, the court did recognise that the artist owed a fiduciary obligation to the group. In this way, he had to deal with the copyright in a manner consistent with the customary obligations associated with his right to depict the images in his work. This might allow the clan representative to take action where the author is unknown or unwilling to take action against a third party infringer.

Performers' rights

Performers' rights are rights provided under the Copyright Act to performers of performances including readings, recitals, dances and dramatic improvisations.⁷⁸ The performers' rights allow performers to prevent certain unauthorised uses of their performances,⁷⁹ such direct or indirect recordings and broadcast of the performances⁸⁰ without the authority of the performer. There are some exceptions including news reading, recital or delivery⁸¹ and sports activities.⁸²

Filmmakers and sound recordists must obtain consent from performers for the recording of performances of dance and story. Such consent may be in writing but it may also be implied. Once consent is given, the filmmaker or sound recordist can deal with the film or recording by way of the copyright without consulting the original performer.

72. World Intellectual Property Organisation, Intergovernmental Committee of Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options' (6th Session paper prepared by the Secretariat, 15–19 March 2004) 23.

73. Copyright Act 1968 (Cth) s 10(1).

74. Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Sydney: Law Book Co, 2nd ed., 1999) [14.135].

75. Above n 8.

76. Ibid.

77. Ibid 204.

78. Copyright Act 1968 (Cth) s 248A(1) defines 'performance'.

79. Copyright Act 1968 (Cth) s 248J.

80. Copyright Act 1968 (Cth) s 248G.

81. Copyright Act 1968 (Cth) s 248A(2)(b).

82. Copyright Act 1968 (Cth) s 248A(2)(c).

A performer's right is not the same as copyright.⁸³ Indigenous performers may think they are consenting for a film to be used for one purpose only, but then the use is much wider. The film may be circulated to a much wider audience than the original performance. The story or dance performance told on the film is in this way controlled by the filmmaker or sound recordist without the ability of the relevant Indigenous community to ensure that the cultural material is portrayed in a respectful way. There are also cultural issues in some communities where it is against customary practices for images of deceased persons to be circulated. This type of cultural practice is not recognised under copyright law. However, we note that there is a developing industry practice within the Australian film industry to include warning and notice before broadcasting images of Aboriginal people that may have deceased since the filming occurred.⁸⁴

Performers' rights do not apply to still photography. Indigenous performers of ceremonies or songs who are photographed by still photographers cannot use these provisions to stop unauthorised use. A commercial photographer at an Indigenous dance festival photographed an Indigenous dance group.⁸⁵ The photographer reproduced the photograph as postcards and licensed the rights to a CD manufacturer to reproduce on the cover of CDs of stylised Indigenous music that was unrelated to the dance group or their clan. The image was also reproduced on a related website. All of this was done without the dance group's permission. The dance group wanted the commercial sale of the image stopped. The unauthorised commercial sale of the photograph was offensive as it reproduced the group in body paintings for ceremony; they were also in a particularly relevant dance stance and one of the dancers had since died. Copyright in a photograph vests with the maker of the photograph and, under copyright laws, the photographer is generally free to exploit that photograph commercially.

The WIPO Performances and Phonograms Treaty (WPPT)⁸⁶ requires contracting parties to grant performers the exclusive right to exploit their performances, whether live or recorded. The performer's consent is necessary before exploitation of any recording of a performance can take place. This includes the making and selling of records or videos of the performance. Prior authorisation by a performer would not be required before the broadcasting or public performance of a record, but the performer would share a statutory payment with the producer of the recording. The WPPT also includes the moral or personal rights of attribution and integrity for sound performers,⁸⁷ along the lines of the moral rights it is proposed to grant creators of works and makers of films.

Australia has not acceded to the WPPT; however the signing of the Singapore–Australia Free Trade agreement and the Australia–United States Free Trade Agreement requires the nation to accede to the WPPT.⁸⁸ The Free Trade Agreement Implementation Bill 2004 (USA) introduces a range of changes to the Copyright Act, which would expand performers' rights, including the creation of performers' copyright in sound recordings. The changes introduce a new definition of performance, as required by Art 2(a) of the WPPT, to expand the current definition to include a performance on an expression of folklore.⁸⁹ This may be of benefit to Indigenous performers as the consent of the folklore performer would be required prior to commercial exploitation of the film or recording, and the performer may also be entitled to share in any royalties.

Copyright cases

Yangarriny Wunungmurra v Peter Stripes Fabrics

In 1983, Yangarriny Wunungmurra took Peter Stripes Fabrics to the Federal Court for unauthorised use of his painting, *Long-necked Freshwater Turtles by the Fish Trap at Gaanan*.⁹⁰ The artwork was an important cultural work. The artist had learnt to paint the story from Gawirrin Gumana's father, a senior member of the clan who also had rights under Aboriginal laws to the story embodied in the painting. However, the artist added his own style of signature to the work in the way he depicted the turtle. The work also included the background diamond shapes and cross-hatching patterns to denote social and ancestral relationships. By changing elements of the design, Peter Stripes Fabrics offended Aboriginal law.⁹¹

83. Janke, *Our Culture: Our Future*, above n 10, 56.

84. Janke T, *Towards a Protocol for Filmmakers Working with Indigenous Content and Indigenous Communities* Issues Paper (Australian Film Commission, 2003) 11.

85. See Janke T, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Geneva: World Intellectual Property Organisation, 2003) 87–99.

86. World Intellectual Property Organisation, *Performances and Phonograms Treaty*, Geneva, 20 December 1996.

87. *Ibid*, Art 5.

88. Art 17.1.3.

89. Varghese J, 'Guide to Copyright and Patent Law Changes in the US Free Trade Implementation Bill 2004', (2004) 3 *Current Issues Brief* <<http://www.apf.gov.au/library/pubs/CIB/2004-05/05cib03.htm>>.

90. *Wunungmurra v Peter Stripes Fabrics*, (unreported, Federal Court of Australia, 1983). See the recent article by Burns E Coleman, 'Aboriginal Art and Identity: Crossing the Border of Law's Imagination' (2004) 12 *Journal of Political Philosophy* 24.

91. Stevenson N, 'Infringement of Copyright in Aboriginal Artworks' (1985) 17 *Aboriginal Law Bulletin* 3.

Using copyright laws, the artist was able to show that his painting had been copied from a catalogue produced as part of one of the first major Aboriginal art exhibitions, *Aboriginal Australia*. The court awarded damages of \$1 500 and account of profits as well as ordering the delivery up of the infringing fabric.⁹²

Yumbulul v Reserve Bank

In *Yumbulul v Reserve Bank of Australia*,⁹³ Mr Yumbulul created a morning star pole under the authority given to him as a member of the Galpu clan group. The pole, a funerary object, was sold to the Australian Museum for public display. As part of an agency agreement, Mr Yumbulul licensed his reproduction rights to the Aboriginal Artists Agency. The right to reproduce the pole was subsequently licensed to the Reserve Bank of Australia to reproduce on the bicentennial \$10 note.

Mr Yumbulul received considerable criticism from his community for allowing this to happen. According to the traditional custodians, such use exceeded the authority he had been given under customary laws. While it was permissible for the pole to be permanently displayed to educate the wider community about Aboriginal culture, it was not considered culturally appropriate for such a sacred item to be reproduced on money.

Mr Yumbulul initiated action in the Federal Court against the Aboriginal Artists Agency and the Reserve Bank. The Court found that Mr Yumbulul mistakenly believed the licence to the Aboriginal Artists Agency and the Reserve Bank would impose limitations on the use of the pole similar to those in Aboriginal customary laws. Mr Yumbulul alleged that he would not have authorised the licence to the Reserve Bank had he fully understood the nature of it. However, the court ruled that there was insufficient evidence to establish this. In reaching its decision the court noted that 'Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin'.⁹⁴

Bulun Bulun v Flash T-shirt (settled matter)

In 1989, the artistic works of Johnny Bulun Bulun and 13 other Aboriginal artists were reproduced without authority on t-shirts. The artistic works embodied pre-existing traditional images of the artist's clan group. Johnny Bulun Bulun was entitled by custom to depict magpie geese and waterholes. The case did not proceed to hearing and was settled for approximately \$150 000 for compensation and costs for alleged infringement of their copyright in the artworks by the manufacturer and two retailers.

Milpurrruru v Indofurn Pty Ltd (Carpets Case)

In *Milpurrruru v Indofurn Pty Ltd*,⁹⁵ von Doussa J discusses copyright infringement of Indigenous artworks, which concerned creation of stories of cultural significance to the artist applicants and the cultural groups to which the artists belonged. The case involved the unauthorised reproduction of Indigenous artworks on carpets that were made in Vietnam and imported into Australia. The main findings of the case covered the following issues.

Originality: Despite the fact that many Indigenous artworks follow pre-existing traditional designs, a work may be original if there is sufficient detail and complexity reflecting great skill and originality.

Substantial reproduction: Some carpets had altered versions of the artworks. Under the Copyright Act it is not necessary for an artwork to be an exact copy for it to infringe copyright. Copying occurs when an artwork has been substantially reproduced. Generally, to consider this the court will look at the striking similarities between the original artwork and the infringing copy. Quality is more important than quantity and depends largely on the nature of the parts taken from the original artwork. Von Doussa J noted that the altered images on the carpets, although not identical to the artworks, reproduced parts of the original artworks that were centrally important to that particular artwork. For example, the part taken from Tim Payunka Tjapangati's artwork *Kangaroo and Shield People Dreaming* to produce one of the infringing carpets reproduced an important part of the painting which depicted a sacred man's story. This was one factor that led the court to conclude that copyright had been infringed.⁹⁶

92. Johnson V, 'The First Copyright Case' in National Indigenous Arts Advocacy Association and Macquarie University *Copyrites: Aboriginal Art in the Age of Reproductive Technologies* (Sydney, 1996) 15.

93. (1991) 21 IPR 481.

94. Ibid 490.

95. Above n 8.

96. Ibid 678–679.

Cultural harm damages: The court's decision regarding damages was also significant. Having decided that the carpets were infringements of copyright, the court awarded approximately \$188,000 in damages and ordered the importers to hand over the unsold carpets. Part of the award was given in consideration of the personal hurt and cultural harm. The judge considered that the misuse of the artwork caused great upset and cultural harm to the artists. The court noted that the standing of the artist within the community can be affected where the artworks are reproduced without the consent of the group and in a culturally offensive manner. This was because, regardless of whether the artists authorised the reproduction of their artworks on carpets, they were responsible under Indigenous law for the transgression that had occurred and were liable to be punished for such a breach.

Remedies – jointly awarded: The joint applicants of the case requested that the damages be made as a global award to the artists as a group so that the artists, the representatives of the deceased artists and the Public Trustee could discuss and determine the distribution in accordance with their cultural wishes. The court looked at the fact that the *Administration and Probate Act 1969* (NT) allowed the estate of intestate Aboriginals to 'be distributed in accordance with the traditions of the community or group to which the intestate Aboriginal belonged'.⁹⁷

The court agreed to make a global award to the artists as a group rather than by assessing each artist separately according to the loss and damage that each suffered.⁹⁸ The court considered that:

[T]here may be scope, even in the case of the estates administered by the Public Trustee, for the distribution of the proceeds of the action to those traditional owners who have legitimate entitlements according to Aboriginal law to share compensation paid by someone who has without permission reproduced the artwork of an Aboriginal artist.⁹⁹

We note that the Western Australian administration laws allow for similar distribution of intestate Aboriginal estates. There is a special section dealing with customary law for intestacy in the *Aboriginal Affairs Planning Authority Act 1972* (WA).¹⁰⁰

Bulun Bulun v R & T Textiles

In *Bulun Bulun v R & T Textiles Pty Ltd*¹⁰¹ issues of collective ownership and copyright were discussed. Johnny Bulun Bulun is a well-known Indigenous artist from Arnhem Land. His work *Magpie Geese and Water Lilies at the Waterhole* was altered and copied on fabric imported into Australia by R & T Textiles. The artistic works incorporated imagery that is sacred and important to the Ganalbingu people's cultural heritage.

The important aspect of the case was that George Milpurrruru, a representative of the Indigenous owners of the Ganalbingu people, also commenced action as co-applicant. Mr Milpurrruru brought proceedings in his own right, claiming that the Indigenous owners of Ganalbingu country are the equitable owners of the copyright subsisting in the artistic works. The court dismissed Mr Milpurrruru's claim on the basis that in doing so provided some interesting points regarding the application of copyright to Indigenous culture as follows:

- Evidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system.
- The applicants claimed that intellectual property is an incident of native title in land. The Minister for Aboriginal and Torres Strait Islander Affairs, who was granted leave to make submissions to the court, argued that pleading may give rise to the claim that the Ganalbingu people were entitled to a determination in the proceedings that they were the native title holders of the Ganalbingu country. The *Native Title Act 1993* (Cth) contains provisions for applications for determination of native title. In the absence of such an application, the Federal Court has no jurisdiction to make a determination of native title in land. Von Doussa J considered that in this case there was no application for determination of native title; therefore, the court did not have jurisdiction to make a determination on the issue of native title.
- The joint ownership provisions of the Copyright Act effectively preclude any notion of group ownership in an artistic work, unless the artistic work is a 'work of joint ownership' within the meaning of s 10(1) of the Copyright Act. In this

97. *Milpurrruru v Indofurn*, above n 8, 688; *Administration and Probate Act 1969* (NT) s 71B.

98. Remedies are usually calculated on the basis on loss and damage to each individual.

99. *Milpurrruru v Indofurn*, above n 8, 240.

100. *Aboriginal Affairs Planning Act 1972* (WA) s 35.

101. Above n 8.

case, von Doussa J considered that there was no evidence to suggest that any person other than Mr Bulun Bulun was the creative author of the artistic work.

- There was no evidence as to any form of express agreement of a contractual nature that vested an equitable interest in the ownership of the copyright in Mr Milpururru or the Ganalbingu people.
- Mr Bulun Bulun owes under fiduciary duty to Mr Milpururru and the Ganalbingu people to protect the ritual knowledge that he has been permitted to use under customary laws. Their primary right, in the event of a breach of obligation by the fiduciary, is a right in personam to bring an action against the fiduciary to enforce the obligation. The court considered that Mr Bulun Bulun had fulfilled this obligation by taking legal action; therefore there was no need for the intervention of equity to provide any additional remedy to the beneficiaries of the fiduciary relationship.

Bulurru v Oliver

In *Bulurru Australia Pty Ltd v Oliver*¹⁰² an Indigenous artist, Mr Dale Oliver, licensed his artwork to Bulurru. Mr Oliver owned copyright in his artworks and entered into a written agreement with Bulurru in 1992 for a term of three years with an option to renew. In 1994 a disagreement arose, in which Mr Oliver sought to reject the renewal option. Bulurru commenced court action against Mr Oliver seeking a declaration that its option to renew was validly exercised.

Around the time the dispute arose, Bulurru engaged a graphic designer to produce designs that reflected aspects of Mr Oliver's designs. Mr Oliver argued as a cross-claim that the new designs infringed the copyright in his original licensed designs. The court accepted that the Bulurru artworks were derivative and reflected Mr Oliver's ideas, concepts and many of his techniques. The court held that some of the new designs were substantial reproductions of the original artworks of Mr Oliver. Davies AJ stated:

Overall I am satisfied that there has been deliberate copyright, not merely of Mr Oliver's ideas but of the essence of the design which appears in the bottom half of Mr Oliver's Kangaroo Tracking, and that a substantial part of Mr Oliver's work has been reproduced.¹⁰³

However, the court looked at some of the other new designs and considered that they were substantially different from Mr Oliver's work. Even though the designer used Mr Oliver's artwork in preparing the new designs, they did not breach copyright.¹⁰⁴

Moral rights

Moral rights were introduced into the Copyright Act by the *Copyright Amendment (Moral Rights) Act 2000*.¹⁰⁵ Moral rights are:

- The rights of attribution of authorship.
- The rights not to have authorship falsely attributed.
- The rights of integrity of authorship.¹⁰⁶

Only individuals have moral rights.¹⁰⁷ Companies do not have moral rights. Currently, an Indigenous clan group or community cannot generally assert moral rights collectively. However, the federal government has recently drafted the Indigenous Communal Moral Rights Bill 2003 (Cth). The rights apply to creators of artistic, literary, dramatic or musical works, and directors, producers and screenwriters of films. The rights apply to authors of literary, dramatic, musical and artistic works and authors of cinematograph films.¹⁰⁸

Unlike copyright, moral rights are not economic rights, although damages may be granted as relief for an infringement of moral rights.¹⁰⁹ Moral rights are inalienable rights. They cannot be assigned or sold. Moral rights are in addition to other rights under copyright;¹¹⁰ therefore, they remain with the author where the copyright does not belong to the author. For instance, employees hold moral rights in created works, even if the copyright belongs to the employer.

The current moral rights provisions exist for the benefit of individuals.

102. (2000) 49 IPR 384.

103. Ibid 14.

104. Ibid 13.

105. The new laws came into effect on 21 December 2000.

106. Copyright Act 1968 (Cth) s 189.

107. Copyright Act 1968 (Cth) s 190.

108. Authors of cinematograph films include the director, the producer (where that person is a natural person) and the screenwriter of the film.

109. Copyright Act 1968 (Cth) s 195AZA.

110. Copyright Act 1968 (Cth) s 192.

• The right of attribution

The author of a work has a right to be identified as the author of that work.¹¹¹ The author is entitled to be attributed where the work has been used in a certain way. For example, the author of an artistic work is entitled to be attributed where his or her work is reproduced in material form, published, exhibited or transmitted.¹¹²

Identification of the author of a work must be clear and reasonably prominent;¹¹³ that is, attached to each copy or adaptation made of the work.¹¹⁴ The right of attribution in all works continues for the period of copyright;¹¹⁵ that is, 50 years after the death of the author.

• The right not to be falsely attributed as the author

An author has the right not to have authorship of a work falsely attributed.¹¹⁶ It is false attribution to deal with an altered literary, dramatic, musical or artistic work, or reproduction of the work, as if it were unaltered, knowing that the work or reproduction is in fact altered.

• The right of integrity

The author has the right of integrity of authorship in respect of the work.¹¹⁷ This right provides that an artist may bring an action if the work is subjected to derogatory treatment. 'Derogatory treatment' in respect of an artistic work includes:

- (a) the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or
- (b) an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs.¹¹⁸

The right of integrity is not infringed if a work is subjected to derogatory treatment and it can be proved that the treatment was reasonable in all the circumstances,¹¹⁹ or if the author consented to the treatment.¹²⁰ Indigenous authors should be cautious when considering commercial agreements and contracts of employment that ask them to consent to acts that would usually infringe their moral rights. However, even if consent was not given, the fact of employment¹²¹ and industry practice may be taken into account when deciding whether the derogatory treatment was reasonable in all the circumstances.¹²²

Preserving the overall integrity of the work and the underlying story or ritual knowledge is extremely important to the proper representation of Indigenous art and film. Digital technology allows greater access to copyright materials and increases the ways in which copyright works and films can be distorted and altered. The right of integrity is a useful right for Indigenous artists to protect the integrity of their works.

• Remedies for moral rights infringements

The remedies available for a successful action include:

- An injunction imposed by the court.
- Damages for loss resulting from the infringement.
- An order for a public apology.
- An order that the false attribution or derogatory treatment be removed or reversed.

When pursuing copyright claims, Indigenous artists have asked for public apologies from infringers to rectify their reputations. This had not been a remedy until moral rights laws were introduced. The moral rights laws open the door to this type of remedy.¹²³

111. Copyright Act 1968 (Cth) s 193(1).

112. Copyright Act 1968 (Cth) s 194(2).

113. Copyright Act 1968 (Cth) s 195AA.

114. Copyright Act 1968 (Cth) s 195 AB.

115. Copyright Act 1968 (Cth) s 195AM.

116. Copyright Act 1968 (Cth) s 195AC.

117. Copyright Act 1968 (Cth) s 195AI.

118. Copyright Act 1968 (Cth) s 195 AK.

119. Copyright Act 1968 (Cth) s 195AS. Certain matters must be taken into account when determining if the treatment was reasonable. These are listed in s 195AS(2) for literary, dramatic, musical and artistic work; and s 195AS(3) for films.

120. Copyright Act 1968 (Cth) s 195AW (film or work included in a film); and s 195AWA (work that is not a film or included in a film).

121. Copyright Act 1968 (Cth) s 195AS(2)(e)–(g) (literary, dramatic, musical or artistic works); and s 195AS(3)(f)–(h) (films).

122. Copyright Act 1968 (Cth) s 195AS.

123. Janke T, 'A Moral Issue: Moral rights and Indigenous People's Cultural Rights', *NIAAA Newsletter*, Autumn 2001, 2–3.

Balgo Artists: Olympic museum website

From 10 July to 15 October 2000 in Lausanne, Switzerland, the Olympic Museum Foundation presented an exhibition entitled *Aboriginal Art: An Immemorial Fountain of Youth*. This exhibition contained works by Australian Aboriginal artists including Western Australian Aboriginal artists Tjampitjin and Richard Tax Tjupurulla. The exhibition posters, the invitations to its preview, the promotional flyers and the exhibition catalogue featured a reproduction of a work entitled *Kulkun Near Lake Mackay in the Great Sandy Desert* by Tjampitjin, without indicating the name of the artist or the title of the work.

During the exhibition, and for several weeks afterwards, the Olympic Museum website¹²⁴ featured images of three of the works shown at the museum; viz *Bush Flowers* by Mary Kemarre; *Tiddal in the Great Sandy Desert* by Richard Tax Tjupurulla; and *Kulkun near Lake Mackay in the Great Sandy Desert* by Tjampitjin. These works were reproduced on the museum website without the authorisation of the authors or their assigns. During this time, people visiting the website were able to download the images to use them as wallpaper on their computer screens.

The artists pursued the matter arguing that under the Swiss Copyright Law¹²⁵ the Olympic Museum had infringed their copyright and rights of paternity (moral rights). When notified of the issue, the Olympic Museum immediately agreed to stop its conduct and removed the images from its website. The issue relating to damages continued and the matter was settled, damages paid, and a written letter of apology given to the artist signed by Juan Antonio Samaranch, President of the Olympic Museum Foundation.¹²⁶ The apology was also published on the website in four languages asking any people who downloaded the images to delete them from their hard drives.

Indigenous communal moral rights

Moral rights are individual rights only. They belong to the copyright owner of a work. For example, the work 'Djanda and the Sacred Waterhole', created by Banduk Marika, is a communally owned design and theme belonging to the Rirrangu clan. If the work was derogatorily treated, Banduk would have a remedy under moral rights. However, the Rirrangu clan do not have any moral rights under the Copyright Act even though, under their customary laws, the clan or a person on behalf of the clan may have responsibility for the cultural integrity of a work. This does not necessarily have to be the artist. This requirement excludes Indigenous persons with authority other than the author (creator) from legally exercising moral rights over works embodying traditional ritual knowledge.¹²⁷

Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003

In December 2003, the government drafted proposed amendments to the Copyright Act for Indigenous communal moral rights. The draft Bill is said to give effect to the government's 2001 election policy commitment and to a commitment made to Senator Aden Ridgeway in parliament during the passing of the Moral Rights Bill in December 2000.¹²⁸

The Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth) was sent to selected Indigenous organisations for comment. To date, there has been no public discussion relating to the amendments. The Bill proposed the following regime:

Must be a copyright work or film

For Indigenous communal moral rights to be recognised, they must be in a copyright work or a film with the rights attached. This means that there must be a work as defined under the Copyright Act; that is, the particular cultural item must be:

- an artistic, musical, dramatic or literary work which meets the requirement of the Copyright Act, or
- a film as defined under the Copyright Act.

124. <<http://www.museum.olympic.org>>.

125. Federal Law on Copyright and Neighbouring Rights (RS/SR 231.1) October 1992, as last amended in December 1994.

126. E Colman, 'Olympic Apology to Artists', *The Australian*, 17 February 2003, 3.

127. Janke, 'A Moral Issue', above n 123, 2–3.

128. Intellectual Property Branch, Department of Communications, Information Technology and the Arts and the Copyright Law Branch, Attorney General's Department, *Indigenous Communal Rights Paper*, (Canberra, December 2003).

To be protected under communal moral rights, the cultural material item must be one that is:

- in material form and is original, or
- created by a living artist or one that has only been deceased for less than 50 years.

Many works of cultural significance will not meet this requirement because they will be oral in form or older than 50 years after the death of the artist.

Communal moral rights exist alongside individual moral rights

The Bill provides that communal rights will be exercisable independently of the individual author's copyright. It also exists separately from the copyright in the relevant material. In this respect, Ian McDonald notes that Indigenous communal moral rights apply to a cultural work. A person seeking permission to use the work will need to address:

- copyright clearance,
- individual moral rights issues to be observed, and
- Indigenous communal moral rights issues to be observed.¹²⁹

Duration of Indigenous communal moral rights

The Bill proposes that Indigenous communal moral rights would exist in a work for the duration of the copyright period. The right should be in perpetuity if it is to adequately recognise Indigenous customary laws to protect cultural material.

Before first dealing requirements

For there to be Indigenous communal moral rights in a copyright work, the following requirements must be met before the first dealing of the work:

(i) Drawn from traditional base

The work must be drawn from the 'particular body of traditions, observances, customs and beliefs held in common by the Indigenous community'.¹³⁰ A community is defined loosely and can include an individual, family, clan or community group.

(ii) Voluntary agreement that communal moral rights exist

A voluntary agreement must be entered into between the creator of the work and the Indigenous community. The requirement of a voluntary agreement puts the onus on the Indigenous community. Most Indigenous artists and creators who live and work in their communities would obligingly meet this requirement. It is current practice for them to consult and practice cultural protocols or to observe customary laws, and to seek consent and permission to use culturally owned material. Outsiders who are not Indigenous or third party users perform the majority of abuses of communal moral rights. For example, in the *Carpets Case*¹³¹ the altered designs were copied images from text books. These types of abuses will not be protected against by the proposed amendments. The community would not be able to make third party non-Indigenous users subject to a voluntary agreement, and in many cases may not even know about them until they have occurred.

(iii) Notice of association must be given to third parties

There must be acknowledgement of the Indigenous community's association with the work.¹³² This requires notice of association to be given by the community and the author. This can be done by the community in respect of works and films on which it has been consulted; however, it will not be able to give 'notice' on works and films on which it has not been consulted. These are likely to be the works and films that are infringing communal moral rights.

(iv) Consent from interest holders

Interest holders in the work need to have consented to the Indigenous communal rights in the work. In this respect, an Indigenous community has no rights if an interest holder refuses or fails to consent to the Indigenous communal moral rights arising.

129. McDonald I, 'Indigenous Communal Moral Rights', *Australian Intellectual Property Law Bulletin*, 16 July 2003.

130. Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth), clause 195AZZZT, 1(a), 39.

131. Above n 8.

132. Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth), clauses 195AZZL, 195AZZM.

How are Indigenous communal moral rights exercised?

An Indigenous community that has Indigenous communal moral rights in respect of a work may exercise those rights only through an individual who is the authorised representative in respect of the work. This authorised representative may be recognised by the community according to its cultural practices, or may be appointed by the community according to decision-making processes.

Defences, notices and consents

There is no Indigenous communal moral rights infringement if the actions were reasonable or if the authorised user consented.

Reasonableness defence

Matters to be taken into account when considering whether an action has been given derogatory treatment are listed in the proposed legislation and include the nature of the relationship between the author of the work and the Indigenous community at the time of any contact, or attempted contact, by the person for the purposes of:

- determining whether the community has a right of integrity in respect of the work;
- seeking consent to an act or omission that would infringe the right;
- the nature of the Indigenous community at the time of any contact or attempted contact for the purposes of:
 - determining whether the community has a right of integrity, or
 - seeking consent to an act or omission;
- the nature of the work;
- the purpose for which the work is used;
- the context in which the work is used;
- any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
- any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work; and
- whether the treatment was required by law or was otherwise necessary to avoid a breach of any law.¹³³

Consent

It is not an infringement of an Indigenous communal moral right of an Indigenous community in respect of a work to do, or omit to do, something if the act or omission is within the scope of a written consent given by the community's authorised representative in respect of the work. There is provision which makes consent from undue pressure invalid. It is important to note that there already is considerable inflexibility in some industries with individual moral rights. Many authors are faced with wide consent clauses in funding and commission agreements. A similar situation could occur with Indigenous communal moral rights if there is a consent regime in the model.

Remedies

If the authorised representative brings a successful action of infringement, the following remedies are available:

- Injunction;
- Damages for resulting loss;
- Declaration that an Indigenous communal moral right has been infringed;
- An order that the defendant make a public apology for the infringement; and
- Any false attribution or derogatory treatment be removed or reversed.

The public apology is often a remedy that Indigenous artists and communities consider culturally appropriate and it is sought as retribution.

Commentary on the Bill

The draft Bill has been criticised as not being effective. According to Jane Anderson, 'the draft Bill is highly complicated and legalistic, presenting serious practical hurdles for Indigenous people and communities seeking to protect their

¹³³. Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth).

knowledge and its use'.¹³⁴ Jane Anderson states that there is a big difference between the government's stated objective and the current draft presented. She states that it is difficult to see where a remedy might arise for infringement.

Another issue is that there has been limited consultation by the government with Indigenous peoples on the draft Bill. The government has failed to engage Indigenous stakeholders in a meaningful debate on the contents of the Bill. This seems to be a major oversight if the main impetus for the introduction of the Bill was to benefit Indigenous communities. Robynne Quiggin criticises the Bill as being based on the need to provide certainty to third parties in their dealings with Indigenous art, rather than being based on the nature or content of communal ownership.¹³⁵

If Indigenous communal moral rights only exist where there is a voluntary agreement between the creator and the Indigenous community then the following situations occur:

- Non-Indigenous people, who use Indigenous knowledge, stories and songs without permission and do voluntarily agree that the new copyright work they produce has Indigenous moral rights, will not be actionable under these provisions.
- Indigenous creators are more likely to voluntarily agree that Indigenous communal moral rights exist in their works. For these creators, issues of giving attribution and guarding integrity will need to be observed in their arts practice.

Is a violation of customary law an infringement of moral rights? Not all violations of customary law are likely to be infringements of moral rights. The role of customary law in moral rights issues will be important in determining the content of the rights of attribution and integrity.

Resale royalty

For many years artists, Indigenous and non-Indigenous, have sought the introduction of a resale royalty scheme in Australia. The resale royalty, also known as the *droit de suite*, is an amount paid to artists on sales of their work in the secondary art market.

Underlying the arguments for the resale royalty include concerns for:

- recognition of the poor economic status of artists; and
- large profits made, in some instances by purchasers and sellers of artistic work, with no returns to the artist.

In the case of an Indigenous artist, these arguments are strengthened by recognition of the artist's ongoing connection to the cultural material embodied in some artistic works. For instance, if a painting or other work includes cultural information relevant to the artist, it may often be appropriate that the artist be informed about subsequent sales and receive some share of the sale price. Introduction of the resale royalty in Australia is consistent with Article 14^{ter} of the *Berne Convention for the Protection of Literary and Artistic Works*¹³⁶ which provides that members of the union may provide for the protection of a resale royalty for artists,¹³⁷ but the protection is available only where national legislation for the right is implemented. The nature of the legislation is to be determined by the member country.

The resale royalty operates in a number of jurisdictions in the United States and Europe. Members of the European Union have been directed to implement domestic resale royalty arrangements by 2006.¹³⁸

Registered designs¹³⁹

Designs laws protect designs as they are applied to products and items. Under Indigenous customary laws, a design or motif belongs to a certain Indigenous cultural group, and there are laws that govern who can use and

134. Anderson J, 'Indigenous Communal Moral Rights: The Utility of an Ineffective Law' (2004) 5(30) *Indigenous Law Bulletin* 8.

135. Quiggin R, 'The Contribution of Protocols and Moral Rights' (Paper presented to the Arts Management Advisory Group, Snapshot 2, Melbourne, 5 August 2004).

136. Article 14^{ter} of the *Berne Convention for the Protection of Literary and Artistic Works*, (Paris, 24 July 1971) states:

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

137. Article 1 of the *Berne Convention for the Protection of Literary and Artistic Works*, (Paris, 24 July 1971) states: 'The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.'

138. Directive 2001/84/EC, European Parliament and Council of the European Union, *Artists' Resale Right (Droit de Suite) Directive*, 21 September 2001.

139. This section is adapted from Janke, *Looking Out For Culture: Introduction to Indigenous Arts and Culture and Copyright, Trademarks and Designs*, Workshop Paper (Sydney, 2004) 14.

reproduce this material. Can the designs laws be used to protect Indigenous clan designs, didgeridoos, morning star poles and basket weaving techniques that are produced in recognition of Indigenous cultural rights?

In 1993, a review of the *Designs Act 1906* (Cth) undertaken by the ALRC looked at the issue of protecting Indigenous designs as part of the overall review of the Act. The Issues Paper, *Designs*, noted as follows:

Reports of misappropriation and misuse of Aboriginal designs and art have increased with the growing popularity of Aboriginal art. Existing copyright and design law is not adequately equipped to deal with the particular ownership rights which are recognised under Aboriginal customary law. In relation to a particular design, a select few Aborigines, because of their position in the community, may understand the cultural and spiritual significance of the design and have rights to 'own' the design. Other Aborigines will also hold rights of another kind, while others may have no rights in the design. In traditional Aboriginal society the responsibility for safeguarding cultural heritage is vested in a few custodians or guardians who have been given this authority by the community, and free or unrestricted access to traditional designs will result in a serious abuse of the rich Aboriginal heritage.¹⁴⁰

In its Final Report released in 1995,¹⁴¹ the review team considered that the issue should be dealt with in a broad-based approach rather than including them as part of the Designs law review. There is no special protection for Indigenous designs or cultural material under the new *Designs Act 2003* (Cth) which came into operation in 2004. The Designs law applies to Indigenous designs as it does to all designs that meet the requirements for protection.

What is a design?

The *Designs Act 1906* (Cth) defined a design as the 'features of shape, configuration, pattern or ornamentation applicable to an article, being features that, in the finished article, can be judged by the eye, but does not include a method or principle of construction'.¹⁴² An 'article' was defined under the Act to mean any article of manufacture.

The 1906 Act was replaced by the *Designs Act 2003* (Cth). The 2003 Act defines 'design' much more broadly as follows:

'Design' in relation to a product, means the overall appearance of the product resulting from one or more visual features of the product.¹⁴³

A design can only be registered in relation to a product. It is not possible to register a design itself. A 'product' is 'a thing manufactured or hand made'.¹⁴⁴ There is a commercial focus. Indigenous designs such as wandjinas and other clan insignia may not be commercially applied to a product; therefore, they are not registrable as a design under the *Designs Act 2003* (Cth).

Registration process

Applications must be lodged with the Designs Office of IP Australia, a federal government agency. There is a standard form for applications. Applications must meet minimum filing requirements as stipulated under legislation.¹⁴⁵

Registered designs can be made enforceable by certification, can carry exclusive rights or can be published only. Published designs do not give any rights.

There are costs and fees payable to IP Australia associated with the registration of a design and the examination process. This does not include legal fees if a lawyer or patent attorney is involved in lodging or prosecuting the application. To register Indigenous designs for protection under this system could be expensive. Many Indigenous groups have little access to legal services and resources to afford registration costs and legal fees.

Exclusion for insignia

There are exclusion categories in the Designs Regulations for certain insignia, Australian state and Commonwealth flags and emblems, medals and scandalous designs.¹⁴⁶ Clan motifs are signifiers of Indigenous groups and are arguably the same as insignia; however, there are no exclusion categories for Indigenous insignia.

140. Australian Law Reform Commission, *Designs*, Issues Paper No 11 (April 1993) [9.9].

141. Australian Law Reform Commission, *Designs*, Final Report No 74 (1995).

142. *Designs Act 1906* (Cth) s 4(1).

143. *Designs Act 2003* (Cth) s 5.

144. *Designs Act 2003* (Cth) s 6.

145. *Designs Act 2003* (Cth) s 21(2) and Designs Regulations 2004 (Cth) reg 3.01.

146. Designs Regulations 2004 (Cth) reg 4.06.

New and distinctive

Under the *Designs Act 1906* (Cth), a design had to be 'new' and 'original' at the date of application (priority date). The 2003 Act retains the requirement of 'new' but replaces the 'original' requirement with 'distinctive'.¹⁴⁷ A design must be new in that it is not known or previously used in Australia. A design is new unless it is identical to a design that forms part of the prior art base. The Registrar of Designs may refuse to register a design if, before the date of application, the design has been used previously in Australia or published anywhere in the world.¹⁴⁸

A design must be 'distinctive' in that it must not be 'substantially similar in overall impression to a design that forms part of the prior art base'.¹⁴⁹ This concept of 'substantial similarity in overall impression' is critical to considering the issue of distinctiveness. The design will be assessed from the point of view of someone who is familiar with the product to which the design relates; that is, from the informed user's point of view. This is quite different from the test under the 1906 Act which required expert evidence to identify the similarities and differences and an alleged infringing article.

How long does design registration last?

Under the 1906 Act, protection for registered designs lasted for up to 16 years from the date of filing the application.¹⁵⁰ The 2003 Act now reduces the period of protection to a maximum of 10 years. An initial term of five years from the filing date is given after acceptance.¹⁵¹ The registered owner may apply for renewal of the registration for a further five years.¹⁵² There is a renewal fee payable at this time.

Once design protection expires the registered designs are released into the public domain where they are free for all to use – commercially or otherwise. Indigenous people's right to use their communal owned designs, and to exclude use by others under their customary law, is a cultural practice that continues in many Aboriginal communities. This practice continues for as long as the culture continues.¹⁵³ The limited term of protection for designs limits the rights of Indigenous cultural custodians to control the use of their sacred motifs or clan identified designs outside this period. Once the period has expired, any person, either inside or outside a cultural group, can use an Indigenous motif or design without seeking proper consent under customary law. For this reason, the ALRC Discussion Paper on *Designs* considered that:

Such an outcome would be inappropriate when designs are sacred and reproducing them would cause offence to Aborigines. The Working Party found that in such circumstances reproduction outside the traditional or customary law context should be prohibited.¹⁵⁴

Who may register a design?

Generally, the person who creates the design or a person who employs the creator, or derives title from the creator, is entitled to be entered on the register as the registered owner of the design.¹⁵⁵ There is no recognition of the communal ownership of the design as belonging to a cultural group or groups. This is not applicable to Indigenous cultural iconography that is often collectively owned.

Exclusive rights of registered owners

During the term of protection, the registered owner has the exclusive right to use the design and to prevent others from using the design without permission, including 'to make or offer to make a product, in relation to which the design is registered, which embodies the design'.¹⁵⁶ These rights are personal property and can be assigned and licensed. They are also transferable under will or by operation of law.

147. *Designs Act 2003* (Cth) s 15(1).

148. The 2003 Act extends the prior art base: *Designs Act 2003* (Cth) s 15.

149. *Designs Act 2003* (Cth) s 16(2).

150. *Designs Act 1906* (Cth) s 27A.

151. *Designs Act 2003* (Cth) s 46(1).

152. *Designs Act 2003* (Cth) s 47.

153. Janke, *Our Culture: Our Future*, above n 10, 64.

154. Australian Law Reform Commission, *Designs*, Discussion Paper 58 (1994) 16.

155. *Designs Act 2003* (Cth) s 13(1).

156. *Designs Act 2003* (Cth) s 10(1)(a).

Infringement

A person infringes a registered design if he or she deals and uses it as per any of the exclusive rights of the registered owner. It is also an infringement to use or deal with a design that is substantially similar in overall impression to a registered design.¹⁵⁷ The registered owner may bring an infringement action against the other person in the Federal Court of Australia; however, only after the design has been examined and a certificate of examination has been issued.¹⁵⁸

Remedies

The relief that a court may grant in an infringement of a registered design includes:

- An injunction – this is the power to stop the other person from making, selling or using the design without permission; and
- At the option of the plaintiff – damages or an account of profits.¹⁵⁹

Designs and copyright

Copyright protection and designs law overlap in some ways. Under copyright laws, it is not necessary for an 'artistic work' to have artistic merit to gain protection. Hence, production, engineering and design drawings, moulds and prototypes produced for the design and manufacturing process of an article, may fall within the definition of an 'artistic work' under the Copyright Act.¹⁶⁰ Further, some artistic works that qualify for protection under the *Designs Act 2003* (Cth) would also be considered works of artistic craftsmanship under the Copyright Act. This latter category would include sculptures, jewellery and ceramics. Many artistic works such as paintings may also be directly applied as a design to t-shirts or fabric. The Copyright Act protects artistic works from unauthorised reproduction in material form.¹⁶¹ This includes making a three-dimensional work from a two-dimensional work and vice versa.¹⁶²

At the same time that the *Designs Act 2003* (Cth) was enacted, a separate piece of legislation was enacted to alter the design/copyright overlap – the *Designs (Consequential Amendments) Act 2003* (Cth).

Design registration provides an enforceable property right that can be used to prevent slavish copying of manufactured products. Design protection is generally inexpensive to obtain and gives the registered owner a property right from a registered date. Copyright protection is no longer lost when a 'flat design' (two dimensional artistic work) is applied to the surface of an article for mass production. However, to protect the three-dimensional application of a design in mass production, it is necessary to obtain registered design protection. For example, if a design for morning star poles or other three-dimensional works were to be mass-produced with the authority of the artist, copyright protection would be lost.¹⁶³

Three-dimensional designs that have been applied industrially by, or with the licence of, the owner of the monopoly in the corresponding design may lose copyright protection.¹⁶⁴ A design is taken to be applied industrially if it is applied to more than 50 articles or to one or more articles (other than handmade articles) manufactured in lengths or pieces.¹⁶⁵ It is not an infringement of the copyright in the artistic work to reproduce the work on or after the day on which articles made to the corresponding design are first sold, let for hire, or offered or exposed for sale or hire, by applying that or any other corresponding design to an article.

Relevance for Indigenous designs

The *Designs Act 2003* (Cth) protects three-dimensional items for industrial or commercial purposes. It would be difficult and impractical to use the designs law, for instance, to protect against Indigenous designs that are protected

157. *Designs Act 2003* (Cth) s 71.

158. *Designs Act 2003* (Cth) s 73(3).

159. *Designs Act 2003* (Cth) s 75.

160. *Copyright Act 1968* (Cth) s 10(1) defines 'artistic works'. See *Warman International v Envirotech Australia Ltd* (1986) 6 IPR 578.

161. *Copyright Act 1968* (Cth) s 31(1)(b)(i).

162. *Copyright Act 1968* (Cth) s 21(3).

163. McKeough J & Stewart A, 'Intellectual Property and the Dreaming' in E Johnston, M Hinton and D Rigney (eds), *Indigenous Australians and the Law* (Sydney: Cavendish Publishing, 1997) 53, 73.

164. *Copyright Act 1968* (Cth) s 77(1)(b).

165. Copyright Regulations, reg 17(1).

under customary laws such as wandjinas, mimis and styles. Protection under the Act is focused on the commercial production of products and it would be necessary to be the producer of such products.

The *Designs Act 2003* (Cth) may offer some protection for commercially applied Indigenous peoples' designs that meet the registration requirements. A group of Queensland Indigenous artists who made jewellery designs from Indigenous motifs including platypuses, echidnas and Torres Strait Islander drums registered their designs with IP Australia in 2003 before being commercially released. The Saltwater Collection designs are made for mass production so the registration of the designs would give protection.¹⁶⁶

Trademarks¹⁶⁷

What is a trade mark?

A trade mark is 'a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person'.¹⁶⁸ A sign includes 'any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent'.¹⁶⁹

Under the *Trade Marks Act 1995* (Cth) the registered owner of a trade mark is granted a statutory property right to use that trade mark in association with his or her trade and in accordance with the class of goods and services approved by the Trade Marks Office of IP Australia. Trade marks are personal property;¹⁷⁰ therefore, they can be licensed, assigned and transmitted.

Trade mark application process

An application to register a trade mark must be made on an approved form and accompanied by a specified fee. The mark must be represented graphically. Once lodged, the application is examined to see if the mark complies with the requirements for registration. This takes approximately 12 months. Rights are granted in the specified classes of goods and services.¹⁷¹ Applicants must apply and pay a registration fees based on each class of goods or services for which registration is sought. This could make the registration of some cultural material quite expensive and may limit many Indigenous groups from using the trade mark laws to protect Indigenous cultural material.

Who can apply?

The person who claims to be the owner of the mark and is using or intends to use the trade mark may apply to register the mark with the Trade Marks Office at IP Australia.¹⁷² This includes if he or she intends to license use of the trade mark. When applying for a trade mark in respect of goods and services, the applicant is not required to obtain any 'permission' to use the Indigenous cultural material. It is not necessary for a person to show he or she has the prior informed consent of the Indigenous traditional owners in order to register a trade mark related to an Indigenous word, symbol or design, and thereby become the registered owner of the mark.

Indigenous groups have complained that non-Indigenous companies have trade marked Indigenous words without prior informed consent and without observance of Aboriginal customs or laws. The following examples are cited in *Minding Cultures*:¹⁷³

- Monaro is the name of a clan group – it has been the subject of several trade mark applications. Three trade marks have been registered using this word.
- One attempt has been made to register the term 'wandjina'.

The registered owner of a regular trade mark can be an individual, a company, an unincorporated club or association, or any group of individuals in a business together and who jointly use a trade mark.¹⁷⁴ Therefore, it is possible for

166. Janke, *Looking Out For Culture*, above n 139, 14.

167. This section is adapted from Janke, *ibid*.

168. *Trade Marks Act 1995* (Cth) s 17.

169. *Trade Marks Act 1995* (Cth) s 6.

170. *Trade Marks Act 1995* (Cth) s 21(1).

171. For list of classification of goods and services in Australia, see <http://www.ipaustralia.gov.au/trademarks/apply_classes.html>.

172. *Trade Marks Act 1995* (Cth), s 27(1).

173. Janke T, *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Geneva: WIPO, 2003).

174. Australian Government, *The Trade Marks Application Kit: An Easy Guide to Applying for Your Trade Mark*, (Canberra: IP Australia, 2000) 4.

Indigenous people either individually or collectively to register trade mark rights accordingly. For instance, an Indigenous community organisation, an individual Indigenous person or an unincorporated Indigenous association can be a registered owner of a trade mark. The *Draft Manual of Practice and Procedure*¹⁷⁵ notes that there is no prohibition in relation to the entry of notice of trusts in the register. This may allow Indigenous groups to register a trade mark in the name of the trustee and/or on behalf of the beneficiaries.¹⁷⁶ For example, an Indigenous community organisation could register as a trustee on behalf of the Indigenous clan members as beneficiaries. An individual traditional custodian, such as Mr Milpurrru in *Bulun Bulun*¹⁷⁷ may be able to register a design as a trade mark and the beneficiaries could be the entire clan group.

Examination

Once lodged, a trade mark application is examined by an officer at the Trade Marks Office. The examiner considers whether there are any grounds for rejecting the application and whether it has been made according to the legislation. Division 2 of Part 4 of the *Trade Marks Act 1995* (Cth) lists grounds by which the registrar can reject an application. There are no specific grounds that address the registration of Indigenous knowledge. There is currently no basis in the Act or Regulations that would require inquiries to be made as to whether a word or design is used with the consent of the relevant traditional owners. However, grounds for rejection of a trade mark include:

- Not distinctive

A trade mark can be rejected if the applicant's mark is not distinctive from the goods and services of other persons in the relevant classes of goods or services.¹⁷⁸ The test for capacity to distinguish is the likelihood that other traders, in the ordinary course of their business and without improper motive, will wish to use the same mark.¹⁷⁹ Geographic marks and descriptive marks may not be distinctive for registration. This is because descriptive words describe a product and should be available for other traders to use. A geographic name, such as the town or area where goods are produced, would not be registrable. This is because other traders from the same region would want to use the geographic name without necessarily trying to ride off the applicant's reputation.¹⁸⁰

- Likely to deceive or cause confusion

A trade mark can be rejected if it is likely to deceive or cause confusion¹⁸¹ or if it is substantially identical with, or deceptively similar to, the trade mark of another person who has an earlier priority date for registration.¹⁸²

- Scandalous and contrary to law

A trade mark or part of the trade mark which comprises of scandalous matter or is contrary to law may be rejected by the registrar.¹⁸³ This provision is not often used but may provide scope for Indigenous people to challenge registration of culturally offensive marks.

Challenging trade marks

The *Trade Marks Act 1995* (Cth) allows third parties to oppose the registration of a trade mark.¹⁸⁴ Grounds for opposition are similar to those that the registrar can use to reject applications. They include that the trade mark does not distinguish the applicant's goods and services from the goods and services of others; is scandalous or contrary to law; or is likely to deceive or cause confusion.¹⁸⁵

Indigenous people may be able to make use of the restrictive provisions under the *Trade Marks Act 1995* (Cth) to challenge culturally offensive trade marks that are scandalous or contrary to law. It is arguable that trade marks which make use of sacred material are scandalous and contrary to Indigenous customary laws. Perhaps there is scope for an Indigenous community to challenge marks that are against customary laws as scandalous marks. It may at least be possible to draw offensive use to the attention of the registrar.

175. Australian Government, IP Australia, *Draft Manual of Practice and Procedure* (Canberra, 1 March 2001).

176. *Ibid*, Part 10: Formalities [1.1.8].

177. Above n 8.

178. *Trade Marks Act 1995* (Cth) s 41.

179. *Registrar of Trade Marks v W & G DuCros Ltd* [1913] AC 624.

180. *Re Registered Trade Mark 'Yanx'; Ex parte Amalgamated Tobacco Corp Ltd* (1951) 82 CLR 199.

181. *Trade Marks Act 1995* (Cth) s 43.

182. *Trade Marks Act 1995* (Cth) s 44.

183. *Trade Marks Act 1995* (Cth) s 42.

184. *Trade Marks Act 1995* (Cth) s 52(1).

185. *Trade Marks Act 1995* (Cth) s 43.

In New Zealand, recent changes to the *Trade Marks Act 1953* (NZ) requires the New Zealand Trade Mark Commissioner to establish a Maori Trade Mark Advisory Committee to provide advice on the registrability of trade marks which contain Maori signs, such as text or imagery. This will take into account a new offensiveness test,¹⁸⁶ which provides an absolute ground for refusing registration of a trade mark if the mark would be likely to offend a significant section of the community including Maori. There has been significant debate on this section. Regulations relating to this process are due to be drafted by the end of 2004. A similar process was recommended for adoption in the Australian Trade Marks Office.¹⁸⁷ However, there have been no legislative moves towards this by IP Australia.

Utopia Batik trade mark

In 2003, a group of Aboriginal artists opposed a trade mark application by a proprietary limited company. An opposition was made on behalf of Aboriginal individuals regarding an application for the registration of a trade mark 'Utopia Batik' by Utopia Batik Proprietary Limited. The artists argued that the word 'Utopia' should not be the subject of a trade mark monopoly and that it should be available to all artists from the region. The artists were successful in opposing the trade mark on the grounds that the applicant is not the owner of the trade mark.¹⁸⁸

Rights

If successful registration of the application occurs, the registered owner of the trade mark holds the following rights for his or her exclusive use:

- To use the trade mark.
- To authorise other persons to use the trade mark in relation to the goods and/or services in respect of which the trade mark is registered.¹⁸⁹
- To obtain relief if the trade mark's rights are infringed.¹⁹⁰

This means that the owner of a trade mark can generally prevent other traders from using that mark, or a very similar mark, on or in relation to goods and services for which it has been registered.

How long does trade mark protection last?

Once registered, the trade mark is protected for 10 years, which may be renewed, in sets of 10 years, for as long as the registration is kept current. In this respect, trade mark registration is continuous and can be useful to protect Indigenous cultural material for long periods of time, even beyond the copyright period. This feature of trade marks law makes it more flexible than copyright, designs and patents for protecting Indigenous rights because the problem of the public domain may be avoided.¹⁹¹

Infringement

Under the *Trade Marks Act 1995* (Cth), a registered trade mark is infringed if a person uses a sign as a trade mark which is identical with, or deceptively similar to, the trade mark of goods or services that are similar to those for which the trade mark is registered.¹⁹² Protection is also available to the registered owners of famous trade marks, to the extent that such owners will be able to take infringement action if a person uses a sign that is identical with or deceptively similar to the trade mark in respect of goods or services unrelated to those for which the trade mark is registered.

Certification marks

The *Trade Marks Act 1995* (Cth) has provisions that allow for registration of certification marks. Certification marks are trade marks which denote something about the quality or a characteristic of the goods or services. For example, one well-known Australian certification trade mark is the 'Woolmark' logo used for 100 per cent wool products.¹⁹³

186. *Trade Marks Act* (NZ) s 17(1)(b).

187. Janke, *Our Culture: Our Future*, recommends the establishment of an Indigenous Staffing Unit and an Indigenous Trade Mark Focus Group: above n 10, 149.

188. *Trade Marks Act 1995* (Cth) s 58 applied in opposition by M Turner, R Kunoth Kngwarry, L Skinner Ngai, DR Apwerl, J Apetyarr, M Apetyarr and Desart Inc to registration of trade mark applications 802956 and 802957, Trade Mark Hearing, 31 August 2003.

189. *Trade Marks Act 1995* (Cth) s 20(1).

190. *Trade Marks Act 1995* (Cth) s 20(2).

191. Janke, *Minding Cultures*, above n 173, 25.

192. *Trade Marks Act 1995* (Cth) s 120.

193. Trade Mark 185835 registered by the Australian Wool Research and Promotion Organisation.

Under the *Trade Marks Act 1995* (Cth), a certification trade mark is a sign used, or intended to be used, to distinguish goods or services that are:

- (a) dealt with or provided in the course of trade; and
 - (b) certified by a person (owner of the certification trade mark), or by another person approved by that person, in relation to quality, accuracy or some other characteristic, including (in the case of goods) origin, material or mode of manufacture;
- from other goods or services dealt with or provided in the course of trade but not so certified.¹⁹⁴

A mark or label verifying that a product or service is authentically Indigenous could be registered as a certification mark under the *Trade Marks Act 1995* (Cth).¹⁹⁵ A certification trade mark is a sign used to distinguish goods or services which possess a certain quality, accuracy or characteristic.¹⁹⁶ The distinguishing characteristics may include geographic origin, quality of material used or the mode of manufacture.¹⁹⁷ Use of the mark is certified by the registered owner of the certification trade mark, or by representative organisations approved by the registered owner in accordance with the rules for use.

To register a certification mark, the traditional owners would need to adopt a process and rules associated with the use of the certification mark. The mark would need to be examined by the Trade Marks Office and approved by the Australian Consumer and Competition Commission. There is considerable value in a certification mark. It allows for control of the use of the trade mark by the registered owner. The system requires rules upon which authorised users must comply.

A certification trade mark may be useful for Indigenous cultural products if the mark is intended to certify that the work is authentic; that is, it is produced by Indigenous people who have a claim to the type of style or to use the type of knowledge or information embodied in that product. This option would allow Indigenous people to encourage and promote authenticity and cultural integrity. The degree of protection that the mark provides would only be to the extent of unauthorised use of the mark.

NIAAA's label of authenticity

In 2000 the National Indigenous Arts Advocacy Association (NIAAA) launched the label of authenticity system. The label of authenticity is the primary mark that, when affixed to goods or services, denotes that a product or service is created, authored or produced wholly by an Aboriginal or Torres Strait Islander person. The rules have incorporated terms for complying with Indigenous customary law. In particular, rule 4.1 states that:

The label can only be used where works which purport to encode, depict or reflect ceremony, law knowledge, customs, stories, dreaming or ritual of traditional owners of land are produced in accordance with any customs or laws of the relevant traditional owners and permission of the traditional owners has been given for creation and dealing with the work.

The rules also require that the label can only be used alongside information about the traditional group, language group or land to which the creator belongs, where they live if relevant to the work, and the way in which they regard the work as reflecting their Indigenous heritage or experience.¹⁹⁸

A second level of the system involves the collaboration mark, for products and services derived from a work of art which has been created by an Aboriginal or Torres Strait Islander person or people who satisfy the definition, and which has been reproduced or produced and manufactured under fair and legitimate licensing arrangements with non-Aboriginal and Torres Strait Islander people. There is also a third level of the system for use by retailers.

The label of authenticity has not enjoyed wide support from artists or retailers. Its limited use has been for collaboratively produced goods such as t-shirts. The future of the label is uncertain in light of recent funding cuts to NIAAA. However, the label did inspire the New Zealand mark, *Toi Iho*, the Maori made mark.¹⁹⁹ It is possible that Indigenous people could adopt a similar mark for goods and services that originate from Indigenous people.

194. *Trade Marks Act 1995* (Cth) s 169.

195. *Trade Marks Act 1995* (Cth) Pt 16.

196. *Trade Marks Act 1995* (Cth) s 169(a).

197. *Trade Marks Act 1995* (Cth) s 169(b).

198. National Indigenous Arts Advocacy Association, *Label of Authenticity Trade Mark Certification Rules*, r 4.2–4.3. For a full version of the rules, see Janke, *Minding Cultures*, above n 173, 153–158.

199. See <<http://www.toiho.com>>.

Collective marks

Collective marks were introduced to the Australian trade marks regime in 1995.²⁰⁰ A collective trade mark is a sign used in relation to goods and services provided in the course of trade by members of an association to distinguish their goods and services from those of non-members.²⁰¹ Like ordinary trade marks, collective trade marks are used to denote the trade origins of the goods and services rather than indicating that the goods and services meet a certain standard. However, the particular source indicated in the case of a collective trade mark is not a single trade source but one comprising of the members of the association which has registered the collective mark. Registration is not available for trade marks which are used solely to indicate membership of an association or any other organisation. The trade marks must be applied to goods and/or services.

Unlike certification marks, there is no requirement that rules for use of a collective trade mark be developed. Only members of the association in whose name a collective trade mark is registered may use the collective trade mark. A member of an association in whose name a collective trade mark is registered does not have the right to prevent another member of the association from using the same trade mark, unless the use does not comply with any rules of the association governing that trade mark.²⁰² Collective trade marks include 'Toyota Dealer Group'.²⁰³

Indigenous associations, including groups of artists, could use the collective mark system to indicate their association within a group. The mark, of course, would need to be applied to goods and services but can be used by individual members of that association.²⁰⁴ Unlike certification marks, there are no rules of requirement and use of the mark can be controlled by the rules of the constitution of the association.

In the United States, the *Indian Arts and Craft Act 1935* (US) allows Indians to apply for a collective membership design mark that denotes membership in an organised collective association that 'promotes the preservation of the Native American or American Indian culture, tradition, art and related activities'.²⁰⁵ It is unlawful for a person to display or sell a good 'in a manner that falsely suggests it is Indian produced'.²⁰⁶ There may be scope for Indigenous Australians to develop similar marks for protection of Indigenous Australia arts and cultural expression.

Geographic indications

Geographic indications identify a good as 'originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin'.²⁰⁷

The most common type of geographic indication is the name of the place of origin of the goods. For example, products made from the land that have a local or regional agricultural influence—such as cheese, wine and olives—have qualities that result from the region in which it is grown and nurtured. Whether these rights are recognised depends on the domestic law of a country and the perceptions of consumers.

In Europe, the geographic indication has been used by the makers of wines, cheeses and other food stuffs, for the protection of well-known regionally produced goods that have distinctive qualities. For example, 'Tuscany' is a geographic indication protected under Italian law for olive oil produced in the Italian region of Tuscany.²⁰⁸ 'Roquefort' for cheese produced in France is also protected under European Union (EU) regulations.²⁰⁹ The geographic registration system in Europe has developed to an extensive system. Once registered, a geographic registration may only be used by approved producers. In 2004, the World Trade Organisation supported a complaint brought by Australia, the United States and a number of other countries, and ruled that the EU had to open its trade mark system to protect geographic indicators from other countries.²¹⁰

200. Part 15 of the *Trade Marks Act 1995* (Cth) introduces collective trade marks as a new category of trade mark.

201. *Trade Marks Act 1995* (Cth) s 162.

202. *Trade Marks Act 1995* (Cth) s 165.

203. As noted in Dwyer J, Duffy A, Lahore J & Garnsey J (eds), *Patents, Trade Marks and Related Rights* (Sydney: Butterworths, 1996) 50, 138.

204. Compare registered trade mark owners who are unincorporated groups and associations. Use is made of the trade mark to, or in relation to, goods or services on behalf of all its members. See IP Australia *Draft Manual of Practice and Procedure*, above n 175, Part 10: 'Formalities'.

205. Title 25 of the *United States Code*, s 205(c).

206. *Ibid.*

207. Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, Art 22(1).

208. World Intellectual Property Organisation, *About Geographical Indications*, Law No 169 of 5 February 1992, Italy, <http://www.wipo.int/about-ip/en/geographical_ind.html>.

209. *Ibid.*, Under Regulation (European Community) No 2081/92 and in the United States under US Certification Registration Mark No 571.798.

210. Editorial, 'Victory for Aussie Foods in EU Trademark Ruling', *The Canberra Times*, 23 December 2004, 19.

The most established geographic indications in Australia are used in the wine industry. The *Australian Wine and Brandy Corporation Act 1980* (Cth) protects the names of Australian grape growing regions.

There may be scope for Indigenous cultural material to be protected by a geographic indications system given that many artistic designs, motifs, stories and knowledge originate from specific geographic regions. However, this would depend on regional associations of Indigenous people gaining government or corporate recognition to set up their own appellations of origin or certification-issuing entities.²¹¹

Business names are not trade marks

Business names do not provide property rights to the registered business name owners for use of the trading name, unlike trade marks. A business name is the name under which a business operates and registration thereof identifies the owner of that business. Registration is legally required before the business can start to trade. Laws against passing off can protect business names.

Domain names

Under customary laws, the rights to use names and identifiers belonging to the group require consent and consultation. How does this apply to the use of Indigenous words for domain names?

A domain name is the Internet address used to locate websites on the World Wide Web. Only one entity in the world can have a specific domain name and for this reason, the registration and use of certain words is seen in the same way as trade marks. The WIPO has established the Internet Domain Name Process, which sets out best practices for registration authorities. The list of standard practices relate to registration of the generic top-level domain names including dispute resolution procedures and registration of domain names of famous and well-known marks.²¹² Disputes about international domain names should be taken to the WIPO Dispute Resolution Centre.²¹³

The Australian Domain Name Registry manages the Australian domain names. There are certain rules that must be met before registration of a domain name is allowed. For instance, it must be either the person's name or a business name belonging to the relevant person. It is possible for domain names to be registered and protected before use, if these requirements are met.

The use of Indigenous names and words for domain names is an important cultural issue for Indigenous people. Indigenous people may want to make use of their cultural names to promote their cultures. Some are finding that as they attempt to register, the words are already used. For example, Ngarinyin elders Paddy Neowarra and Scotty Martin have set up a website <<http://www.wandjina.com>> to spread the message of their culture worldwide. In the process, they have found on the Internet three companies named after the 'wandjina' and have politely requested the relevant owners to change the names appropriately. Two of the companies have handed over the names at the request of the owners.²¹⁴

Another example of use of Indigenous identifiers involved the use of the surname of Eddie Mabo. The website <<http://www.mabo.com.au>> was offered for sale at \$165 000. The Mabo family was outraged at this and asked for the removal of the site. The website was removed from the web domain.²¹⁵

Other words may not be appropriate in the first place for use as a domain name; for example, sacred words. The *Our Culture: Our Future* report suggested that there should be some level of inquiry about whether an Indigenous word is appropriate or has consent from relevant persons in cultural authority when registration of a domain name is being considered by the domain name registration agency.²¹⁶

211. Posey D & Dutfield G, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Canada: International Development Research Centre, 1996) 91.

212. World Intellectual Property Organisation, *The Management of Internet Names and Addresses: Intellectual Property Issues*, Final Report (Geneva: WIPO, 30 April 1999).

213. For more information, see <<http://www.wipo.org>>.

214. Jopson D, 'Misused Spirits of Creation Returned to Proper Custodians', *Sydney Morning Herald*, 7 March 2001, 7.

215. 'Family Upset Over Misuse of Name Mabo on Website', *Sydney Morning Herald*, 8 August 2002, Editorial.

216. Janke, *Our Culture: Our Future*, above n 10, 149.

Patents

What is a patent?²¹⁷

A patent is a right granted for any device, substance, method or process that is new, inventive and useful. A patent is legally enforceable and gives the owner the exclusive right to commercially exploit the invention for the life of the patent. Unlike copyright protection, patent protection is not automatic. An application must be lodged for the grant of a patent.

There are two types of patents in Australia:

- (i) a standard patent gives long-term protection and control over an invention for up to 20 years; and
- (ii) an innovation patent is a relatively fast, inexpensive protection option, lasting a maximum of eight years. The innovation patent replaced the petty patent on 24 May 2001.

Patents provide effective protection to the owners of inventions of new technology that will lead to a product, composition or process with significant long-term commercial gain. In return for the patent protection, patent applicants must share their knowledge by providing a full description of how their invention works. This information eventually becomes public and can provide the basis for further research by others.

Manner of manufacture²¹⁸

To be patentable, an invention must be a manner of manufacture.²¹⁹ A good idea or a mere discovery is not patentable. The discovery of existing, naturally occurring substances cannot be patented unless there is some newly invented method of using the material or some new adaptation of it to serve a new purpose.²²⁰ As Stephen Gray notes:

On this analysis, it is clear that the mere existence of genetic resources on land owned or formerly owned by Indigenous people will not give the Indigenous people any intellectual property rights in those resources, should they turn out to have some scientific or commercial value. In order to gain patent protection or to prevent others from gaining it, the Indigenous people would have to 'discover' the resources, and put them to a new use with commercial significance.²²¹

Naturally occurring genetic material found on Indigenous land is potentially patentable under the *Patents Act 1990* (Cth), if a new use for that material can be identified.

Novelty²²²

An invention must be novel and involve an inventive step.²²³ An invention is generally considered novel and involving an inventive step when it is compared with the prior art base.²²⁴

Indigenous perspectives²²⁵

Across the world, many Indigenous peoples and organisations have expressed their opposition to patenting of genetic materials, life forms generally and inventions derived from Indigenous knowledge where there was no compliance with customary laws. In order to challenge a patent, interested parties can oppose the grant of the patent using various grounds, including that it is part of the prior art base within the three-month period after its publication in the *Official Journal of Patents*.²²⁶ The *Patents Act 1990* (Cth) also allows any person, with information that may show a patent should not have been granted, to apply to court for an order to revoke the patent. These avenues require considerable legal and technical resources that Indigenous peoples frequently do not possess.

217. Adapted from IP Australia *What is a Patent* (2004) <http://www.ipaustralia.gov.au/patents/what_index.shtml>.

218. Adapted from Janke T, *Biodiversity, Patents and Indigenous Peoples*, Media Development (Vol XLVI, No 2, March 1999).

219. Within the meaning of s 6 of the *Statute of Monopolies 1623* (England).

220. *National Research Development Corporation v Commissioner of Patents* (1990) 102 CLR 252.

221. Gray S, 'Vampires Round the Campfire' (1997) 22(2) *Alternative Law Journal* 61.

222. Adapted from Janke, *Biodiversity, Patents and Indigenous Peoples*, above n 218.

223. *Patents Act 1990* (Cth) s 18(1).

224. *Patents Act 1990* (Cth) s 7(1).

225. Adapted from Janke, *Biodiversity, Patents and Indigenous Peoples*, above 218 and Janke, *Our Culture: Our Future*, above n 10.

226. Australian Government, IP Australia.

Gray notes that Indigenous groups, wishing to challenge the use of Indigenous genetic resources on the basis of lack of novelty, have to prove their knowledge of that use as part of the 'prior art base'.²²⁷ For instance, while Indigenous people were aware that smokebush had certain healing properties, they were not aware that it was a potential cure for AIDS.

For Indigenous people who do wish to patent inventions themselves the technical expertise and infrastructure is prohibitive. Patent applications for biotechnological inventions usually apply to the novel compound, a process for producing that compound and sometimes the compound when produced by a particular process. Scientists are able to extract the pharmaceutical components of medicinal plants to a level by which the active ingredients can be isolated and defined. It is often this process or the pharmaceutical composition of the Indigenous resource that becomes the subject of patents.²²⁸ This process requires great technical knowledge and resources which Indigenous communities do not have readily available. Professor Blakeney estimates the cost of patenting an invention in Australia is about \$14,000 and ranges from \$5,000 to \$23,000 in other countries.²²⁹ He notes that such a high cost to apply for and further enforce patent rights often precludes Indigenous communities from making use of patent law to legitimise their rights.

Indigenous people who seek to patent their inventions may also be hindered by previous publication of their knowledge. Blakeney notes that the practice of ethnobotanists and ethnopharmacologists publishing accounts of the uses of plants by Indigenous people has created a problem with Indigenous people being able to claim patents for their traditional medicinal remedies.²³⁰ This is because, once published, such information becomes public knowledge and therefore part of the prior art base. By publishing information themselves about the traditional uses of plants in leaflets and books, Indigenous people also risk being able to patent their traditional medicinal knowledge.²³¹

The increase in bioprospecting and successful exploitation of biological resources has led to global moves to protect the interests of nation states. International instruments have been developed to enunciate standards and mechanisms for dealings between nation states in relation to access and benefit sharing of biological resources. This has included limited recognition of the role of Indigenous knowledge. Further, when Indigenous knowledge is accessed and used to contribute to the development of products that can be patented, Indigenous people may have no control over or benefits from their contribution.

Plant breeder's rights

Indigenous people face similar problems accessing protection through the *Plant Breeder's Rights Act 1994* (Cth). The Act gives plant breeders the exclusive commercial rights to market a new plant variety or its reproductive material. Such rights allow the plant breeder to produce, reproduce, sell and distribute the new plant variety, and to receive royalties from the sale of the plant or sell the rights to do so.²³² Holders of plant breeder's rights can prevent others from selling seeds of that variety.²³³

Applications are costly, and the applicant must provide extensive information requiring considerable labour, expense and expertise. For instance, the applicant must

provide descriptions of the plant sufficient to establish a *prima facie* case that the variety is distinct from other varieties of common knowledge; particulars of the location at which and manner by which the variety was bred; particulars of the names (including pseudonyms) by which that variety is known and sold in Australia; and particulars of any [plant breeder's rights] granted in that variety in Australia as well as of any application.²³⁴

The accrual of commercial monopoly rights to plant varieties has the potential to contravene Indigenous customary laws in relation to plant knowledge, land management and caring for the country. Indigenous peoples, especially

227. Gray, above n 221, 62.

228. Power PA, 'Interaction Between Biotechnology and the Patent System' (1992) 3 *Australian Intellectual Property Journal* 214, 217.

229. Blakeney M, 'Bioprospecting and the Protection of Traditional Medical Knowledge' (1997) 6 *European Intellectual Property Reports* 298, 300.

230. Ibid 298.

231. While communities may own copyright in such publications, their rights to the information contained in the book does not amount to patent rights.

232. *Plant Breeder's Rights Act 1994* (Cth) s 11.

233. Janke, *Our Culture; Our Future*, above n 10, 68.

234. Lotz M, 'Indigenous Plants, Indigenous Rights: A Discussion of Problems Posed for Protecting Indigenous Intellectual Property (Paper presented at 8th Annual Conference of Australian Association for Professional and Applied Ethics, Adelaide, 27–29 September 2001). See *Plant Breeder's Rights Act 1994* (Cth) s 26(2)(e)–(h).

Indigenous farmers, have registered their complaints about the loss of control over plant varieties and seeds for collection, exchange and replanting.²³⁵

Breach of confidence laws

Breach of confidence laws refers to an area of the common law that has developed to protect confidential knowledge or trade secrets from wide dissemination by unauthorised persons. The common law makes the taking without permission of confidential information an illegal act if:

- the information has the necessary quality of confidence about it;
- the information was imparted in circumstance where there was an obligation of confidence; or
- there was an unauthorised use of that information which was detrimental for the party whose confidence was communicated.²³⁶

Indigenous people have used these laws to protect their cultural interests. The most notable case is *Foster v Mountford*,²³⁷ which related to sacred material that was not suitable for wide publication. In this case the Federal Court granted an injunction in favour of members of the Pitjantjatjara Council, who took the action under breach of confidence laws to stop the publication of a book in the Northern Territory. Mountford, an anthropologist, undertook a field trip in 1940 into remote areas of the Northern Territory. The Pitjantjatjara male elders revealed tribal sites and items of deep cultural and religious significance to the anthropologist. Mountford recorded the information and later revealed them in a book, *Nomads of the Australian Desert*, which was distributed for sale in the Northern Territory. The book contained photographs, drawings and descriptions of persons, places and ceremonies of deep religious and cultural significance to the Pitjantjatjara people. The wide dissemination of this information could cause serious disruption to Pitjantjatjara culture and society should this material be revealed to women, children and uninitiated men. The information was shown to have been given to Mountford in confidence.

5. Intellectual property and contracts

While contracts are not strictly an area of intellectual property, they are often used in the assignment and licensing of intellectual property and for this reason are discussed in this section of our paper.

Agreements and contracts are being used to take into account customary law obligations and responsibilities over intellectual property. They include sharing of benefit provisions and can allow scope for Indigenous people to negotiate culturally advantageous terms that strengthen customary laws.

The use of contracts between knowledge holders and developers has become the main method of resolving problems arising from the lack of correlation between Indigenous knowledge structures and the intellectual property system. Contractual arrangements have the benefit of flexibility, but can sometimes provide a lesser form of protection than a statute, because they bind only the parties to the agreement. Once a successful product is exposed to the market place, it is common for competitors to emulate it. Indigenous people may find their knowledge used by third parties who have struck upon the component, ingredient or recipe or whatever knowledge may have been used. Indigenous people may have no remedy against such a third party under contract. In this instance, private agreements provide flexible but limited protection compared to legislation. On the other hand, perhaps such accepted business practice cannot be legislated against and Indigenous people remain in the position of weighing commercial benefits against cultural values. In some cases Indigenous knowledge holders may attempt to force third parties into action on their behalf based on the fiduciary duty recognised in *Bulun Bulun*.²³⁸

Other remedies might be found through the common law action of passing off or under trade practices laws. In any event, the ability of Indigenous people to assert and seek enforcement of their rights will be dependent on their capacity to access the legal system. This is limited by the high costs of litigation. In view of this situation, the commercialisation of culture should be seriously considered prior to commercialising or making public important cultural knowledge.

235. Ridgeway A, 'Plant Breeders Intellectual Property' (Australian Democrat Speech, Canberra, 21 October 2002). See also the work of international non-government organisation, Grain <<http://www.grain.org/>>.

236. *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

237. (1977) 14 ALR 71.

238. Above n 8.

6. Intellectual property: protocols and ethics

Protocols and ethics in the use of Indigenous cultural and intellectual property are useful non-legal options where intellectual property laws fall short of adequately catering for Indigenous cultural issues. This has been an area of growth in Australia and the development of codes and protocols for various sectors of our wider cultural industries have worked with Indigenous communities to develop various standard-setting protocol and ethical documents.

Some of the existing protocols and ethical documents include:

- Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Indigenous Studies*.
- Code of Ethics and Standards of Practice of the International Society of Ethnobiologists.
- Bostock L, *The Greater Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities* (2nd ed., 1997).
- Byrne A, Garwood A, Moorcroft H & Barnes A, *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*, endorsed by Aboriginal and Torres Strait Islander Library and Information Resources Network (1995).
- Johnson D, *Indigenous Protocol* (2003), written for Special Broadcasting Services – refers to documentary production.²³⁹
- Mellor D with a legal section by Janke T, *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector* – written and researched by Published by National Association for the Visual Arts, Sydney, 2001
- Janke T, under commission for the Australian Film Commission, *Towards a Protocol for Filmmakers Working with Indigenous Content and Indigenous Communities*, Issues Paper (February 2003).
- Australia Council protocols for various Indigenous artforms, written for the Aboriginal and Torres Strait Islander Board of the Australia Council:
 - Janke T, *Visual Cultures: Protocols for Producing Indigenous Australian Visual Art and Craft*.
 - Janke T, *Writing Cultures: Protocols for Producing Indigenous Australian Literature*.
 - Janke T, *New Media Cultures: Protocols for Producing Indigenous Australian New Media*.
 - Quiggin R, *Song Cultures: Protocols for Producing Indigenous Australian Music*.
 - Quiggin R, *Performing Cultures: Protocols for Producing Indigenous Australian Performing Arts*.
- Akwe: Kon Guidelines (see Part 5, 3.5 *Convention on Biological Diversity*).
- Bonn Guidelines (see Part 5, 3.5 *Convention on Biological Diversity*).
- Nationally developed protocols: Human Rights and Equal Opportunity Commission and Griffith University, *Development and Indigenous Land: A Human Rights Approach* (2002).
- Some locally developed protocols, such as Hurley A, *Respect, Acknowledge, Listen: Practical Protocols for Working with the Indigenous Community of Western Sydney* (Community Cultural Development, New South Wales, 2003).

There is scope for the Western Australian government and its industries to adopt existing protocols or develop local and regional protocols to specifically cover Western Australian cultural material.

239. Available at <<http://www.sbs.com.au/sbsi/documentary.html>>.

Part II: Recognition of Indigenous intellectual property in the regulation of resources

1. Introduction

Indigenous peoples hold important knowledge in relation to the cultivation, collection, preparation and uses of many plants, animals and minerals. Indigenous people's knowledge about the biota of a region relates to, inter alia, medicine, nutrition, agriculture and land care, the arts, ceremony and other uses. While Indigenous people may not regard the biota of a region as resources,²⁴⁰ much of Australia's law in relation to management of resources has implications for Indigenous knowledge holders.

Knowledge of the properties and uses of these materials that is held by Indigenous people is often referred to as 'traditional knowledge' or 'Indigenous knowledge'. Customary law may inform the content of Indigenous knowledge; for instance it may set out the manner in which a remedy is prepared, when it can be used and who can use it.

The Anmatyerr women of Laramba (Napperby) community, recently published material about the names of plants and their uses in their area.

For them the names of plants (as of other natural phenomena) go beyond the merely lexicographical. The names of things signify a complex relationship between living people, their country and their antecedents, many of whom bore the names of particular plants and animals.

Respect for Aboriginal law and a sophisticated use of the Anmatyerr language means knowing the detailed names for plants and for the particular parts of plants – seed, roots, flowers and leaves. Some plants have a different name for ripe fruits, unripe fruits and for fruits that have fallen to the ground. For some plant species there are also specialised verbs which describe the method of collecting the fruit, seeds, resins or tubers, and of processing and eating them.

Using this specialised vocabulary shows respect for the custodians of the Dreaming manifest in the plants themselves.²⁴¹

Customary law may also regulate the transmission and dissemination of Indigenous knowledge; for instance, it may determine issues such as the age and gender of recipients of the knowledge. Customary law contains 'positive obligations towards cultural knowledge and the need to ensure that the culture is maintained and protected so that it can be passed on to future generations'.²⁴²

2. Bioprospecting and biotechnology

Across the world, Indigenous or traditional knowledge has attracted the attention of universities and other commercial research and development companies. Indigenous knowledge of the particular characteristics and applications of biological resources provides valuable insights for researchers into potential treatments, herbicides, insecticides and other products derived from biological material. For example, in September 2004 an agreement was announced between the Samoan government and the University of California at Berkeley to share equally in royalties arising from any sales of an anti-AIDS drug derived from the genes of the native Samoan tree mamala.

The agreement, signed by Prime Minister Tuila'epa Aiono Sialele Malielegaoi of Samoa and UC Berkeley's Vice Chancellor for Research Beth Burnside, gives Samoa and UC Berkeley equal shares in any commercial proceeds from the genes. Samoa's 50 per cent share will be allocated to the government, to villages, and to the families of healers who first taught ethnobotanist Dr Paul Alan Cox how to use the plant.²⁴³

The agreement also provides that if the drug is successfully developed, the University of California and the Samoan government can negotiate distribution of the drug in developing nations at a minimal profit.²⁴⁴

240. The biological components of land, sea and air are generally referred to as interrelated elements of life, past present and future rather than as resources for commercial exploitation.

241. Anmatyerr Women of Laramba (Napperby) Community, *Anmatyerr Ayey Arnang-akert, Anmatyerr Plant Stories* (Alice Springs: IAD Press, 2003) viii.

242. Janke, *Biodiversity, Patents and Indigenous Peoples*, above n 218, 2.

243. Sanders R, *Land Mark Agreement Between Samoa and UC Berkeley Could Help Search for AIDS Cure* (2004) <http://www.berkeley.edu/news/media/releases/2004/09/29_samoa.shtml>.

244. Ibid.

There are many instances of Indigenous knowledge contributing to the development of useful medicinal and other products. But there are many instances in which Indigenous peoples' customary laws have been contravened or disregarded through lack of accurate information, consultation, consent, acknowledgement and benefit sharing.

One recent example is the development of a new drug based on the knowledge held by the San people of Southern Africa about the appetite suppressant qualities of the hoodia cactus. The San had used the hoodia cactus as an aid when hunting over vast distances for long periods of time.

In the 1960s the Council for Scientific and Industrial Research (CSIR), based in South Africa, isolated the appetite suppressant molecule in the hoodia and patented it. In 1997 the CSIR licensed the rights to the molecule, named P57, to a UK-based company, Phytopharm. After initial tests on the drug looked promising, Phytopharm sold on the rights for US\$21 million to the pharmaceutical giant, Pfizer.²⁴⁵

In July 2001, describing research progress on P57, a Pfizer spokesperson in the UK linked the Hoodia to the San but said they were extinct. An international outcry followed and the South African San Council, set up in November 2001 and representing the Khomani, the !Xun and the Khwe, threatened a lawsuit. Negotiations with the CSIR followed and the San demanded recognition of their knowledge and a share of benefits.²⁴⁶

[T]he CSIR will pay the San eight per cent of all milestone payments it receives from its licensee, UK-based Phytopharm plc, as well as six per cent of all royalties that the CSIR receives once the drug is commercially available. Milestone payments are subject to agreed technical performance targets of P57 during its clinical development over the next three to four years, and royalties are based on sales which are not set to commence before 2008. This benefit-sharing model ensures that the San will receive equitable benefits if the drug is successfully commercialised, and is based on established international benefit-sharing models for the pharmaceutical industry. Factors, such as the size of the global anti-obesity market and the percentage of total market that the potential new drug could capture, are typically factors which determine the translation of the royalty percentage into monetary value.²⁴⁷

Pfizer have since suspended their efforts to develop a commercial appetite suppressant for marketing in the west.²⁴⁸ Unless another pharmaceutical company undertakes the drug development work, the San may not receive any commercial benefit for the use of their knowledge.

Many of the developments that rely on Indigenous knowledge have come about because of the increase in advances in biotechnology and bioprospecting. Biotechnology has been defined as:

a broad term covering the use of biological discoveries for the development of industrial processes and the production of useful organisms and their products. Uses include the production of foods and medicines, the reduction of wastes and the creation of renewable energy sources.²⁴⁹

Bioprospecting has been defined as:

the search for and sourcing of organisms from the natural environment with the purpose of extraction of compounds for further investigation of their potential for development in therapeutic or industrial applications.²⁵⁰

Bioprospecting and biotechnology involve a number of sectors including government, public and private research facilities, biotechnology companies, Indigenous peoples, their organisations and others. Each group has distinct and often divergent interests. Matthew Rimmer describes the dynamics of bioprospecting as follows:

There has been much conflict and misunderstanding between the stakeholders because of the lack of certainty about the rights and responsibilities of the parties involved in natural drug discovery. Indigenous people have desired legal protection; researchers and scientists looked for guidance as to their legal responsibilities; green groups sought to conserve the environment; and biotechnology companies and pharmaceutical drugs companies have wanted commercial certainty.²⁵¹

The Australian government considers Australia to be well placed for strong participation in biodiscovery and biotechnology industries because of its substantial research infrastructure, robust and internationally compatible

245. Wise J, 'Hunter-Gatherers Win Profit Sharing Deal for Obesity Drug' (2003) 81 *Bulletin of the World Health Organisation* 382.

246. Integrated Regional Information Network, *Marginalised San Win Royalties from Diet Drug* (2003) <<http://www.kalaharipeoples.org/documents/diet%20drug.html>>.

247. Working Group for Indigenous Minorities of South Africa, *WIMSA Report on Activities, 2002–2003* <http://www.san.org.za/wimsa/ar2002_3/annualrep10.htm>.

248. Interview with Owen Hughes, Senior Counsel, Pfizer, 15 February 2005.

249. Biotechnology Australia, *Fact Sheet 1: What is Biotechnology?* (2003) <http://www.biotechnology.gov.au/library/content_library/BA_FS1_WhatIs_Jan04.pdf>..

250. Jones J, 'Regulating Access to Biological and Genetic Resources in Australia: A case Study of Bioprospecting in Queensland' (1998) 5 *Australasian Journal of Natural Resources Law and Policy* 89.

251. Rimmer M, 'Blame it on Rio: Biodiversity, Native Title and Traditional Knowledge' (2003) 7 *Southern Cross University Law Review* 11.

intellectual property protection system, and a regulatory framework for management of the risks and ethical issues associated with genetic research.²⁵²

In Australia, the search for organisms from the natural environment that might provide the basis for product development involves the use of Indigenous knowledge. Henrietta Marrie²⁵³ provides the following example:

The Australian Tree Seed Centre of the Commonwealth Scientific and Industrial Research Organisation (CSIRO) Division of Forestry is heavily engaged (in a number of African dry-land countries) in trialling various acacia species to suit a range of needs (soil conservation, firewood, food).²⁵⁴ Aboriginal knowledge was instrumental in identifying 44 of the 49 species of acacias traditionally used by central Australian Aboriginal communities as potential food species for planting overseas. Also critical to the project is knowledge of traditional techniques for food preparation as the seed of a number of these species is toxic to humans unless properly prepared. As Devitt concluded, *With respect to food potential, what is currently known about the food value of acacias has been largely the result of tapping into Aboriginal knowledge.*²⁵⁵ And yet Aboriginal people are not involved in the subsequent research, development and application processes regarding these overseas projects.²⁵⁶

These issues have particular relevance to Western Australia for at least two reasons. Firstly, Indigenous people of Western Australia have a rich knowledge of their biological environment. Secondly, the state of Western Australia has significant biological resources particularly flora. 'About half (12 000) of the total number of species of flowering plant in Australia occur in Western Australia. Further, 42 per cent of Australia's rare or endangered flora is in Western Australia'.²⁵⁷

The best-known example of the interface between the Western Australian government and Indigenous people in relation to traditional knowledge held in respect of flora is the commercial exploitation of smokebush. Henrietta Fourmile²⁵⁸ has reported on the patenting by an American company of an element found in smokebush, a plant that has been traditionally used by the Indigenous people of Western Australia for its healing properties. In the 1960s, the Western Australian government granted the United States National Cancer Institute (NCI) a license to collect plants for screening for the presence of cancer-fighting properties.

The specimens were found to be ineffective, but they were held in storage until the late 1980s when they were tested again in the quest to find a cure for AIDS. Out of 7 000 plants screened from around the world, the smoke bush was one of four plants found to contain the active property Conocurovone, which laboratory tests showed could destroy the HIV virus in low concentrations. This 'discovery' was subsequently patented.²⁵⁹

The NCI sought further samples and a licence to collect more samples in Western Australia. The Department of Conservation and Land Management (CALM) attempted unsuccessfully to negotiate a contract with the NCI.

When after four months or so had gone by and there was no contract agreed between Western Australia and the NCI, the collector attempted to leave the country with the samples. He was found at Tullamarine airport with two of his three cases full of smokebush and other plants.²⁶⁰

The claims of biopiracy²⁶¹ and the negative publicity for the NCI that followed these events led ultimately to the NCI granting Victorian pharmaceutical company Amrad an exclusive worldwide licence to develop Conocurvone. An agreement was made between CALM and Amrad for Western Australian scientists to be involved in the research on production and preparation of Conocurvone and a provision for royalties from any commercial drug development, where the leading compound is Conocurvone, to come to Western Australia.²⁶² According to Blakeney, Amrad paid \$1.5 million to the Western Australian government and it was agreed that, if Conocurvone was successfully commercialised, the Western Australian government would be paid royalties of \$100 million by 2002.²⁶³

252. Commonwealth Biotechnology Ministerial Council, *National Biotechnology Strategy* (2000) <http://www.biotechnology.gov.au/library/content_library/BA_strategy.doc on 29 October 2004> 7.

253. Previously Henrietta Fourmile-Marrie.

254. In particular in the drought and famine prone areas of countries such as Senegal, Niger, Burkina Faso, Somalia, Kenya, and Zimbabwe: see Fourmile-Marrie H, 'Developing a Regime to Protect Indigenous Traditional Biodiversity – Related Knowledge' (2000) 1 *Balayi: Culture, Law and Colonialism* 165.

255. Devitt J, 'Acacias: A Traditional Aboriginal Food Source in Central Australia', in House AP & Harwood CE (eds) *Australian Dry-zone Acacias for Human Food. Proceedings of a Workshop Held at Glen Helen, Northern Territory, Australia* (Melbourne: CSIRO, 1991) 51, cited in Fourmile-Marrie, *ibid*.

256. Fourmile-Marrie, above n 254.

257. Parke M & Kendall C, 'Bioprospecting of Traditional Medical Knowledge' (unpublished paper, Murdoch University School of Law, Perth, 1997) 2, citing Armstrong J & Hooper K, 'Nature's Medicine', in Department of Conservation and Land Management *Landscape* (Winter 1994) 12, 14.

258. Fourmile H, 'Protecting Indigenous Intellectual Property Rights in Biodiversity' (Paper presented at Kaltja vs Business Conference, 28 August 1996), cited in Janke, *Our Culture: Our Future*, above n 10, 24.

259. Janke, *Our Culture: Our Future*, *ibid*, 24.

260. Marchant N, Bailey C & Cannon J reported these events in Parke and Kendall, above n 257, 13.

261. 'Biopiracy' is the term used to describe bioprospecting, biodiscovery and biotechnology where it contravenes Indigenous cultural or customary law requirements.

262. Parke & Kendall, above n 257, 13–14.

263. Blakeney, above n 229, 298; cited in Janke, *Our Culture: Our Future*, above n 10, 25. To date no large scale commercialisation has occurred.

Property in the flora and fauna of Western Australia vests in the Crown. Western Australian legislation in the 1980s also provided the Minister for the Environment with the power to grant exclusive rights to Western Australian flora and forest species for research purposes. In 1990 the Western Australian government awarded Amrad the rights to develop an anti-AIDS drug.

While Indigenous people generally support development of important medical treatments, they should not be disadvantaged by such work. Indigenous people's customary law should be respected and complied with. Some ways to achieve this include, but are not limited to:

- Seeking consultation with Indigenous people as to their customary law and other requirements.
- Compliance with Indigenous peoples' customary law and other requirements.
- Provision of comprehensive information to Indigenous people on proposed collection activities, research, development, commercial exploitation of any biological resources and knowledge, potential impacts on daily activities of Indigenous peoples, the ownership of biological resources and their derivatives, the ownership of Indigenous knowledge, and any possible future impacts or uses of resources and knowledge.
- Seeking prior informed consent for the use of any Indigenous knowledge.
- Seeking prior informed consent for access to Indigenous land for any purposes including collection.
- Ethical conduct in any consultation, collection or other processes.
- Agreements on mutually agreed terms with Indigenous people for all parts of the process.
- Equitable benefit sharing arrangements.
- Acknowledgement of Indigenous peoples contribution.
- Other requirements determined by Indigenous people according to their customary law.

The experience of the Western Australian government and Indigenous people in relation to smokebush is proof of the need for regulation of biological resources. Such regulation would acknowledge Indigenous peoples' rights over land, biological resources and related knowledge, as well as respect for Indigenous customary laws. For Indigenous people, lack of recognition, consultation, participation and benefit-sharing has made the smokebush case synonymous with biopiracy. Strong regulation is needed to provide recognition, respect and enforcement of Indigenous customary law.

3. Commonwealth public inquiry – access to biological resources in Commonwealth areas

In 2000, an inquiry into access to resources in Commonwealth areas was conducted. The inquiry was required to advise on a scheme capable of implementation through regulations under s 301 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The significant contribution of Indigenous knowledge to the development of commercial products was acknowledged by the Inquiry's Chair, John Voumard, who stated:

There is considerable commercial interest in Indigenous knowledge of plant and animal species for food, medicine and other purposes. Much of this knowledge has already been published and is readily available to the public. Their knowledge helps to locate species that could be used, for example, by:

- (a) the pharmaceuticals industry for developing new drugs;
- (b) herbalists and the medical profession in developing natural therapies and nutraceuticals;
- (c) the bush food industry, for new herbs, spices, flavours and food staples;
- (d) agricultural, aquaculture and floriculture industries;
- (e) industries based on developing personal care products, ie cosmetics, soaps, shampoos, fragrances, sunscreens, aromatic oils, etc;
- (f) biotechnology industries, in which biotechnology can be used to develop products associated with any of the above industries, as well as in the development of industrial products and processes.²⁶⁴

The inquiry received many submissions about the requirements of Indigenous peoples for recognition, acknowledgement, information, ethical conduct in collection processes, agreements with mutually agreed terms,

264. Voumard J, *Commonwealth Public Inquiry: Access to Biological Resources in Commonwealth Areas* (Canberra: Australian Government Printing Service, July 2000) 84.

equitable benefit sharing and the need for parties to seek the prior informed consent of Indigenous peoples.²⁶⁵ The inquiry considered the submissions and the need to establish a system that respects Indigenous peoples' customary law obligations and provides an equitable platform for negotiation of rights.

The scheme takes into account the concerns of Indigenous organisations and communities by recommending that the regulations include:

- The requirement that the Minister take certain factors into account, when deciding whether to grant or refuse and access permit; and
- Provision that the decision of the owners of biological resources to deny access to their resources is not reviewable.²⁶⁶

The Inquiry also sought consultation with Commonwealth agencies and the states and territories on the establishment of a nationally consistent approach.

4. The Commonwealth regime

Nationally consistent approach for access to and the utilisation of Australia's native genetic and biochemical resources (NCA)

On 11 October 2002, the 14 Commonwealth, state and territory ministers of Australia constituting the Natural Resource Management Ministerial Council endorsed the NCA.²⁶⁷ The NCA makes adoption of the Bonn Guidelines explicit in its preamble in which all Australian governments state their acceptance of the invitation by the *Convention on Biological Diversity*²⁶⁸ to apply the guidelines. The connection is further reinforced by including key elements of the guidelines among the features of the NCA.²⁶⁹

The NCA includes a set of principles to underpin the development of legislative, administrative or policy frameworks in Commonwealth, states and territories. The principles also aim to deliver important elements of the National Strategy for the Conservation of Australia's Biodiversity. One aspect of the NCA is Indigenous biodiversity knowledge.

The foreword to the NCA states that frameworks for access and benefit sharing must respect Indigenous people's special knowledge of biodiversity and ensure that Indigenous people have a choice and means to share their knowledge on fair and equitable terms.²⁷⁰ It is noted in the Introduction that the NCA makes a significant contribution to achieving objective 1.8.2 of the National Strategy which states:

Ensure that the use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners of that knowledge and ensure that the use and collection of such knowledge results in social and economic benefits to the traditional owners. This will include:

- a. encouraging and supporting the development and use of collaborative agreements safeguarding the use of traditional knowledge of biological diversity, taking into account existing intellectual property rights;
- b. establishing a royalty payments system from commercial development of products resulting, at least in part, from the use of traditional knowledge.

One general principle is that frameworks will 'recognise the need to ensure the use of traditional knowledge is undertaken with the cooperation and approval of the holders of that knowledge and on mutually agreed terms'.²⁷¹ A second general principle of the NCA is that where governments develop or review legislative, administrative or policy frameworks, the frameworks will be consistent with the *Native Title Act 1993* (Cth).²⁷² In the application of the general principles, governments are required, as far as is practical and appropriate, to apply a number of elements. One element, relating to the need for consistency between jurisdictions in the development or review of access and benefit sharing frameworks, requests that governments have regard to the value of 'collaborating when considering common issues such as the ownership of resources and the possible application of frameworks to private land'.²⁷³

265. Schnierer S, Submission, in Voumard, *ibid*, *Executive Summary*, 77.

266. Voumard, *ibid*, viii.

267. Australian Government, Department of the Environment and Heritage, *Understanding the Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources* (2003) <<http://www.deh.gov.au/biodiversity/science/access/nca/pubs/understanding.doc>>1.

268. Above n 11.

269. *Ibid* 4.

270. Natural Resource Management Ministerial Council, *Nationally Consistent Approach For Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources* (adopted 11 October 2002) 1.

271. *Ibid* [7], 'General Principles Underpinning Development or Review of Legislative, Administrative or Policy Frameworks in Australian Jurisdictions'.

272. *Ibid* [4(c)].

273. *Ibid* [11(j)], 'Common Elements of Access and Benefit-sharing Arrangements Established in Australian Jurisdictions'.

The emphasis of the NCA is to give effect to Australia's obligations under the Convention on Biological Diversity, to encourage investment in Australia's biotechnology capacity, ecological sustainability, certainty, transparency and a fair and equitable sharing of benefits. While Indigenous peoples may gain some benefits from outcomes of the NCA, the NCA does not mandate the creation, implementation or enforcement of Indigenous peoples' rights to Indigenous knowledge according to customary law. The NCA provides potential for governments to develop and review frameworks that provide respect for, or even implement, Indigenous customary law as it relates to Indigenous traditional knowledge. Whether governments maximise that potential in favour of Indigenous people will depend on many factors, including political will and the influence of stakeholders.

Environment Protection and Biodiversity Protection Act

In 2000, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) was passed by the federal government. The EPBC Act implements Australia's obligations under the *Convention on Biological Diversity*. It includes specific references to the interests of Indigenous Australians. The objects of the Act include:

- (a) to protect the environment;
- (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
- (c) to promote the conservation of biodiversity;
- (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and Indigenous peoples;
- (e) to assist in the implementation of Australia's international environmental responsibilities and in relation to Indigenous peoples;
- (f) to recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- (g) to promote the use of Indigenous people's knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.²⁷⁴

In order to achieve its objects, the Act:

promotes a partnership approach to environmental protection and biodiversity conservation through:

- (i) bilateral agreements with States and Territories; and
- (ii) conservation agreements with land-holders; and
- (iii) recognising and promoting Indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity; and
- (iv) the involvement of the community in management planning.²⁷⁵

The Environmental Protection and Biodiversity Conservation Regulations 2000 (EPBC Regulations) provide procedures for checking research and certain activities on Commonwealth territories. This has allowed Indigenous concerns to be considered as an important part of management in the territories. One example is the clearance procedure operated by national parks for use of images from Uluru-Kata Tjuta National Park. The traditional owners of the park and the Department of the Environment and Heritage manage the park jointly. The EPBC Regulations provide that anyone wishing to conduct commercial filming, videoing, photography or art in the park must obtain a permit from the Director of the National Park. There are also guidelines for photographing and filming that must be adhered to as part of the permit conditions.²⁷⁶

Draft amendments to the EPBC Regulations 2000 – access and benefit sharing arrangements under section 301

Section 301 (control of access to biological resources) of the EPBC Act provides for the making of regulations for the control of access to biological resources in Commonwealth areas.²⁷⁷ The regulations may contain provisions for the

274. *Environment Protection and Biodiversity Protection Act 1999* (Cth) s 3(1).

275. *Environment Protection and Biodiversity Protection Act 1999* (Cth) s 3(2)(g).

276. Uluru–Kata Tjuta National Park, *Film and Photography Guidelines* (Northern Territory, 2002).

277. *Environment Protection and Biological Conservation Act 1999* (Cth) s301(1).

equitable sharing of benefits arising from the use of biological resources, facilitation of access to biological resources, the right to deny or grant access, and to set the terms of access.²⁷⁸

Regulations for administration of access and benefit sharing arrangements pursuant to s 301 of the EPBC Act have been drafted and currently await approval by the minister.²⁷⁹ These proposed regulations²⁸⁰ amend the EPBC Regulations.

The purposes of Part 8A of the regulations are:

- (a) providing for control of access to biological resources in Commonwealth areas, promoting their conservation and ecologically sustainable use;
- (b) ensuring equitable benefits by providing for agreements between the party seeking access and the access provider;
- (c) recognising the special knowledge of Indigenous people about biological resources;
- (d) establishing an access regime providing certainty, minimising cost for access seekers; and
- (e) seeking to ensure that social and economic benefits of access accrue to Australia.²⁸¹

Indigenous people are regarded as access providers to the land for the purpose of the regulations, in instances where the land is held under lease by the Commonwealth or a Commonwealth agency and is Indigenous peoples' land²⁸² and where they are the native titleholders for the area.²⁸³ Access for persons who are not access providers for a Commonwealth area is only available in accordance with a permit in force under Part 17 of the proposed regulations. A 50-unit penalty applies to contraventions.²⁸⁴

Applicants for access must enter into a benefit sharing arrangement with all access providers.²⁸⁵ These may include Indigenous land use agreements²⁸⁶ within the meaning of the *Native Title Act 1993* (Cth). Benefit sharing agreements must provide for reasonable benefit sharing arrangements, including protection for, recognition of and valuing of any Indigenous knowledge given by the access provider.²⁸⁷

The regulations provide that where the access provider is an Indigenous owner, the access provider must have given informed consent to the benefit sharing agreement.²⁸⁸ The matters the minister must consider in determining whether informed consent was given include the adequacy of the information provided by the applicant, the conduct of the negotiations, adequacy of the time provided for consideration of the permit application, consultation and negotiation of the benefit sharing agreement, the views of representatives of the access provider, and the availability of independent legal advice for the provider.²⁸⁹ In assessing the agreement the minister may be satisfied that informed consent was given by native titleholders where there is a registered Indigenous land use agreement that purports to reflect the benefit sharing agreement.²⁹⁰

This system is important to Western Australia because states and territories have committed to a NCA for development or review of laws, administrative or policy frameworks for access to biological resources discussed above. The proposed Commonwealth regime may provide a model scheme for adoption by other states and territories. The standards of access and benefit sharing in relation to Indigenous people were strongly informed by the Voumard Report.²⁹¹

The proposed Commonwealth scheme has been criticised on a number of grounds including failure to secure the right of prior informed consent, reliance on Indigenous land use agreements for benefit sharing,²⁹² failure to create Indigenous rights to biological knowledge as intellectual property or resource rights, and inadequate infrastructure arrangements for administering benefits accrued.²⁹³

278. *Environment Protection and Biological Conservation Act 1999* (Cth) s 301(2).

279. Department of Environment and Heritage, 'Access to Biological Resources in Commonwealth Areas – Draft Amendments to the Environment Protection and Biodiversity Conservation Regulations 2000 Access Permits and Benefits Sharing Arrangements: A Guide' <<http://www.deh.gov.au/epbc/about/amendments/pubs/guidetodraftregs.pdf>>.

280. Department of Environment and Heritage 'Draft Environment Protection and Biodiversity Conservation Amendment Regulations' (2001) <<http://www.deh.gov.au/epbc/about/amendments/pubs/draftbiologicalreg.pdf>>.

281. *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.01.

282. *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.03(1)(c).

283. *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.03(1)(j).

284. *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.05.

285. *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.06 (1).

286. *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.06 (3).

287. *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.08.

288. *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.09.

289. *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.09(2).

290. *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.12(2).

291. Voumard, above n 264.

292. Rimmer, *Blame It On Rio*, above n 251, 12.

293. Langton M, Rhea ZM, Ayre M & Pope J, 'Composite Report of the Status and Trends Regarding Knowledge, Innovations and Practices of Indigenous Local Communities' UNEP/CBD/WG8J/3/INF/4, (UNEP, CBD, 2003) 80–81.

5. Indigenous protected areas

Knowledge about land management is an important aspect of Indigenous knowledge. Where Indigenous people manage land their knowledge is utilised and intellectual property issues may arise in the recording or other uses of that knowledge. This is especially relevant to joint management arrangements. Customary law should be considered in land management and any uses of Indigenous knowledge in relation to land management.

The Indigenous Protected Areas (IPA) program is part of Australia's National Reserve System Program which aims to establish a network of protected areas which includes a representative sample of all types of ecosystems across the country. The National Reserve System Program is itself a part of the Australian government's Natural Heritage Trust.

The IPA program supports Indigenous landowners who seek to commit themselves 'to manage their lands for the protection of natural and cultural features in accordance with internationally recognised standards and guidelines'.²⁹⁴ The IPA program funds management plans and practical work to protect natural and cultural features and to contribute to conserving biological diversity.

Indigenous groups who wish to seek funding to develop an IPA should:

- Have legal ownership of the land where they wish to establish an IPA. Note that different forms of tenure such as freehold, deed of grant or leasehold can all potentially be considered IPA establishment.
- Have land which has high natural and cultural heritage values.
- Have a clear intention to manage the land for the conservation of natural and cultural features for the long term.
- Not intend to use the proposed IPA for any land use that will have a detrimental effect on the cultural or natural heritage values.
- Have legal or other effective means available to manage and protect an IPA. For example traditional management practices such as patch burning can be an effective means of management. Customary Law is recognised as a form of management which satisfies the International Union for the Conservation of Nature (IUCN) guidelines. Legal mechanisms for protecting IPAs might include Commonwealth, State or Territory legislation, which may be implemented through an agreement with the appropriate government agency.²⁹⁵

Where Indigenous peoples' land management practices correspond to those required by the IPA, the IPA arrangement may provide an opportunity for Indigenous people to be supported while practising their customary law obligations in relation to land management.²⁹⁶

Indigenous protected area in Western Australia

Paruku Indigenous Protected Area (IPA) covers 434 600 hectares, including an internationally significant wetland system, south of Halls Creek in the Kimberley region of Western Australia. It was the first IPA declared in WA and the 15th declared in Australia.²⁹⁷

Paraku was declared an Indigenous Protected Area (IPA) in September 2001 and was the first IPA to be declared in West Australia. The IPA, which covers an area of 434 000 ha and includes an internationally significant wetland system, is managed by the Tjurabalan Pastoral Company. Paraku (Lake Gregory) is of enormous spiritual significance to the Traditional owners including the Walmajarri, Jaru and Kukatja peoples.²⁹⁸

Indigenous advisory committees

Although to date there has not been any legislative recognition of substantive rights in relation to customary law and Indigenous knowledge, there has been some implementation of rights to effective participation and consultation. The constitution of Indigenous advisory groups provides an opportunity for input on issues of customary law and Indigenous knowledge.

294. Department of Environment and Heritage, *The Indigenous Protected Area Program* (2002) <<http://www.deh.gov.au/indigenous/ipa/pubs/ipa-advice-02-03.doc>> 1.

295. Ibid 6.

296. This is not always the case. In some nations arrangements for protected areas have led to the forced removal of Indigenous peoples from their lands, dispossession of Indigenous peoples' legal rights to land and interference with customary law practices. See F MacKay, 'Addressing Past Wrongs: Indigenous Peoples and Protected Areas: The Right to Restitution of Lands and Resources' (October 2002) <http://forestpeoples.gn.apc.org/Briefings/Indigenous%20Rights/ips_restitution_protected_areas_oct02_eng.htm#IV_B->.

297. Department of Environment and Heritage, 'Paruku Indigenous Protected Area' (2001) <<http://www.deh.gov.au/indigenous/fact-sheets/paruku.html>>.

298. Agreements Treaties and Negotiated Settlements Project, 'Paraku Indigenous Protected Area' (2001) <<http://www.atns.net.au/biogs/A000460b.htm>>.

The Indigenous Advisory Committee – EPBC Act

The EPBC Act establishes an Indigenous Advisory Committee which advises the Minister for the Environment and Heritage on the operation of the EPBC Act, taking into account the significance of Indigenous people's knowledge of the management of land and the conservation and sustainable use of biodiversity. The EPBC Act also provides for appointment of Indigenous people to the Biological Diversity Advisory Committee.²⁹⁹

Indigenous Protected Areas Advisory Group

In June 1999 the Minister for Environment and Heritage established an Indigenous Protected Areas Advisory Group to provide advice on the development of the IPA program. The membership of the group reflects a range of participants with both expertise and commitment to promoting the benefits of Indigenous involvement in the management and protection of Australia's biodiversity. The Advisory Group has representation from Indigenous people from across the country as well as other stakeholders such as the World Wide Fund for Nature and Government Nature Conservation Agencies.³⁰⁰

Part III: Recognition of Indigenous cultural and intellectual property in land and heritage legislation

Land rights legislation and the common law

In the Northern Territory, land rights legislation has been an important means of enforcement of customary obligations. For example, the permit system allows communities to decide issues of access to land. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) also provides for respect of customary law. For example, in 1998 Mr Yunupingu, a senior custodian, successfully defended the charge of assault when he enforced his cultural obligations and prevented the photographing of children. The photographs were understood to be property in the case. Gillies SM heard the case of *Colin Goodsell v Galawruy Yunupingu*,³⁰¹ in the Northern Territory Court of Summary Jurisdiction. The facts are as follows:

The defendant was charged with assault, criminal damage to film and a camera, and theft of a camera, arising out of an incident in which a commercial photographer who entered Aboriginal land without a statutory permit and contrary to Yolngu law (that is, the traditional laws of north-east Arnhem Land) had taken photographs of the defendant's extended family.

The defendant is the senior elder of the Gumatj clan and is responsible under Yolngu law for authorising photography on Gumatj land and ensuring the spiritual welfare of two children who were present (and were photographed). Attempts to settle the dispute failed and in accordance with Yolngu law, the defendant seized the camera and destroyed the film. Although there was no body contact, the seizing of the camera caused the camera strap to impart force to the photographer.³⁰²

Gillies SM held:

1. The defendant was authorised under s 26(1)(a) of the *Criminal Code Act 1997* (NT) to seize the camera (by means of a technical assault) and destroy the film. His entitlement to act under Yolngu law is recognised by, and enforceable under, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The beneficial purpose of this Act is to enable Aboriginal people to pursue traditional lives on Aboriginal land which implicitly means, inter alia, the observance and enforcement of traditional laws on that land. Since Yolngu rights are enforceable under the Act, it was not necessary to determine whether these rights are also recognised as native title under the common law.
2. Further, the defendant acted under an honest belief that Yolngu law had been recognised as native title by the *Land Rights Act* and the common law, thus could rely on an 'honest claim of right' (a 'mistake of law') under s 30(2) of the *Criminal Code Act* (NT). This section provides a defence regarding acts 'done with respect to property' such as criminal damage to a camera. The assault, being for the purpose of seizing property, was 'done with respect to property' and thus came within the section.³⁰³

299. *Environment Protection and Biological Conservation Act 1999* (Cth) s 504(4)(ea).

300. Department of Environment and Heritage, above n 294, 7.

301. (1999) 4 AILR 29.

302. Ibid 29.

303. Ibid.

Although Western Australia does not have land rights legislation, the case is a useful example of the incorporation of Indigenous customary law in areas where Indigenous rights to land are recognised, or where an honest belief in the applicability of customary law could be inferred.

The Aboriginal Heritage Regulations 1974 (WA) apply 'in relation to any Aboriginal site or protected area or land held subject to a covenant in favour of the minister in relation to which the minister has a duty under the Act'.³⁰⁴ Regulation 10(h) states that 'written permission is required before photographs or recordings of Aboriginal sites can be published or used for commercial reproduction'. A penalty of \$50 is imposed for breaches. The Aboriginal Affairs Department of WA noted that this provision is regularly overlooked by publisher, and if publishing occurs outside WA little can be done under the Act. Reproduction for post cards, material or ceramics and the like are equally hard to enforce.³⁰⁵

Cultural heritage laws

Currently, the Australian legal system protects Indigenous heritage in a legal framework that offers limited recognition and protection of Indigenous cultural heritage. Tangible heritage is protected through a system of Commonwealth and state heritage laws³⁰⁶ including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the *Protection of Moveable Cultural Heritage Act 1986* (Cth). Aboriginal heritage laws have been the subject of great dissatisfaction among Indigenous people and significant reform of the system was recommended in the 1996 Evatt review.³⁰⁷ The long-standing pursuit of heritage protection of Boobera Lagoon by the traditional owners in New South Wales is an example of the difficulties faced by Indigenous people using the Commonwealth heritage protection system.³⁰⁸

The Aboriginal Heritage Act 1972 (WA)

Places and sites

The *Aboriginal Heritage Act 1972* (WA) provides for Indigenous cultural heritage protection in Western Australia. The Act protects Aboriginal sites, places and objects.

The Act applies to:

- Any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;³⁰⁹
- Any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;³¹⁰
- Any place associated with the Aboriginal people that the Aboriginal Cultural Material Committee (ACMC) considers is important and of special significance to persons of Aboriginal descent and which is also of historical, anthropological, archaeological or ethnographic interest;³¹¹
- Any place where objects are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.³¹²
- The right to excavate or remove anything from any Aboriginal site is reserved to the Registrar who on advice of the ACMC may authorise these actions, taking into account any conditions made by the ACMC.³¹³

Objects

The Act also protects objects, whether natural or artificial:

- which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent; or
- which were made or used for or adapted for use for, any purpose connected with the traditional cultural life of Aboriginal people, past or present.³¹⁴

304. Aboriginal Heritage Regulations 1974 (WA) s 3(a).

305. Janke, *Our Culture: Our Future*, above n 10, 296.

306. Ibid 283–298.

307. Evatt E, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Canberra: Commonwealth of Australia, 1996).

308. Quiggin R, 'Boobera Lagoon' (2001) 5(6) *Indigenous Law Bulletin* 4. Boobera Lagoon is a site of particular cultural and spiritual significance to the Goomeroi people of the Toomelah, Boggabilla, Goondawindi area. They sought protection for the lagoon for over 30 years. For 20 years they sought protection under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). In 2002 they were successful in their application for a declaration under s 10 of the Act which lasted for two years.

309. *Aboriginal Heritage Act 1972* (WA) s 5(a).

310. *Aboriginal Heritage Act 1972* (WA) s 5(b).

311. *Aboriginal Heritage Act 1972* (WA) s 5(c).

312. *Aboriginal Heritage Act 1972* (WA) s 5(d).

313. *Aboriginal Heritage Act 1972* (WA) s 16.

314. *Aboriginal Heritage Act 1972* (WA) s 6.

The Act applies to objects that resemble sacred objects and are likely to deceive or be capable of being mistaken for such an object.³¹⁵ However, the Act does not apply to objects made for the purpose of sale that is not an object of sacred significance to Aboriginal people.³¹⁶

It is an offence to alter, damage, remove, destroy or conceal an object on or under an Aboriginal site without authority of the ACMC or the minister; to deal with an object in a manner not sanctioned by relevant custom; or to assume the possession, custody or control of such an object.³¹⁷

The Act focuses on the protection of tangible heritage such as sites and objects. The Indigenous knowledge that is associated with all tangible heritages and held by custodians ought to be recognised and protected under the Act. Some protection of customary law obligations in relation to knowledge is found in s 7 of the Act.

Subject to subsection (2), in relation to a person of Aboriginal descent who usually lives subject to Aboriginal customary law, or in relation to any group of such persons, this Act shall not be construed –

- (a) so as to take away or restrict any right or interest held or enjoyed in respect to any place or object to which this Act applies, in so far as that right or interest is exercised in a manner that has been approved by the Aboriginal possessor or custodian of that place or object and is not contrary to the usage sanctioned by the Aboriginal tradition relevant to that place or object; or
- (b) so as to require any such person to disclose information or otherwise to act contrary to any prohibition of the relevant Aboriginal customary law or tradition.³¹⁸

These laws are primarily aimed at protecting sites and objects, which are of significance to Indigenous people, from destruction. In most jurisdictions—except Victoria who have legislation pertaining to folklore—the intangible aspects of a site or object including, for instance, knowledge, art and stories are not protected under these laws.

Confidentiality

When Indigenous people engage in legal systems to achieve rights to land or rights to protect sites or objects, they are required to disclose information. Indigenous people need mechanisms to ensure confidentiality of the information generated for claims, applications for heritage protection and land management arrangements.

For example, in *Ngalpil v State of Western Australia*³¹⁹ Carr J made orders in respect of native title over an area surrounding Paruku (Lake Gregory) near Mulan. One issue remained in dispute at the time of the consent determination, relating to the anthropological reports generated during the course of the matter. The applicant wanted the reports to be subject to confidentiality orders by the court. The terms of such an order and whether they were authorised under the relevant statutory provisions were in dispute. Carr J resolved the matter by granting 'confidentiality orders which followed those proposed by the State of Western Australia with the requirement that the native title holders are given notice and consulted regarding their use'.³²⁰

Native title

Since *Mabo v Queensland (No 2)*³²¹ in 1992, native title rights to land have been recognised. Native title has its origins in, and gets its content from, the traditions and customs of the Indigenous inhabitants. The extent to which native title incorporates customary law in relation to cultural knowledge has been an aspect of a number of important recent native title cases.

The *State of Western Australia v Ward*³²² is the most well known of these cases. At trial Lee J held that 'the native title rights held by the Miriuwung Gajerrong People included 'a right to maintain, protect and prevent the misuse of cultural knowledge'.³²³ However, Lee J's judgment in this respect was subsequently overturned by the majority of the Full Court of the Federal Court on appeal.³²⁴ The case went to the High Court, and the issue was apparently put to rest when it handed down its judgment on 8 August 2002.³²⁵

315. *Aboriginal Heritage Act 1972* (WA) s 6(2).

316. *Aboriginal Heritage Act 1972* (WA) s 6(3)(a).

317. Janke T, *Indigenous Cultural and Intellectual Property and Cultural Heritage Legislation* (Unpublished paper, Sydney, 2004).

318. *Aboriginal Heritage Act 1972* (WA) s 7.

319. [2001] FCA 1140 (20 August 2001).

320. *Ngalpil*, *ibid.* Agreements, Treaties and Negotiated Settlements Database <<http://www.atns.net.au/biogs/A000013b.htm>>.

321. (1992) 175 CLR 1.

322. [2002] HCA 28.

323. *Ben Ward v State of Western Australia* (1998) 159 ALR 483, 640.

324. *Western Australia v Ward* (2000) 170 ALR 159.

325. *Western Australia v Ward* [2002] HCA 28, See K O'Brien, 'The Appropriation of Indigenous Ecological Knowledge' (2004) 1 *Macquarie Journal of International and Comparative Environmental Law* 44.

In the majority judgment, the judges note the decision of the Full Federal Court as follows:

Although the relationship of Aboriginal people to their land has a religious or spiritual dimension, we do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title.³²⁶

The majority of the High Court held:

In this Court, it was submitted that the Full Court erred in this respect and that this Court should restore par 3(j) of the first determination. The first difficulty in the path of that submission is the imprecision of the term 'cultural knowledge' and the apparent lack of any specific content given it by factual findings made at trial. In submissions, reference was made to such matters as the inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives.

To some degree, for example respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land found in par (b) of the definition in s 223(1) of the [*Native Title Act 1993* (Cth)]. However, it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1). The 'recognition' of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere. It is here that the second and fatal difficulty appears.

In *Bulun Bulun v R & T Textiles Pty Ltd*, von Doussa J observed that a fundamental principle of the Australian legal system was that the ownership of land and ownership of artistic works are separate statutory and common law institutions. That is the case, but the essential point for present purposes is the requirement of 'connection' in par (b) of the definition in s 223(1) of native title and native title rights and interests. The scope of the right for which recognition by the common law is sought here goes beyond the content of the definition in s 223(1).

That is not to say that in other respects the general law and statute do not afford protection in various respects to matters of cultural knowledge of Aboriginal peoples or Torres Strait Islanders. Decided cases apply in this field the law respecting confidential information, copyright, and fiduciary duties. Provision respecting moral rights is now made by Pt IX (ss 189–195AZO) of the *Copyright Act 1968* (Cth).³²⁷

The joint majority judgement noted that s 233(1)(b) of the *Native Title Act 1993* (Cth) required consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a 'connection' with the land or waters. However, the court found it unnecessary to form a conclusion as to whether there could be a spiritual connection to the land.

In particular, we need express no view on when a 'spiritual connection' with the land (an expression often used in the Western Australian submissions and apparently intended as meaning any form of asserted connection without evidence of continuing use or physical presence) will suffice.³²⁸

[The majority judgment] reads down the scope of the *Native Title Act 1993* (Cth), so that it does not encompass cultural knowledge... The majority argued that native title rights were limited to tangible property, and did not extend to intangible property because of a cultural materialism and a legal pragmatism. Arguably there is a need to take a more expansive view of the relationship between native title rights, customary law and spiritual custodianship.³²⁹

Kirby J, in his dissenting judgment, acknowledges the limitations of the existing legal regime for the protection of cultural property.³³⁰

[Kirby J] seeks to rebut the comments of Justice von Doussa³³¹ that recognition of native title rights analogous to intellectual property rights would fracture a so-called 'skeletal principle' of the common law in Australia by contravening the 'inseparable nature of ownership in land and ownership in artistic works' and that therefore such recognition would be contrary to s 223 (1)(c) of the *Native Title Act*.³³²

Kirby J also explores the possibility that cultural knowledge may be protected under s 116 of the *Constitution* (Cth)³³³ which provides: 'The Commonwealth shall not make any law for establishing religion, or for imposing any religious

326. *Western Australia v Ward* above n 322, 84.

327. *Ibid* 84–85 (footnote omitted).

328. *Western Australia v Ward* (2002) 213 CLR 1, 86.

329. Rimmer, *Blame it on Rio*, above n 253, 27.

330. Rimmer, *ibid* 28.

331. In *Bulun Bulun v R & T Textiles*, above 8.

332. Rimmer, *Blame it on Rio*, above n 251, 28.

333. See *Western Australia v Ward*, above n 328.

observance, or for prohibiting the free exercise of any religion.' Kirby J believes that s 116 of the *Constitution* (Cth) has the potential to provide for the right to cultural knowledge insofar as it is based upon the spirituality of Australia's Indigenous people.³³⁴

In South Australia native title claimants in the *De Rose* case, sought a limited right to protect their cultural knowledge by preventing

the disclosure otherwise than in accordance with traditional laws and customs of tenets of spiritual beliefs and practices (including songs, narratives, rituals and ceremonies) which relate to areas of land or waters, or places on the land or waters.³³⁵

The Full Federal Court cited *Ward*³³⁶ stating:

[T]he joint judgment in *Ward* rejected a contention that a determination of native title can include a right or interest exercisable by reason of the existence of native title to protect and prevent the misuse of 'cultural knowledge of the ... holders associated with the "determination area".' A recognition of such a right 'akin to a new species of intellectual property' went beyond the content of the definition in s 223(1), specifically the requirement of 'connection' in s 223(1)(b).³³⁷

The Full Federal Court went on to consider the position of cultural knowledge in relation rights to land.

[T]he High Court in *Ward* expressed the view that the distinction between pars (a) and (b) of s 223(1) can be 'critical' to the resolution of a particular case. The relevant issue in *Ward* was whether the NTA is concerned with the maintenance and protection of cultural knowledge. Their Honours pointed out that cultural knowledge may be possessed under the traditional laws acknowledged and traditional customs observed by the relevant people. However, they held that the asserted right to maintain, protect and prevent the misuse of 'cultural knowledge' did not satisfy the requirement of connection with the land imposed by s 223(1)(b) of the NTA. This was so because recognition of the asserted right would extend beyond denial or control of access to land held under native title and would amount to acknowledgement of a new species of intellectual property.

Their Honours did not explicitly address whether the asserted right, insofar as it went beyond permitting or controlling access to sites where artworks were located or ceremonies performed, could be said to be a right possessed under traditional laws and customs 'in relation to land'. It may be implicit in their Honours' reasoning that the asserted right was possessed 'in relation to land'. If so, that fact was not enough, in their Honours' view, to establish that the claimants had a 'connection' with the land for the purposes of s 223(1)(b). The explanation may be that a right can exist 'in relation to land' for the purposes of s 223(1)(a), even if the 'right' carries with it no entitlement to do or prevent anything from being done on the land; but that such a right is not of itself necessarily sufficient to establish that, by traditional laws and customs, the holder of the right has a 'connection' with the land for the purposes of s 223(1)(b).³³⁸

The Aboriginal and Torres Strait Islander Social Justice Commission has commented that:

[The court's approach] makes clear that it is unlikely that the NTA will be seen as a vehicle for the protection of cultural knowledge, even though the High Court in *Miriwung Gajerrong* identified some of the conditions under which this might be possible.³³⁹

However, O'Bryan J notes the case of *Wongatha People v Western Australia (No 6)*,³⁴⁰ in which the applicants sought leave and succeeded to amend their application in response to *Miriwung Gajerrong* to 'include in their list of native title rights and interests claimed, the right to 'teach and pass on knowledge of the applicant group's traditional laws and customs pertaining to the ... area' and the right to 'learn about and acquire knowledge concerning the applicant group's traditional laws and customs pertaining to the ... area'.³⁴¹ O'Brien notes that the explicit linking of rights to teach and pass on culture to land may allow the judge to recognise and protect the right under the native title regime.³⁴²

334. Rimmer, *Blame it on Rio*, above n 251, 31.

335. *De Rose v South Australia*, [2002] FCA 1342 (1 November 2002) [50].

336. *Western Australia v Ward*, above n 328.

337. *De Rose v State of South Australia* [2003] FCAFC 286 (16 December 2003) [171].

338. *Ibid* [306]–[307] (footnotes omitted).

339. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (Sydney: Human Rights and Equal Opportunity Commission, 2002) 41.

340. [2003] FCA 663.

341. O'Brien, above n 325, 45.

342. *Ibid* 46. Oral submissions were concluded in June 2004 and at the time of writing the claimants were awaiting the judge's decision on the determination.

Part IV: International laws and developments in Indigenous cultural and intellectual property

Introduction

'International laws' refer to the rules governing relations between nation states. They take the form of treaties, declaration, conventions, protocols and agreements. Through their participation in the United Nations systems many international laws are drafted by nations.

The value of international laws is that they set the standards for the international community on how to implement the obligations contained in the treaties. However, Australian law itself does not recognise treaty obligations as a source of law unless the treaty is specifically incorporated into Australian law through legislation.

International laws do not automatically turn into domestic laws and a range of political factors impact on whether a nation state will sign, ratify or accede to a particular treaty or convention. Nation states are not legally bound to implement the provisions of an international agreement even if they have ratified it. However, in *Minister for Immigration & Ethnic Affairs v Teoh*,³⁴³ a majority of the High Court of Australia considered that the Australian government's entry into international conventions gives rise to a legitimate expectation that, in reaching their decisions, administrative decision makers should consider all relevant treaties to which Australia is a party. If a decision maker does not act in accordance with a treaty, an affected individual may have a right to a hearing. After the Teoh Case, the Minister for Foreign Affairs and the Attorney General for the then Keating government released a formal statement which stated that Australia's ratification of an international treaty could not give rise to a legitimate expectation that government decision makers would take international treaties and conventions into account.³⁴⁴ The Howard government has also upheld this position.

The Crown has exclusive power to make treaties; the authority being exercised by the Governor General in Council. The federal government's Department of Foreign Affairs and Trade is responsible for concluding internationally binding treaties between Australia and other countries. Prior to signing or ratifying a treaty, the approval of the federal Cabinet is required. Since 1998 there has been a Joint Parliamentary Committee on Treaties whose main role is to scrutinise treaties signed by the Executive and report on the implications for Australian domestic law.

The right of the Commonwealth Government to give effect to treaties is recognised as being under the external affairs power.³⁴⁵ Many international treaties need state and territory cooperation for their domestic implementation. In this respect, discussions with state and territory governments occur at many levels. The peak consultative body is the Treaties Council consisting of the Prime Minister, the premiers and the chief ministers.³⁴⁶ Once a treaty has been entered into on behalf of Australia, it is binding upon the entire territory of Australia.

The usefulness of international law to a large extent depends on how fully these treaties and conventions are implemented into domestic law. International law has an influence on the development of the common law and may also be used to interpret statutes.³⁴⁷

International instruments and policy development

Traditional knowledge and cultural expressions of Indigenous people are the subject of discussion in the international arena.

Human Rights Conventions and Indigenous Cultural and Intellectual Property

Article 27 of the *International Covenant on Civil and Political Rights*³⁴⁸ recognises the collective rights to culture, language and religion of minorities. Article 27 states:

343. (1995) 183 CLR 273.

344. Minister for Foreign Affairs and the Attorney-General, 'The Effect of Treaties in Administrative Decision-Making' (Joint Statement, 25 February 1997).

345. *Australian Constitution* s 51(xxix). See *Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1.

346. Department of Foreign Affairs and Trade, 'Australia and International Treaty Making Information Kit' <<http://www.austlii.edu.au/au/other/dfat/reports/infokit.html>>.

347. Department of Foreign Affairs and Trade, 'Negotiating and Implementing Treaties: Non-government Organisations and State and Territory Participation' (2004) <<http://www.dfat.gov.au/treaties/making/making3.html>>.

348. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force in Australia 13 November 1980).

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 15 of the *International Covenant on Economic, Cultural and Social Rights*³⁴⁹ recognises the rights of individuals to participate in cultural life, to benefit from scientific progress and to benefit from their intellectual property. Article 15 states:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Draft Declaration on the Rights of Indigenous People

The Declaration on the Rights of Indigenous Peoples was developed from the work of the United Nations Working Group on Indigenous Populations. Over the years, Indigenous peoples, non-government organisations and representatives of United Nation member states have met at regular intervals to discuss the articles. The purpose of these meetings is to reach agreement on the wording and progress of the declaration through established United Nations processes culminating in adoption by the United Nation's General Assembly. Once the declaration is adopted it will constitute a non-binding declaration.

Although the declaration will not create any legal obligations on states in the sense of a treaty, it will

contribute to a growing body of customary international law in the area of Indigenous peoples' rights. Customary international law is associated with the concept of 'State practice'. This is the notion that binding rules of international law can be discerned in the ways States habitually behave with one another. Particular principles can acquire the status of customary law and become binding on States, even when the State is not a party to a treaty, such a resolution or declaration of the UN General Assembly.³⁵⁰

Articles 12, 13, 14, 24 and 29 of the draft Declaration include protection for Indigenous heritage rights. Article 12 states: 'Indigenous peoples have the right to practise and revitalize their cultural traditions and customs.' This includes all manifestations of culture, such as archaeological sites, artefacts, designs, ceremonies and art forms. It also includes the right of return of tangible and intangible cultural property which was taken without their consent.

The Australian government representatives expressed concern with respect to the rights of third parties to ownership within the framework of Article 12. The representative of Australia also expressed concern as to the practicality and feasibility of restitution for past acts and referred to the need to clarify the term 'intellectual property' in Articles 12 and 29.³⁵¹

These comments are instructive of the kinds of objections Indigenous Australians might expect to encounter when negotiating Indigenous heritage rights within Australia. For instance, the collection, distillation, production and application of tea tree oil is arguably derived from Indigenous knowledge concerning the healing properties of the tea tree. Many companies commercially offer tea tree oil products. How would Indigenous people receive restitution for the use of this knowledge? These kinds of issue will need to be thought through by Indigenous communities and negotiators.

During negotiations of the declaration it has been suggested that Articles 12, 24 and 29 be brought together into a single article, but this would not accord with the broad definition of Indigenous heritage adopted by Indigenous Australians.

349. *International Covenant on Economic, Cultural and Social Rights*, opened for signature 16 December 1966, [1976] ATS 5 (entered into force in Australia 10 March 1976).

350. Pritchard S, *Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous People and the First Six Sessions of the Commission on Human Rights*, 3rd edn (Canberra: ATSIC, 2001) 50.

351. *Ibid* 126.

Article 13 protects Indigenous peoples' rights to their spiritual and religious traditions, customs, ceremonies, sites and ceremonial objects; to the repatriation of human remains; and to preservation and protection of sacred places including burial sites. These rights currently find some representation in Australian law and policy. The return of human remains is a significant issue for Indigenous Australians. In 2000, the British and Australian prime ministers issued a joint statement pledging their commitment to repatriation of Indigenous remains held in British museums.³⁵²

Article 14 protects the rights to Indigenous history, language, oral traditions, philosophies, place and community names, and the right to an interpreter in political, legal and administrative proceedings. This Article combines the rights of Indigenous people to ongoing language, linguistic identity and to procedural fairness where language differences may be a barrier. Indigenous Australian's definition of Indigenous heritage includes linguistic identity, but has not so far linked this to procedural fairness in legal or administrative matters.

Article 24 protects rights to traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals. It combines these cultural rights with rights to access health services of all kinds.

Article 29 focuses on the right to protection and control of intellectual property and to develop sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, and visual and performing arts. This article is arguably the most comprehensive representation of Indigenous heritage as defined by Indigenous Australian representatives.

Pacific model law for the protection of traditional knowledge

Regionally, a model law for protecting traditional knowledge in the Pacific was drafted and completed in July 2002. The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* establishes 'traditional cultural rights' for traditional owners over traditional knowledge and expression of culture.³⁵³ The prior and informed consent of the traditional owners is required, among other things, to:

- reproduce or publish the traditional knowledge or expressions of culture;
- perform or display the traditional knowledge or expressions of culture in public;
- make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expression of culture; and
- use the traditional knowledge or expression of culture in any other form.

If individual Pacific countries wish to enact laws for protection of traditional knowledge, the model law is a useful starting point. Fiji is currently drafting a law based on this model.

World Intellectual Property Organisation (WIPO)

In 2000 WIPO established an Inter-Government Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to discuss issues relating to:

- access to genetic resources and benefit sharing;
- the protection of traditional knowledge, innovations and creativity; and
- the protection of expressions of folklore.

WIPO is currently evaluating policy and legal issues and facilitating development of national and international responses to issues raised by Indigenous peoples in relation to the use of their knowledge and the intellectual property system.³⁵⁴

The Convention on Biological Diversity

The objectives of the *Convention on Biological Diversity*³⁵⁵ are the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilisation of genetic

352. Forde C & Ormond-Parker L, 'Repatriation Developments in the UK' (2001) 5 *Indigenous Law Bulletin* 6.

353. Working Group for Legal Experts on the Protection of Traditional Knowledge and Expressions of Culture, 'Model Law for the Protection of Traditional Knowledge and Expressions of Culture', (Noumea, New Caledonia, 26–28 June 2002) s 6.

354. Information on the World Intellectual Property Organisation's work can be found at <<http://www.wipo.int/tk/en/>>.

355. Above n 11.

resources – including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies by appropriate funding. Discussions and negotiations between the parties to the convention have resulted in decisions in relation to the development of an international regime for access and benefit sharing; domestic access and benefit sharing laws; and the role of the knowledge of Indigenous peoples.

The sixth conference of the parties of the *Convention on Biodiversity* adopted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (Bonn Guidelines). The guidelines are voluntary. They identify the steps in the process of access and benefit sharing, and emphasise the need for the prior informed consent of the nation in which the resources are located.³⁵⁶ The Bonn Guidelines make a number of references to Indigenous peoples and local communities, and to traditional knowledge. All provisions are subject to the national legislation in force in each member state. Clause 31 states:

Respecting established legal rights of indigenous and local communities associated with the genetic resources being accessed or where traditional knowledge associated with these genetic resources is being accessed, the prior informed consent of indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices should be obtained, in accordance with their traditional practices, national access policies and subject to domestic laws.

Subject to national legislation, the Bonn Guidelines require the parties to ensure that the commercialisation and any other use of genetic resources should not prevent traditional use of genetic resources,³⁵⁷ and support measures, as appropriate, to enhance Indigenous and local communities' capacities to represent their interests fully at negotiations.³⁵⁸

Indigenous peoples and local communities are regarded as stakeholders and states are encouraged to seek their views in relation to access, benefit sharing, mutually agreed terms, and the development of national strategy, policies or regimes on access and benefit sharing.³⁵⁹ The guidelines recommend the establishment of national consultative groups, comprising relevant stakeholders including Indigenous peoples and local communities, in order to facilitate their involvement.³⁶⁰

The parties have also endorsed the *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place, or Which Are Likely to Impact on Sacred Sites, and on Land and Waters Traditionally Occupied or Used By Indigenous and Local Communities*.³⁶¹ In Decision VII/16 the Conference of the Parties encourages governments to initiate a legal and institutional review of matters related to cultural, environmental and social impact assessment, with a view to exploring options for incorporation of these guidelines into national legislation, policies and procedures.³⁶² Parties are also requested to use the guidelines as appropriate.³⁶³ The purpose of the *Akwé: Kon Voluntary Guidelines* includes the following reference to the traditional knowledge of Indigenous peoples.

[T]he purpose of these Guidelines is to provide a collaborative framework within which Governments, Indigenous and local communities, decision makers and managers of developments can ... take into account the traditional knowledge, innovations and practices of Indigenous and local communities as part of environmental, social and cultural impact-assessment processes, with due regard to the ownership of and the need for the protection and safeguarding of traditional knowledge, innovations and practices.³⁶⁴

Article 8(j) of the *Convention on Biological Diversity* reads:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

356. 'Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization' (Bonn Guidelines), Introduction.

357. Bonn Guidelines, *ibid.*, Cl 11 (iii).

358. *Ibid.*, cl 11 (vii).

359. *Ibid.*, cl 18. Special Rapporteur, Erica Irene Daes notes that there is considerable developing international law which recognises Indigenous people's status as rights holders, not just stakeholders in relation to natural resources: see E/CN.4/Sub.2/2004/30 Prevention of Discrimination and Protection of Indigenous peoples: Indigenous Peoples' Permanent Sovereignty Over Natural Resources, 13.

360. Bonn Guidelines, *ibid.*, cl 19.

361. Report of the Seventh Meeting of the Conference of the Parties to the Convention on Biological Diversity (UNEP/CBD/COP/7/21, 13 April 2004) n 57. (Pronounced 'agway-goo'. A holistic Mohawk term meaning 'everything in creation' provided by the Kahnawake community located near Montreal, where the guidelines were negotiated.)

362. *Ibid.*, Decision VII/16, [2] 260.

363. *Ibid.* [3].

364. *Ibid.*, Annex, 261.

Australia ratified the Convention in 1993, and has implemented the National Strategy for Conservation of Australia's Biological Diversity. The strategy has a policy and legislative element.

The National Strategy for the Conservation of Australia's Biological Diversity³⁶⁵ adopts a number of principles. The following relate to Indigenous concerns:

Although all levels of government have a clear responsibility, the cooperation of conservation groups, resource users, Indigenous peoples, and the community in general is critical to the conservation of biological diversity.³⁶⁶

The close, traditional association of Australia's Indigenous peoples with components of biological diversity should be recognised, as should the desirability of sharing equitably benefits arising from the innovative use of traditional knowledge of biological diversity.³⁶⁷

The Australian government implemented the Natural Heritage Trust, which consists of a series of programs and includes the appointment of 13 Indigenous land management facilitators around Australia who provide information to Indigenous communities about the types of support and technical advice that is available to assist them with the land management issues of their lands. The facilitators also provide feedback to Commonwealth Government policy-makers on land management issues that are of concern to Indigenous communities. Land management projects involving Indigenous communities include:

- Establishing nurseries for revegetation with native plants;
- Rabbit and weed control;
- Fencing out stock from ecologically sensitive areas such as river banks; and
- Developing interpretation trails to inform the broader community about Indigenous land management practices and the benefits of protecting cultural sites.³⁶⁸

Indigenous statements

Maatatua Declaration 1993

In 1993 the nine tribes of Maatatua in the Bay of Plenty Region of Aotearoa, New Zealand convened the first ICIP Rights Conference. The Maatatua Declaration was adopted by the delegates and includes the following principles among many others in the declaration:

The right to self determination, the exercise of which includes recognition of Indigenous people as the exclusive owners who are capable of managing their ICIP, and their intellectual property.³⁶⁹

Indigenous people affirm that 'the knowledge of Indigenous peoples of the world is of benefit to all humanity'. The sharing of this knowledge is qualified by the requirement that Indigenous people's fundamental rights to define and control this knowledge are protected by the international community.³⁷⁰

Julayinbul Statement

In 1993, a meeting of Indigenous delegates in Australia developed and endorsed the Julayinbul Statement,³⁷¹ which identifies the rights of Indigenous people to continue to live within and protect, care for, and control the environment and Indigenous heritage. The statement includes recognition of the right of Indigenous people to define themselves and their Indigenous heritage. The statement echoes the Maatatua commitment to sharing Indigenous heritage provided fundamental rights are respected. The statement locates Indigenous heritage within the framework of Aboriginal customary laws. Aboriginal intellectual property, within Aboriginal common law, is an inherent inalienable right which cannot be terminated extinguished or taken.

Any use of the intellectual property of Aboriginal Nations and Peoples may only be done in accordance with Aboriginal Common Law, and any unauthorised use is strictly prohibited.

365. Department of the Environment, Sport and Territories, *National Strategy for the Conservation of Australia's Biological Diversity* (1996) <<http://www.deh.gov.au/biodiversity/publications/strategy/>>.

366. Ibid, 'Principles' (2).

367. Ibid (9).

368. See Department of the Environment and Heritage <<http://www.ea.gov.au/indigenous/programs.html>>.

369. Maatatua Declaration, preamble.

370. Ibid.

371. 'The Julayinbul Statement on Indigenous Intellectual Property Rights' (Jingarrba, 25–27 November 1993).

Just as Aboriginal Common Law has never sought to unilaterally extinguish English/Australian Common Law, so we expect English/Australian Common Law to reciprocate.³⁷²

The statement then calls upon Indigenous people to develop means to implement these principles. It calls upon governments to review legislation and policy with regard to ICIP, and to implement international standards which protect ICIP rights. The Julayinbul Statement provides important guidance on standard setting for development of legal protections of Indigenous heritage.

Part V: Australian reports and developments in Indigenous cultural and intellectual property

The Working Party Report on the Protection of Aboriginal Folklore

In 1974, the Commonwealth Government set up a working party to investigate the protection of Aboriginal Folklore.³⁷³ Generally, the working party's report, completed in 1981, recommended the enactment of an Aboriginal Folklore Act which would, among other things:

- Prohibit non-traditional uses of secret/sacred materials.
- Prohibit debasement, mutilation or destruction of folklore and impose criminal sanctions.
- Allow payments to traditional owners for the commercial use of items of their folklore.
- Provide for a system of clearances for prospective users of items of folklore.

To oversee the operation of the Act, the working party recommended the establishment of a Folklore Commission to issue clearances and negotiate payments. In this way, Indigenous custodians would have the power to authorise the use and reproduction of their arts and cultural material and receive payment for such uses.

The working party's report considered that it would be impractical to grant a property right which vested in Indigenous groups. The report recommended against the introduction of such a property right because:

- According to Indigenous customary law, there is no right of ownership as distinct from other right.
- There was a concern about giving Indigenous communities the right to isolate their 'folklore' from Australian culture generally which may have the effect of allowing Indigenous groups the right to control the reproduction of items of folklore.
- There was a concern about the capacity of the courts to deal appropriately with the rights arising out of oral tradition.³⁷⁴

These above grounds must be seen to have been eradicated in light of the Mabo case and the recent copyright cases which have gone through the federal courts. They are also based on the premise that the purpose of the legislation is not solely to recognise Indigenous interests in relation to art, but for a national interest perspective on reform.³⁷⁵ In order to prevent the potential conflict between the rights of traditional custodians and the rights of individual copyright owners, the working party recommended that the rights of Indigenous groups, to make claims through the Aboriginal Folklore Commissioner, would only apply to items of folklore that were out of copyright.³⁷⁶

The working party's report also recommended that copyright owners should not be able to stop Indigenous groups from using traditional designs, dance or music. It recommended that copyright and designs legislation should be altered to allow customary users to exercise their customary rights freely in relation to folklore and not have their rights to use folklore interfered with by other copyright owners.³⁷⁷

With respect to non-customary use of secret/sacred materials, the working party recommended that there should be criminal sanctions imposed.³⁷⁸

372. Ibid.

373. Findings of the Working Party are recorded in Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, above n 2. The Working Party defined 'folklore' as the 'body of traditions, observances, customs and beliefs of Aboriginals as expressed in Aboriginal music, dance, craft, sculpture, painting, theatre and literature'.

374. Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, ibid 36.

375. Davis M, Science, Technology, Environment and Resources Group, *Biological Diversity and Indigenous Knowledge*, Research paper 17 (Parliamentary Library: AGPS, 1997) 18.

376. Department of Home Affairs and Environment, above n 373, 37.

377. Ibid 45.

378. Ibid 31.

The Myer Report of the contemporary visual arts and crafts inquiry

In 2003, the then federal Minister for the Arts appointed Mr Rupert Myer to conduct an independent inquiry into the contemporary visual arts and crafts sector. The inquiry took submissions and consulted widely. The inquiry found that intellectual property issues are of considerable importance to the arts and crafts sector, to ensure both the successful functioning of the sector and as a source of income for artists.³⁷⁹ The report made a number of recommendations in relation to ICIP including:

- The report recognised the importance of protecting communally owned cultural material embodied in works and recommended extension of moral rights to Indigenous groups;
- The report recommended that Commonwealth Government departments take action in relation to the misappropriation of cultural imagery and iconography.
- Action was recommended on the importation of works purporting to be on Indigenous origin.
- Commonwealth Government departments were encouraged to take action in relation to the exportation of Indigenous art under cultural heritage provisions.³⁸⁰

Recommendation 5 of the report suggested the introduction of a resale royalty for artists.³⁸¹

The ALRC Report on the Recognition of Aboriginal Customary Law

The recognition of Indigenous customary law within the Australian legal framework was discussed at length in the ALRC's 'Report on the Recognition of Aboriginal Customary Law'.³⁸² The report, which was released in 1986, concluded that Indigenous customary law should be recognised in appropriate ways by the Australian legal system to the extent that it is acceptable to the communities and individuals concerned and in such a way that is consistent with fundamental human rights. The report made specific recommendations in relation to family law, evidence and traditional hunting and gathering rights. Although the report's terms of reference did not include Indigenous intellectual and cultural property, the ALRC supported specific legislative protection for the use of secret/sacred material other than in accordance with custom; the mutilation, debasement or export of items of folklore; and the use of items of folklore for commercial gain without payment to traditional owners.³⁸³

Since the report, there has been increased support for the recognition of Indigenous customary law by such bodies as the Royal Commission into Aboriginal Deaths in Custody and the Council for Aboriginal Reconciliation. The Northern Territory has already enacted legislation to recognise Indigenous customary law in several areas of civil law. For instance, the recognition of traditional marriages and kinship obligations has been incorporated in legislation pertaining to adoption, child welfare and the distribution of property on intestacy. Traditional relationships to land and sea areas including the custodianship of sacred sites and traditional hunting, gathering and fishing rights are also protected under Northern Territory legislation.

The Northern Territory Law Reform Committee

The Northern Territory Law Reform Committee has formed a sub-committee to inquire into Aboriginal customary law in the Northern Territory. The terms of reference of the inquiry are as follows:

- To inquire into the strength of Aboriginal customary law in the Northern Territory.
- To report and make recommendations on the capacity of Aboriginal customary law to provide benefits to the Northern Territory in areas including but not limited to governance, social well being, law and justice, economic independence, wildlife conservation, land management and scientific knowledge.
- To report and make recommendations as to what extent Aboriginal customary law might achieve formal or informal recognition within the Northern Territory.

The preamble to the terms of reference states in part:

Aboriginal Law is commonly misunderstood as relating primarily to issues of punishment and payback and its interface with the Northern Territory Criminal Code. This is simply untrue. Aboriginal Law encompasses an extremely

379. Myer R, *Report of the Contemporary Visual Arts and Craft Inquiry*, Executive Summary (Commonwealth of Australia, 2002) 7.

380. Ibid 13, Recommendation 4.

381. Ibid 14, Recommendation 5.

382. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

383. Ibid, Vol 1, [470].

broad and complex set of rules and unwritten legislation governing social relationships, economic rights, land ownership, wildlife conservation, land management and intellectual property rights.³⁸⁴

The committee made many recommendations including '[t]he Northern Territory Statehood Conference resolution that Aboriginal customary law be recognised as a "source of law" should be implemented'.³⁸⁵

Part VI: Conclusion and proposals for reform

Conclusion

Indigenous people have strong connections with the intellectual and cultural property pertaining to their country and heritage. This connection is at the heart of Indigenous people's identity. Indigenous customary law imposes certain obligations and responsibilities over Indigenous intellectual and cultural property. It is very important to recognise that customary laws may vary from community to community and may be practised at different levels of operation depending on the impact of western influence upon Aboriginal cultures, traditions and lifestyles.³⁸⁶

Indigenous customary laws are not recognised in the western legal system. Third parties outside the Indigenous cultural group have in the past used Indigenous intellectual property without proper respect for Indigenous laws. This includes unauthorised use as well as the derogatory treatment and distortion of the cultural, religious and social interests of Indigenous communities. Reform of state and commonwealth legislation is required to give effect to Indigenous customary laws and to provide adequate protection to Indigenous intellectual property and cultural material.

This paper has considered national legislation, regulation and policy across a broad range of areas including intellectual property, environment protection, conservation and biodiversity, and heritage. The paper has also considered international developments in the areas of intellectual property, biodiversity and human rights. Across all these areas, there is a strong and clear need to recognise Indigenous self determination and Indigenous customary law practices. Law reform is necessary to implement the rights of Indigenous Western Australians to recognise self determination and customary law. Further consultation with Indigenous Western Australians is essential in developing specific law reform for each legal area.

Proposals for reform

Some issues for reform that the Law Reform Commission of Western Australia could focus upon include:

- Protection of intangible, performance and oral forms of Indigenous knowledge and cultural expressions including languages and dances.
- Protection of Indigenous cultural and intellectual property including Indigenous knowledge and Indigenous cultural expressions in perpetuity.
- Protection of rock art sites and information associated with sites of cultural significance – these are not protected by copyright and are often exploited in film and photography. Cultural information is often used without permission of Indigenous custodians.
- Indigenous knowledge and patents, and plant breeder's rights include a number of issues for consideration by Indigenous people and their customary law obligations. For instance: What are the implications of the patenting of life forms and the derivatives thereof for Indigenous peoples? Should there be exclusions from patentability and exemptions from the application of the plant breeder's rights regime for some Indigenous materials?

In the examination processes, consideration should be given to disclosure provisions in the patents and plant breeder's rights regime. Are certificates of disclosure practical and would they benefit Indigenous peoples?

Should there be defensive protection measures adopted—such as databases—or are the unresolved issues of control and management of such databases, the ethics of engaging in patenting of Indigenous knowledge and the limited protection provided by patents too restricting?

These issues require careful consideration by Indigenous peoples and their decisions must inform policy.

384. Northern Territory Law Reform Committee, *Report of the Committee of Inquiry into Aboriginal Customary Law*, (2004) 42.

385. *Ibid* 5, Recommendation 11.

386. Weisbrot, above n 1.

- Implementation of the Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources. Should Western Australia draft laws which regulates access to genetic resources and provides Indigenous people with rights to implement their customary law obligations?
- The interpretation of the *Native Title Act 1993* (Cth) in relation to Indigenous knowledge.
- Individual Indigenous rights versus communal rights – how do individual and communal rights coexist?
- Inclusion of international obligations in Western Australian law.
- Protocols and ethics – adoption of international protocol guidelines such as the *Akwe: Kon Guidelines* and other national guidelines and development of local and regional Western Australian focussed protocol guidelines in all areas including film, art, bioprospecting and Indigenous knowledge.
- Dispute resolution between Indigenous groups/communities claiming ownership and between communities and individuals.
- Trade marks and Indigenous cultural expression – should the trade mark examination process take into account Indigenous cultural interests?
For example, guidelines and information about state cultural expression could be developed for trade mark examiners so that they can use the material as a reference during the trade mark registration process.
- Sacred and secret material needs special protection – can state heritage laws be changed to provide more protection for intellectual property associated with sites, places and objects?
- False labelling and authenticity – state law relating to competition and fair trading could address rip-offs that make use of false labelling. A state developed authenticity Aboriginal art and culture label may be an initiative that could give protection as a certification mark registered under the *Trade Marks Act 1995* (Cth).
- A state-based Indigenous controlled coordinating body/authority could assist Indigenous Western Australian communities with information and advice about intellectual property and heritage laws.

Appendix I: Non-Indigenous laws vs Indigenous customary laws ³⁸⁷

NON-INDIGENOUS LAWS	INDIGENOUS CUSTOMARY LAWS
• Emphasis on material form.	• Generally orally transmitted.
• Limited in time; eg copyright for 50 years after the death of the artist; patent rights are 20 years.	• Emphasis on preservation and maintenance of culture.
• Individually based – created by individuals.	• Socially based – created through the generations via the transmission process.
• Intellectual property rights are owned by individual creators or their employers and research companies.	• Communally owned but often custodians are authorised to use and disseminate.
• Intellectual property can be freely transmitted and assigned—usually for economic returns—for a set time, in any medium and in any territory.	• Generally not transferable but transmission, if allowed, is based on a series of cultural qualifications.
• Intellectual property rights holders can decide how or by whom the information can be transmitted, transferred or assigned.	• There are often restrictions on how transmission can occur, particularly in relation to sacred or secret material.
• Intellectual property rights are generally compartmentalised into categories such as tangible, intangible, arts and cultural expression.	• A holistic approach, by which all aspects of cultural heritage are inter-related.
• Emphasis on economic rights.	• Emphasis on preservation and maintenance of culture.
• No special protection of sacred secret material or gender restrictions.	• Specific laws on gender and sacred secret material.

387. Source: Janke, *Looking Out for Culture*, above n 139.

background paper 13

Aboriginal women's interests in customary law recognition

Catherine Wohlan*

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1. Introduction

This background paper discusses Aboriginal women's interests in the recognition of customary law. The adequate protection of Aboriginal women and children has been raised as a concern in the recognition of customary law.¹ The arguments in this paper can be summarised thus:

- (1) family violence and Aboriginal law are consistently presented as interrelated phenomena, whereas they should be understood as separate issues;
- (2) the way Aboriginal law is being presented and argued in the courts in relation to women is not always accurate; and
- (3) the status of women in Aboriginal society, both in historical times and today, is often misrepresented or otherwise neglected entirely.

It is now widely acknowledged that many Aboriginal women are the victims of horrific family violence, with women in remote and rural areas being particularly at risk. The statistics are staggering, for example:

[C]ountry Aborigines (ie, those living in rural areas or regional centres) are one and a half times more likely than Perth Aborigines and about 45 times more likely than 'country' non-Aborigines to be victims of reported domestic violence.

Aboriginal victims living outside Perth accounted for 38.3 per cent of total reported cases of domestic violence, 80.5 per cent of the total number of Aboriginal cases of domestic violence, and 71.2 per cent of the total number of domestic violence cases reported from the 'country'.²

Such statistics reflect the level of abuse Aboriginal women suffer through family violence. During interviews for this paper it was found that family violence is a serious and disturbing issue; however, it is a separate issue to Aboriginal law. The conflation of family violence and Aboriginal law—suggesting that acts such as beating a spouse have moral sanction under Aboriginal law—disables an adequate interpretation of women's position under Aboriginal law. Family violence and Aboriginal law are separate matters. Family violence reflects community dysfunction and the critical need for community development, while Aboriginal law incorporates the agency of Aboriginal women and has the potential to be a useful tool in addressing community justice.

Unfortunately, courts often receive a fragmented or one dimensional impression of the type of behaviour sanctioned under Aboriginal law. This can occur at the expense of Aboriginal women and children. More often than not, these arguments are used in an adversarial attempt to either divert Aboriginal males from entering the criminal justice system or as mitigation during sentencing. In her background paper for this reference, Victoria Williams refers to instances where the courts did not accept customary law as an explanation for an offence.³ Williams also highlights that '[o]f the cases reviewed, there are three which deal with offences involving violence against Aboriginal women by Aboriginal men'.⁴ One case involved a man beating his wife and attempting to justify his conduct by saying it was not unusual for Aboriginal men to beat their wives,⁵ the second case attempted to argue that it was sanctioned under customary law to 'discipline' your wife and children using a knife,⁶ and the third attempted to argue that an assault by the intoxicated brother on his sister was 'punishment' for her husband swearing in his presence.⁷ It is interesting to note here the author's comments that 'the failure to take customary law into account in mitigation appears to result from the manner in which the case was put to the court rather than because of the complete rejection of the explanation'.⁸ This is of concern because not only did the legal system allow opportunities to create false impressions of the status of women under Aboriginal law, but also the issue of what is culturally acceptable conduct was never really addressed.

Interviews for this paper focused on the west Kimberley with some information from the east Kimberley provided at major meetings, or in centres around Broome.⁹ The study is, therefore, predominantly Kimberley based. Cases of

1. Toohey J, 'Aboriginal Customary Laws Reference – An Overview', Background Paper No 5, above p 173, 175, referring to a report of the Australian Law Reform Commission (ALRC).
2. Ferrante A, Morgan F, Indemaur D & Harding RW, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 36–37 as cited in Kimm J, *A Fatal Conjunction: Two Laws Two Cultures* (Sydney: Federation Press, 2004) 4.
3. Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', Law Reform Commission of Western Australia, Project No 94, Background Paper No 1 (December 2003).
4. *Ibid* 22.
5. *Jadurin v The Queen* (1982) 44 ALR 424.
6. *R v Bulmer* (1986) 25 A Crim R 155.
7. *Ashley v Materna* (Unreported, Supreme Court of the Northern Territory, No JA1/1997, Bailey J, 21 August 1997).
8. *Ibid*.
9. For example the Kimberley Aboriginal Law and Culture Centre, Kimberley Language Resource Centre and Kimberley Land Council Annual General Meeting at Bungarun in September 2004 and in interviews with women in the Broome Regional Prison.

violence against Aboriginal women and children are also reviewed to see whether, and how, Aboriginal law mechanisms operate in these situations. The lack of community justice outlined in the case study below illustrates some of the problems faced when two systems of law compete with each other for justice.

2. Case study – where's the law?

The following case study illustrates the difficulties faced when the state's legal system and Aboriginal law compete with each other for justice. This case study describes violence against women; however, had there been the opportunity within the research timeframe to interview and document a case study about women's violence against men,¹⁰ or ritualised moral violence against women under Aboriginal law sanction,¹¹ these issues might have been addressed in a case study for this paper. Instances of this type were not put forward during interviews and therefore were not pursued. During discussions with Aboriginal women, socially sanctioned Aboriginal law violence against women was not expressed to be an area of major concern. The priority issues that arose during inquiries were a lack of control and a lack of justice for women when dealing with the state's legal system. The case study below expresses these issues well. It also reveals some ongoing difficulties in police intervention, which Aboriginal people continue to experience when they come into contact with the criminal justice system. It illustrates the continuing problem of police treatment and methods of interviewing Aboriginal people and collecting evidence. The case study shows how difficult it can be for Aboriginal people to understand the criminal justice process and how the adversarial system can inadvertently work to the detriment of Aboriginal women. It appears that the recommendations of the Royal Commission into Aboriginal Deaths in Custody affecting police practice in dealing with Aboriginal people (in particular the importance of the Anunga Rules when interviewing Aboriginal people) are not uniformly embraced and applied across the state. The lack of the use of interpreter services¹² was a significant factor in the failure of the state's legal system to deliver justice in the case study described below.

The story¹³

Jupurru got a ride into Derby on a Friday with a group of people who were coming in to town for a meeting. They arrived at lunchtime and went to a hotel and had a couple of beers. After that, Jupurru went for a walk with some other people and bought a carton of beer. The carton was shared in the park with a group of people and then Jupurru got a taxi to his ex-wife's sister (his sister-in-law) Nyapana's house. She wasn't home, but he stayed there and the drinking continued. When he was drunk Jupurru made sexual advances towards Nyapana's daughter, whispering dirty things to her and sitting her on his knee. Jupurru was thought to have tampered with some children. He was believed to have sexually abused one of his step-daughters for an extended period of time. The daughter now has mental health problems, but nobody had spoken directly or openly about the issue. Another child in the house ran and fetched Nyapana, who was visiting friends. When she returned to the house, Nyapana argued with Jupurru, chasing him out of the house and hitting him with a chair. Jupurru left the house but continued drinking.

The killing

Later that evening Jupurru came back to the house. It was locked. He was very drunk by this stage and entered the house through the kitchen window. Once inside he opened one of the locked doors, picked up a large rock from outside and returned to the house. While Nyapana lay sleeping in her room with the children, Jupurru smashed the rock against her head. Jupurru then dragged Nyapana out of the house by the legs, stabbed her in the back of the neck with a metal file, dragged Nyapana to a vacant block then raped her. Despite the massive head injury Nyapana was still alive, biting him and fighting the rape, so Jupurru strangled Nyapana and stabbed her repeatedly with the pointed end of the metal file. Jupurru covered Nyapana's body with what he could find and left her, not knowing if she was dead or alive. Nobody else knew where Nyapana was. Her sister and children had found blood in the house and conveyed alarm to the

10. Aboriginal women did provide information about women killing their husbands in circumstances of family violence or abuse. In one case customary law was discussed as punishment for the murder; however, there was no opportunity to interview the people involved in that case. In respect of the case study presented here, the victim's and perpetrator's families were willing to be interviewed. It was chosen, therefore, to assess how customary law operated in such circumstances.

11. This type of ritualised violence is documented in anthropological material, such as the threat of ritualised rape for women's transgression of men's Law business or sex as part of female initiation practices. See Berndt RM & Berndt CH, *The World of the First Australians* (Sydney: Lansdowne Press, 1996).

12. Michael Cooke interviewed the coordinator of the Kimberley Interpreting Service during his work for the Commission. She suggested that the police are resisting the use of interpreters, mistakenly believing in their own ability to communicate effectively without them. Cooke quotes the coordinator as stating: '...there are interpreters in most regions, so potentially the police could use interpreters throughout the Kimberley ... I also went to visit a senior police officer for the whole of the Kimberley and he told me that although he understood that most Aboriginal people don't speak English, that his boys know how to handle them and ... that within a year or so the new police pick up the lingo.' See Cooke M, 'Caught in the Middle: Indigenous Interpreters and Customary Law', Background Paper No 2, above p 77, 114.

13. Skin names have been used in order to protect the identity of individuals in this case study. The skin names used are incorrect to provide further protection against identification.

family, but Nyapana lay in the vacant block for two days before the smell of her dead body led to her being found by a stranger.

Jupurru fled Derby, leaving forensic evidence of the killing at the hospital water taps. The families of both the victim and perpetrator knew that it was Jupurru who had killed Nyapana. Some of the elders started discussions on the right way to punish him under Aboriginal law. Talks began about where the best place was for everyone involved in the matter to meet and punish him. Jupurru's movements from Derby and across the Fitzroy Valley were being monitored by the Aboriginal community while discussions continued regarding what should be done about the matter. The police caught Jupurru in a remote community nearly one week after the murder.

The elders from the victim's family described Jupurru as being 'good' when he was a child, meaning that he was not seen as intrinsically 'bad'. They found it hard to believe that he had committed this act. Jupurru had been through the Law (men's initiation); his wife was a 'straight' marriage skin way, although the marriage was a love match, not an arranged one. The elders involved in discussion of the punishment had known Jupurru since he was a child. They had helped to raise him, he was remembered as a good child, and in his teenage years he had worked as a stockman on country. He was deeply immersed in and respected his law and culture.

The response under Aboriginal law

What could be regarded as inaction by Western understanding (that is, not capturing Jupurru immediately) was really a thorough grounding to the action required to resolve the situation. Before there was any chance for consensus or adequate meetings for those who live under Aboriginal law, the police arrested Jupurru and took him to Derby. A senior Law man described the arrest as taking Jupurru into Gudia law¹⁴ too quick. The elders needed time to speak and have meetings, to reach some sort of consensus about what would be the best outcome for the situation under their law. Differing responses were offered as to how Jupurru should have been punished. His family, particularly his mother, was concerned with the potential of his death under Aboriginal law. The victim's father is a Law man and described the ideal models of Aboriginal law punishment for his actions.

The conflicting responses show the differing opinions on how the murder should be dealt with. The other element that affects how Aboriginal law would be practised is the fundamentalist Christian faith that many of those involved in the case adhere to. The conflicting responses and Christian faith do not show that there is no response under Aboriginal law or that it has faded beyond any systematic approach, just that these elements will affect Aboriginal law and how it is conducted.

One of the main issues for the elders was deciding on the best geographical location to conduct the punishment for the murder. Gudia law is understood as not allowing this kind of punishment, people interviewed described senior Law men who had been sent to jail for punishment that had been administered under Aboriginal law. Some communities wanted the whole matter kept well away from them. The murder happened in Derby but the families of the victim and perpetrator now live in various remote and rural areas. The community or country that the meetings would be conducted on would have been heavily impacted upon. The ideal place was described as 'by the river' taken to mean as open country away from any community. Jupurru's mother wanted to show a tree where somebody had been killed under Aboriginal law, the events that had taken place there had now changed the country permanently. Deciding where to conduct the punishment was a serious matter.

The victim's father explained that under ideal forms of Aboriginal law Jupurru would have been killed. His actions showed that he was 'bad' (corrupted in a sense). Jail was described as a cruel option compared to Aboriginal law, the proper form of punishment under Gudia law was believed to be long-term jail. The Law elder stated that it could take 20 years for him to die there; things could happen to him in there to really 'mess him up'. He said that Aboriginal law was far less cruel as a punishment. Jail was described as resulting in death, locking Jupurru up and letting him die slowly in prison.

It was said that in punishment there would be group discussion and consensus; that under Aboriginal law Jupurru's mother and sister would have been the first to give him a hiding then the victim's father would have beaten him, probably until he was dead.¹⁵ The extent of the beating would depend on the outcome of discussions for all involved,

14. Gudia (also Kartiya) translates loosely as 'white'. Gudia law is the state's legal system.

15. Whether he would actually be killed is debatable. Many of those involved are fundamentalist Christians which might affect any killing under customary law. The model put forward is social organisation as an ideal form of punishment under customary law.

with both the victim's and perpetrator's families coming to an agreement about what action to take. There would have been time given to Jupurru to talk to his family and for his family to release him for punishment.

The middle-aged family members (about 25–45 years old) believed that some type of Gudia law should be involved in the punishment. Weapons such as guns could have a catastrophic impact on the punishment and having a policeman involved would help keep elements like this under control. Many of the younger people (under 25) thought that 'old law' was too harsh and that jail would be a better option.

When the police arrested Jupurru and took him to Derby it was understood that Jupurru was now going to be dealt with under Gudia law. The time for justice under Aboriginal law had passed and Gudia law would deal with him in its way.

Arrest and police interview

When the police found Jupurru at a remote community, he was asleep and was taken away at 3.00am. He travelled back to Derby in a police van and interviewing commenced at the police station at 11.45am. In the interview room were two detectives and a cousin brother¹⁶ of the murderer. Jupurru and his cousin brother speak a traditional language as well as Kriol and Aboriginal English. They have Standard English as their fourth language. There was no interpreter in the room. The interview began as follows:

Police: Okay. All right, we're making inquiries into the death of Nyapana, okay? Before we continue I must tell you that you do not have to talk to the police, to us here today, unless you want to. Alright? Whatever you and we say is going to be recorded on the video camera which is recording us now, and that's everything in the room here. What we say and what we do is being recorded, okay, and that may be used in the court as evidence later on when you go to court. Do you understand that?

Jupurru: (Nods) no audible response.

Police: Okay? So do you have to talk to us? If I ask you a question, do you have to answer it? Can you talk when you answer questions?

Jupurru: I'll leave it out.

Police: So do you have to talk to me or not?

Jupurru: I'll leave it or —

Police: You can leave it if you — if I ask you a question and you don't want to answer if -

Jupurru: Yeah.

Police: — you just say, "No, I don't want to answer that question".

Jupurru: I'll leave it on the murder.

Police: That question.

Jupurru: Yeah.

Police: Yeah. But you don't want to talk to us at all?

Jupurru: No.

Shortly after saying this Jupurru sent his cousin brother out of the interview room. The cousin brother does not speak Standard English as a first language; therefore, as a prisoner's friend under the Anunga guidelines he is far from ideal. Jupurru's expressed desire not to speak is obvious, however, the police continue.

Police: Okay. Now, just going back, do you have to — if I ask you a question and if you don't want to answer that question, do you have to?

Jupurru: Yeah.

Police: Do you have to talk to me?

Jupurru: Yes.

Police: If I ask you a question and you don't want to answer it, what happens then? What do you do?

Jupurru: If you're asking me a question?

Police: Yeah. If you don't want to — if I ask you a question that you don't like, do you have to tell me something?

Jupurru: Yeah.

Police: Or can you say "No, I don't want to talk to you"?

Jupurru: Yeah I'll try.

16. Cousins under Aboriginal way can be brothers as well. The 'cousin brother' was his mother's sister's son. Such people are regarded as siblings.

Police: You only talk to me if you want to.
 Jupurru: Yeah.
 Police: You want to talk?
 Jupurru: Talk now?
 Police: Yeah.
 Jupurru: No.
 Police: You just told us before though —
 Jupurru: Yeah.

From here Jupurru makes what the police regard as a confession to murder. There is nothing in the confession that is really his own words, he merely agrees to the propositions police make about his actions. As stated before, English is not his first language. The remote location of the arrest should have been an obvious indicator of potential communication troubles through language and cultural difference; however, the police fail to address this. There is no interpreter or prisoner's friend in the room and an obvious lack of understanding of the caution given by police that Jupurru is under no obligation to speak to them. Considering the seriousness of the offence, the police should have taken more care.

The type of confession given is full of leading statements from the police. Throughout the arrest and confession process Jupurru does not deny murdering Nyapana. Early in the interview he says that he is going to jail 'for life'. He has been raised under a strict system of Aboriginal law where answering back gets people into more trouble. Gratuitous concurrence is a concern during the interview.

The two detectives interviewing him believe that they have gained a confession on video and this can be used in court. They tell Jupurru that he can get a lawyer and the lawyer can request a copy of the video. Jupurru spends 18 months on remand before his case comes to court.

Jupurru does get a lawyer from the Aboriginal Legal Service (ALS). The lawyer immediately picks up on the failure to properly deliver the caution to Jupurru. The lawyer believes that he can prove a point of law in this case and decides to resource the case generously. A lawyer from Melbourne with extensive experience in the Northern Territory is brought in to represent Jupurru and an anthropologist is called in to present expert evidence. Culture is argued in court in the form of gratuitous concurrence; the difficulties of communication and language are used to explain how things went wrong. Jupurru has been raised in Aboriginal tradition, he's been through a strict system of Aboriginal Law. Making use of his right not to speak would have been seen as challenging those in authority and risking further punishment. English is his fourth language; there was no interpreter in the room and no prisoner's friend with Jupurru. He was picked up at 3.00am, travelled a long distance and interviewed the same morning. The Anunga guidelines are put before the court and the conduct of the police is challenged. The role of the families or the notion of Aboriginal law is not put before the court.

Inadmissible evidence

The magistrate hearing the case decides that the video-taped confession to murder is inadmissible as evidence. The cultural divide is obvious and the magistrate accepts the evidence of gratuitous concurrence. The magistrate acknowledges that Jupurru did not have the opportunity to understand his rights and was merely agreeing with the police, apparently thinking that by doing this he would not get into further trouble. The charge of murder is reduced to manslaughter and Jupurru is sentenced to seven years' imprisonment. He has already spent 18 months on remand so from the seven year sentence Jupurru eventually only serves a further 18 months. The families have little to no understanding of why the sentence is so minor. The victim's family feel that no justice has been done in the Gudia court; they think about requesting an appeal but do not follow it through.

While Jupurru is in jail the victim's mother's brother Jakarra serves a sentence in the same jail. The prison staff find out that Jakarra and Jupurru are from the same country and Jakarra asks if they can work together. Not long after they are placed together Jakarra assaults Jupurru with a spanner. Jupurru serves the rest of his jail term without further incident and is released on strict parole conditions.

Jupurru goes to Broome not long after he has been released from prison. He sees Nyapana's mother and mother's sister, who are in Broome for a visit. The mother couldn't go to the court hearing because of the distress of the daughter's death. When Jupurru sees her, he taunts her, motioning for her to come over to him. The two women run

away clinging on to each other frightened of the bold actions of the man. He has changed after the murder and his jail term. He seems to have an attitude of being bullet proof: nobody's law is controlling him anymore.

A second offence

After being in Broome for less than a week, Jupurru is sitting on some steps near the local caravan park and says hello to an older non-Aboriginal woman and her Aboriginal granddaughter, Nanyjili, who is in her mid-twenties. He calls the granddaughter by name and says that he remembers her when she was a baby in his community. Jupurru tells her that he is waiting for a friend who hasn't come back. He hangs around the caravan while Nanyjili has dinner with her grandparents. She eventually consents to his request to give him a lift home. While they are driving Jupurru appears to have trouble with his seat belt. Nanyjili stops the car to let him adjust the seatbelt. As he is doing this Nanyjili leans over to turn the radio on. Jupurru grabs her hair and pulls her head down and forward, so all she can see is the floor of the car. Nanyjili is young and fit, has learnt kickboxing and is confident of her own strength. She starts punching him, but Jupurru has a knife and attempts to stab her. She hits him but is stabbed in the right arm. She manages to fight him off and he runs from the car. Nanyjili goes to the hospital to seek attention for the wound and the police are called in by the hospital staff.

Jupurru is arrested and charged for unlawful wounding. Nanyjili is advised not to attempt to charge for grievous bodily harm because the lesser charge of unlawful wounding would be more likely to get a conviction. Jupurru was still on parole when the stabbing happened and he received a sentence of one year for unlawful wounding.

The legacy

There are differing opinions about how to resolve the situation now with Jupurru. His family love and care for him, they keep in phone contact in prison, but the issue of Nyapana's death is not discussed openly. Others now see Jupurru as dangerous; he has gone 'bad'. Some elders now believe that long-term jail is the only option for him. Others want his death as revenge for the woman's murder. It was stated by a Law elder that it is too late to punish him under socially sanctioned ritualised Aboriginal law. The right time to punish Jupurru under structured Aboriginal law was described as passed. Any punishment would now be considered individual revenge, not socially sanctioned Aboriginal law. The talk of punishment appears unstructured and volatile. The two families were once close; they had intermarried and are strong in their Aboriginal culture. Both families worked at the community school teaching Aboriginal language programs and doing school building maintenance work. Now members of the two families that can talk to each other do so in a distant and guarded fashion. There is constant suspicion and fear that one of Jupurru's family members will be the victim of revenge for the death. Some family members say that they cannot leave home without a weapon to defend themselves and worry particularly about being in danger from guns.

Because of tension in the community the victim's family have been forced to move to a more remote outstation in country that they regard as 'harsh' and that is further from the river. Some members have moved to the Northern Territory. There is talk of pursuit of compensation for the death; however, the victim's mother feels that it is too soon, that she still can't speak about her dead daughter. The longer they leave the compensation claim the harder it will be under the Western legal system.

Jupurru is due to be released in early 2005. The tension between the families because of the murder and now the family of the second victim make it difficult for Jupurru to return to the Kimberley. His family has decided to have him sent to a southern relative when he is released. There was an opinion from both sides that around five years would be needed to have the event 'cool down'. The unresolved tension, the lack of any form of justice and the friction between the families make it difficult for Jupurru to be near home. All that is left for the families is a big mess.

Comment

This case study illustrates how injustices, disharmony and existing social problems are exacerbated for Aboriginal people that live under two systems of law. It also highlights that there is moral outrage at violence inflicted against women and children under Aboriginal law. It was understood that Jupurru's motivation for the murder was a fear of the deceased telling her family about his interaction with the young girl. He never denied the murder, but did deny tampering with the young girl. The elders were quick to talk of punishment for the murder under Aboriginal law. The role of Aboriginal law in peace-making was never addressed by the state's legal system and the community tension created is extreme. It also reveals how perpetrators of violence are processed through the state's legal system and its failure to address the cause of an offender's behaviour.

3. Family violence and Aboriginal law

Family violence and the position of Aboriginal women under Aboriginal law

Without formal recognition of Aboriginal law, Aboriginal mechanisms for dispute resolution and community justice compete with the state's legal system and a ripple effect occurs, compounding social problems.

The Law Reform Commission is concerned to investigate any risk for women and children through the formal recognition of Aboriginal law. There is undoubtedly brutality inflicted on Aboriginal women and children by Aboriginal men—the case study shows the type of violence—however, the violence shown in the case study is not part of Aboriginal law. Mechanisms for justice and community harmony were available to restore peace under Aboriginal law but were not acknowledged by the state's legal system.

The level of family violence suffered by Aboriginal people, particularly women and children, disables an adequate interpretation of Aboriginal women's status under Aboriginal law. At a shallow reading the violence appears as an expression of the subordination of women to men. If violence is not a sign of passive subordination then the level of violence inflicted upon Aboriginal women by men must be creating subordination. Violence against women and children is symbolic of the social problems that beset Aboriginal communities. One senior Aboriginal woman stated not to focus on 'domestic violence' during this project on Aboriginal law, that there had been enough of that and there was an implied dissatisfaction with how these issues were being addressed by the police, courts and welfare agencies.

Understanding the position of Aboriginal men also assists in understanding family violence. Blagg points to the dynamic interplay of Aboriginal masculinity 'in crisis' and colonial relationships in the context of family violence.¹⁷ Atkinson shows how family violence is regarded as a breakdown in social order rather than an expression of pre-existing male domination. She writes:

Violence towards Aboriginal women is neither a private, family or Aboriginal community problem. It reflects the broader structures of racial, sexual and economic inequality in society. The level of Aboriginal male violence towards Aboriginal women reflects a breakdown in Aboriginal social order.¹⁸

This 'breakdown in Aboriginal social order' and violence that accompanies it is unrelated to the gender relations and value systems that sustain Aboriginal law. Aboriginal women are not docile creatures 'enabling' their men's behaviour, they are looking at the issue in a holistic way. Not 'forgiving' violent behaviour, implying a sense of loss to themselves; they hate the violent act, rather than the man who committed it. One Aboriginal woman explained the 'web' of relationships that many women are embedded within. The relationships that develop, particularly growing up in small communities, mean that social obligations exist beyond husband and wife. There are community obligations, affinal obligations and family obligations that Aboriginal women need to take into consideration in dealing with family violence. Many family violence situations are multifaceted. Such factors coupled with oppressive structures in mainstream Australia stated above by Atkinson add to the complexity of family violence situations. Regarding the problem of family violence as an Aboriginal community problem or as inherent in Aboriginal social structure (and, by extension, Aboriginal law) misinterprets the status of Aboriginal women in Aboriginal society.

The strategies that Aboriginal women have orchestrated against family violence, outlined later in this paper, reflect their status in Aboriginal communities. They show the agency of Aboriginal women and their use of law and culture to work against violent acts perpetrated by Aboriginal men.

Protection of Aboriginal women in the recognition of customary law

The Northern Territory Law Reform Committee (NTLRC) summarised the Australian Law Reform Commission's (ALRC) arguments for and against recognition of customary law. Part of the summary against recognition was that 'customary law may not adequately protect Aboriginal women'.¹⁹

Previous work by the ALRC has shown that Aboriginal women support the recognition of customary law. In 1986 the ALRC stated:

17. Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Domestic Violence Prevention Unit (WA), 2000) 4.

18. Atkinson J, 'Stinkin' Thinkin' – Alcohol, Violence and Government' (1991) *Aboriginal Law Bulletin* 4, cited in Blagg, *ibid*.

19. ALRC as cited in Toohey, above n 1, 3.

[T]he predominant view expressed to the Commission, in particular by Aboriginal women, supported appropriate forms of recognition of Aboriginal customary laws. But the need to ensure support and legal protection to Aboriginal women has been a major consideration in the formulation of the Commission's proposals.²⁰

During the interviews there was a concern for Aboriginal empowerment in the form of Aboriginal law recognition; this was seen to benefit women, men and children. What was stressed was the potential for Aboriginal law in establishing community harmony. One woman stated that:

The convenience of using Western law means not dealing with the Aboriginal side. A person can be having trouble for the rest of their life, not totally whole functioning humans, they're damaged because there's no opportunity to deal with that issue properly. Aboriginal law way would have cleared the issue. White law way is the easier option at the time, but there's no resolution.

Aboriginal women play a role in Aboriginal law²¹ and act as moral arbiters. Unfortunately, Aboriginal women's status is often belittled when they use pronouncements of their law and culture to address social problems. An example from central Australia is the Yuendumu women's night patrol. The patrols were instrumental in reducing assaults in town camps and at Yuendumu. The initial media coverage described the women as the "Granny Vice Patrol" belittling their authority and use of Aboriginal law that was the basis for their success in reducing the level and range of assaults and offences.²² Understanding the agency of Aboriginal women in matters related to Aboriginal law assists in understanding why they may support the appropriate recognition of Aboriginal law. The agency of Aboriginal women has often been either ignored or misrepresented. Part of this can be blamed on the historical representations of women's status in Aboriginal society. Some of the early representations of Aboriginal women have led to stereotypes that Aboriginal women are still resisting today.

Historical misrepresentations of Aboriginal women

The misrepresentation of Aboriginal women from the time of colonisation continues to affect the understanding of Aboriginal culture and gender relations today. The interpretations of the role and status of women in Aboriginal society, particularly by early anthropologists, are now regarded as containing a gender bias because most of the research was conducted by male anthropologists working with Aboriginal men. The European male chauvinism harboured by the male researchers inevitably expressed itself in their descriptions of Aboriginal women.²³

Catherine Berndt summarises some of the problems of representation for Aboriginal women in the following.

Discussion of the role and status of Aboriginal woman is still haunted by early observations, or *mis*-observations, on the subject. This is partly because, although so much has changed in the Aboriginal scene, the attitudes and perspectives underlying such statements have not done likewise, or not to the same extent. In many respects, they are very much the same as those of a hundred or so years ago. Aborigines in general were regarded, and still are regarded by some, as 'rude', 'crude', 'primitive', 'savage', and so on.²⁴

She also quotes Moore from 1842 who, compared to most Europeans of the time, was sympathetic towards Aboriginal people and interested in Aboriginal culture. Moore stated that:

Women are the mere slaves of the men, obliged to watch and attend their movements, and to carry all their property as well as the young children, in bags at their back. They must construct the hut, make the fire, provide roots for themselves, and give a share to their husband, whilst he does not always share his game with them. Little affection can exist in this state, and the woman is favourably disposed to any one who will pay his court to her. This occasions frequent dissension, which often ends in the woman eloping with her lover.²⁵

Berndt captures the attitude of the late 19th century ethnography where the assumption was that 'women were regarded by [European] men as personal possessions, to be deployed or even ill-treated as their 'owners' saw fit, without the need to take their personal wishes into account'.²⁶ The status of women in such accounts is of slaves and chattels – objects at the mercy of their men.

20. ALRC, *Recognition of Aboriginal Customary Laws – Summary Report*, Project No 31 (1986) 27.

21. For example in male initiation ceremonies or arranged marriages outlined later in this paper.

22. Cited in Lloyd J and Rogers N 'Crossing the Last Frontier: Problems Facing Aboriginal Victims of Rape in Central Australia' <<http://www.aic.gov.au/publications.proceedings>> (accessed 15 September 2004).

23. See Bell D, *Daughter of the Dreaming* (St Leonards, NSW: Allen and Unwin, 1993).

24. Berndt CH, 'Aboriginal Women and the Notion of the 'Marginal Man'', in Berndt RM & Berndt CH (eds) *Aborigines of the West: Their Past and Their Present* (Perth: University of Western Australian Press, 1979) 29.

25. Ibid.

26. Ibid 30.

The early literature was either male-centric or operated under the assumption that what was being learnt of Aboriginal culture through the men must apply to women. Men were regarded as the sole arbiters of Aboriginal law; therefore, the highest authority must have a majority of the say in what happened in the group. As Berndt states:

European observers imposed their own models on what they saw or heard, highlighting some aspects at the expense of others. In these models, the status of Aboriginal women was distorted, and their positive role was barely recognised.²⁷

It was not just that men working with men caused perception problems. Early female ethnographers were hindered by cultural prejudices in their descriptions of Aboriginal women. Daisy Bates took male authority and superiority for granted in Aboriginal society. She saw Aboriginal women as chattels, on par with boomerangs, the difference being that a man who offered his wife for a price to a white man could expect her returned, while a boomerang once sold would not be returned.²⁸ Bates took sensationalised accounts of events in remote Aboriginal communities back to town to shock her audiences. Berndt refers to Bates' work on cannibalism and her statement about an Aboriginal woman killing and eating her newborn baby; according to Berndt, upon investigation the bones were found to be from a cat.²⁹ Bates apparently gave another account of a woman who had killed and eaten four of her own babies. Infanticide has been recorded amongst Aboriginal societies and certainly did happen, but it was something that occurred in circumstances of extreme stress and where the survival of others was at stake.³⁰

The purpose of dredging up these tales is to show the negative interpretation that even women can give to Aboriginal women. As Berndt points out, Bates' descriptions were perhaps the most destructive kind of verbal attack that could have been made about Aboriginal women, because they undermine the centrality of women in family life and the bond of mother–child relationships. The problems associated with non-Aboriginal women interpreting the status of Aboriginal women persist today.

Feminist approaches to research

In the 20th century female anthropologists began to research specifically into Aboriginal women's lives. Phyllis Kaberry (working in the Kimberley region), Catherine Berndt and Jane Goodall all helped to provide insights into Aboriginal women's status countering male-centric descriptions. With fully fledged feminism in the West in the 1960s and 1970s anthropologists such as Diane Bell and Annette Hamilton recorded women's position in Aboriginal society in detail.

To counter the male bias in historical research there has been an attempt to measure female knowledge and power against male authority so that gender relations are viewed as 'a see-saw balanced on a central fulcrum with women sitting on one end and men on the other'.³¹ Hamilton suggests that a more useful understanding of Aboriginal society is one where it 'appear[s] to show both acute sexual inequalities and a high level of autonomy for women'.³² Interpreting the position of women in this way avoids having to measure the comparative worth of men's and women's roles and allows an assessment of them in their own—either separate or interrelated—spheres of influence.

Applying this type of analysis, gender can be used to assess how relationships are structured. The 'see-saw balanced on a central fulcrum' reflects an approach to gender relations through binary or oppositional analysis. The current trend is to abandon binaries and look at the way gender informs relationships in certain contexts. In assessing the role of gender in affiliation to land Toussaint, Trigger and Tonkinson point out:

It is important to stress that past tendencies which have assumed oppositional and 'either/or' analysis (for example 'traditional' or 'contemporary', 'hierarchical' or 'complementary'), have imposed limitations on the descriptions and interpretations of women's situations, women's relationships to men and women's and men's relationship to land. In our assessment, much more attention needs to be paid to the complex ways in which gender is given meaning, informs behaviour and shapes social structures in Aboriginal societies before comprehensive understandings of gendered relationships to land can be reliably articulated.³³

27. Ibid 32.

28. Ibid.

29. Ibid 32–33.

30. Ibid.

31. Hamilton A, 1981. *Nature and Nurture. Aboriginal Child-rearing in north central Arnhem Land*. Australian Institute of Aboriginal Studies, Canberra, as cited in Brock P (ed), *Women, Rites and Sites: Aboriginal Women's Cultural Knowledge* (St Leonards, NSW: Allen and Unwin, 1989) xx.

32. Ibid xxi.

33. Toussaint S, Tonkinson M & Trigger D, 'Gendered Landscapes: the politics and processes of inquiry and negotiating interest in land' in Brock P (ed), *Words and Silences: Aboriginal Women, Politics and Land* (St Leonards, NSW: Allen and Unwin, 2001) 160.

The misrepresentation or oversimplification of gender relations in Aboriginal society can result in the silence of women in their dealings with non-Aboriginal society. Misconceptions of status have practical consequences when working with Aboriginal women. Cultural 'blinkers' or the potential for eurocentrism in white feminist politics can exclude Aboriginal women from critical processes in the bureaucracy and judiciary, silencing or making Aboriginal women invisible. The risk is serious negligence in the recognition of Aboriginal women's rights.

Feminism and Aboriginal women

As stated above, the rise of feminism (or feminisms) in the West has changed the focus of research and attempts have been made to assess the cultural significance of gender and how it informs social behaviour. Non-Aboriginal women armed with feminist politics have conducted research to redress misconceptions about women's status in Aboriginal society. Diane Bell's work is well known for this. A feminist approach has the practical consequences of supplying a body of knowledge that makes some attempt to represent the status of women in Aboriginal society. The flipside to this positive action is that non-Aboriginal feminists may carry with them a cultural bias; the power position of non-Aboriginal women in Aboriginal research can 'blinkers' their approach and ultimately influence their findings. Inserting a woman does not always mean that women's interests will be represented through some type of universal feminist sisterhood.

Marcia Langton, in the context of native title research, warns that placing a woman into the process will not guarantee the adequate representation of Aboriginal women's interests. She states:

Some researchers and legal representatives are aware that the involvement in land claim research and the expert evidence of a female anthropologist (or researcher from a related discipline) or female legal representative is no guarantee that the women claimants will have a fair opportunity to present their evidence, nor even that evidence of the kind they would prefer to present will be presented. Nor will a female researcher or lawyer guarantee appropriate circumstances for the hearing of women's evidence, having regard to the gender differential rules relating to Aboriginal ritual knowledge.³⁴

Non-Aboriginal women may be guided by a eurocentrism that stifles the agency of Aboriginal women. Aboriginal women have argued that non-Aboriginal women remain in a separate set of power relations. It is difficult to form a universal sisterhood when non-Aboriginal women are situated in power structures that oppress Aboriginal women. According to Huggins:

[T]hat's why a lot of Aboriginal women don't participate fully or don't have anything to do with the white women's movement here in Australia, because they see it as assimilationist and they haven't yet given us the respect and dignity that we deserve as women in this country.³⁵

Aboriginal women see themselves as Aboriginal first and women second.³⁶ The battles fought because of racial inequality mean an alignment with Aboriginal men before non-Aboriginal women. Problems arise for Aboriginal women when non-Aboriginal women retain their ethnocentrism and attempt to liberate Aboriginal women from situations such as family violence. Such problems are interpreted as somehow inherent in Aboriginal culture; no time is spent reflecting on the appropriateness of a particular approach, or on sharing platforms of power with Aboriginal women. The result may be that Aboriginal women's community power base is usurped by the non-Aboriginal 'expert' and strategies developed without the guidance or support of the local Aboriginal women.

The agency of Aboriginal women

Blagg reports that the Kurudju Committee, formed because of frustration with government agencies,

felt that the image being portrayed of Aboriginal women in remote communities was one of helpless, docile victims of traditional violence, incapable of developing strategies to combat violence. The implication being that only law and policing strategies driven from outside the community and based upon the general law could be effective.³⁷

The shock of the social problems³⁸ affecting Aboriginal Australia is severe for many non-Aboriginal people when they enter remote Aboriginal communities. For feminists the level of violence that Aboriginal women suffer is horrific:

34. Langton M, 'Grandmother's Law, Company Business and Succession in Changing Aboriginal Land Tenure Systems', in Yunupingu G (ed), *Our Land is Our Life, Land Rights – Past, Present and Future* (St Lucia, Qld: University of Queensland Press, 1997) 86–87.
35. Huggins J, *Sister Girl: the writings of Aboriginal activist and historian Jackie Huggins* (St Lucia, Qld: University of Queensland Press, 1998) 62.
36. Ibid.
37. Blagg H, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia', Background Paper No 8, above p 317, 328.
38. Many social problems stem from colonial dispossession of which white women were a part.

Aboriginal women are diminished to the status of 'docile victims of traditional violence'.³⁹ The response is that Aboriginal women need to be emancipated from their culture. Violence against women is interpreted as inherent in Aboriginal culture and a reflection of the universal subordination of women. Little time is taken to assess the appropriateness or longevity of strategies created outside the community. Government policies and general law are clung to, rather than shaping the rules to suit local circumstances or, more importantly, stepping aside to make room for Aboriginal women's initiatives. As a result, Aboriginal women lack the resources they need to fund their own, usually more viable, strategies.

Colonisation has been a gendered process either in its intent or its outcome.⁴⁰ Aboriginal women and men have been affected in different ways. The effect of colonisation on Aboriginal men has meant that women have a changing status in Aboriginal society. A recent television program about the Marika family in the Northern Territory on the ABC's *Dynasty* series portrayed the changing status of women. In the 1960s Marika men began to pass on painting styles to women that were previously the cultural property of men only. The Marika men were granting the women access to what were once male only domains. The same program showed the problems of Aboriginal males and how the women were working with such problems through the assertion of culture. This can also be extended to understanding women's role in Aboriginal law. The agency of Aboriginal women may be relied upon to a greater extent.

4. Aboriginal women and the courts

Making the law 'fit' – urban models in remote areas

Through not sharing power platforms or reflecting upon strategies shaped outside the community, non-Aboriginal people may disempower and silence Aboriginal women. If the state's legal system is being used as the primary tool of justice without any recognition of Aboriginal law, then there is a risk of exacerbating social problems in Aboriginal communities. The case study above illustrates the ripple effect of the lack of justice.

One example cited consistently through the consultations was the problem of restraining orders. They illustrate the need for protection of Aboriginal women against violence, but they also show the limitations of procedures developed outside the community. Restraining orders are constantly violated and at times create more trouble.

In his report on crisis intervention in Aboriginal family violence, Blagg said:

There is concern that the present system is an 'all or nothing' approach to the problem, particularly where the legal process is concerned. (In consultations for this report the perceived inflexibility of the present system of restraining orders in Western Australia has been singled out for particular criticism). The family violence approach focuses on identifying appropriate ways of ensuring victims' safety at the point of crisis, and imposing sufficient controls over perpetrators to prevent future violence, without the use of incarceration. There is clear preference by Aboriginal women, who are the main victims of violence, for strategies that change behaviour while maintaining family relations.⁴¹

Restraining orders (and particularly the breach of restraining orders) demonstrate the 'all or nothing' nature of intervention that may result in no behavioural reform. Although restraining orders were consistently discussed during interviews, how they were understood by Aboriginal women varied. One senior woman from a remote area who had walked desert country as a child stated that she did not need restraining orders. She indicated that Aboriginal women could fight back, saying that if she was being beaten by an Aboriginal man she would 'bash him' herself to counteract the violence, not rely on a restraining order for protection. Other people spoke of how restraining orders might fit urban areas but the small size of remote communities meant that people could violate a restraining order simply by being at the only community store. Restraining orders send out a strong message that certain behaviour will not be tolerated; however, they are also reportedly being used to settle grievances with the risk of creating further problems. It was said that teenagers are lodging restraining orders against parents; mothers against daughters; women against women; and women against men. The police will often not take a restraining order request seriously and send applicants away telling people to think the matter through and come back. There is also a danger of police abuse of restraining orders. A mother told how her 19 year old son was constantly harassed by police after his girlfriend was granted a restraining order against him. She believed the police used the restraining order as an excuse to intrude into his life; the 19 year old ended up in a southern jail.

39. Blagg, above n 37, 328.

40. See Cunneen C, *Conflict, Politics and Crime: Aboriginal communities and the police* (Crow's Nest, NSW: Allen and Unwin, 2001).

41. Blagg, above n 17, 319.

In discussing restraining orders Aboriginal women indicated that many people did not know what a restraining order entailed and did not know when they were breaching the order. Some communities are developing alternative strategies. If a couple are having difficulties one of the partners is sent to another community for a period of time to let the situation 'cool off'. The couple are encouraged to 'talk' to 'get the story', so that each can take responsibility for their own actions. Strategies such as these are designed by Aboriginal people to cope; they remain unrecognised alternatives to restraining orders and criminalisation of causal behaviours under Australian law. The use and abuse of restraining orders illustrate some of the limitations of urban justice models in remote areas.

Working with two systems of law for the protection of Aboriginal women

John Toohey's background paper for the Commission refers to the work of Joan Kimm⁴² as a valuable treatment of the material produced on violence suffered by Aboriginal women. As the book is referred to by someone of John Toohey's status and experience, I could not ignore her work and felt the need to make a response in the context of this paper. The amount of effort put into the literature review in Kimm's book is impressive, she has obviously worked hard and as Toohey points out, it is a relevant summary of the material produced on Aboriginal women and violence. However, Toohey is also quick to state in relation to the violence that '[i]t is the existence and identification of any customary law aspect with which the Commission is concerned'.⁴³ The majority of the violence described in Kimm's book appears to have little justification under Aboriginal systems of law (each case would need more detail than Kimm has provided to be absolute). From an anthropological perspective Kimm's work suffers from Eurocentrism in interpreting the status of Aboriginal women and an assertion of the centrality of the Australian legal system in dealing with the violence.

Part of Kimm's argument is that the Australian legal system must address the violence suffered by Aboriginal women, she relies on the work of Eggleston from the 1960s and refers to the role of the judiciary in sentencing and the need to look at sentencing as an 'educative deterrent'.⁴⁴ Kimm states:

In general law deterrence is that sentencing factor which acts as a warning that the law will not tolerate a particular form of behaviour. General deterrence is a judicial warning to the community against committing particular criminal acts; specific deterrence is a warning to the prisoner against repeating criminal behaviour. Effectively in many cases concerning Aboriginal men's violence to women sentences have not constituted either a specific (to the prisoner) or a general deterrence (to other men) against committing such acts.⁴⁵

Kimm goes on to say:

Yet because of the intensity of the violence, Aboriginal men frequently commit indictable, that is serious, offences that are heard by a judge and jury in District, County or Supreme Courts. Paradoxically it is in these courts that judges have dealt with Aborigines more leniently than non-Aborigines, although men's violence might be seen as behaviour where deterrence should be particularly important.⁴⁶

There is an assumption made that extending the general law in the form of harsher sentencing will work as an 'educative deterrent', that jail will actually punish and rehabilitate Aboriginal men and that jail terms carry the same stigma for Aboriginal people as they do for non-Aboriginal people. The case study that opened this paper showed that jail did little to rehabilitate the offender. The extensive research and on-the-ground information collected by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommended that 'imprisonment should be the sanction of last resort in sentencing'.⁴⁷ Regarding prison sentencing as an 'educative deterrent' illustrates an approach where the current system is merely intensified or extended, to address problems, rather than find alternatives. General law is needed to ensure the support and protection of Aboriginal women in situations of violence, however, it is only one element of protection. The assertion of Aboriginal law in such cases may benefit women. Aboriginal men may be held more accountable – be made to 'own' their behaviour under Aboriginal law.

In fairness to Kimm she does conclude her book with notions of Aboriginal autonomy and sympathy for the plight of Aboriginal men; however, her interpretation of extreme violence against women by Aboriginal men as inherent in Aboriginal culture and by extension 'moral' punishments under Aboriginal law is flawed. Kimm writes:

42. See Kimm, above n 2.

43. Toohey, above n 1, 12.

44. Kimm, above n 2, 138.

45. Ibid.

46. Ibid 138–39.

47. Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *Report of the Royal Commission into Aboriginal Deaths in Custody* (Canberra: Australian Government Publishing Service, 1991) recommendation 163.

[F]rom the viewpoint of non-Aboriginal society and law, Aboriginal women can be circumscribed by their culture. Male elders have the power to confine women in violent situations within communities. A man's status controls the level of support an abused woman might receive. ... Other matters signify the imbalance of gender rights; sexual assault is regarded as a community matter, a man's right to beat his wife, 'morally justified violence', is something between the two of them. They are isolated from Anglo-Australian law under which these offences would be regarded as serious.⁴⁸

Kimm also states that:

Despite areas of autonomy in traditional society, Aboriginal women have not enjoyed either in traditional, colonial or post-colonial societies the kind of ascendancy which would enable them to superimpose their rights on men in cases of violent assaults upon them.⁴⁹

In Kimm's estimation it appears that the picture looks bleak for Aboriginal women; they are 'circumscribed by their culture' rather than empowered by it. Taking a snapshot of particular incidences, without looking at the situation holistically, runs the risk of finding solutions that create more problems. The Aboriginal women interviewed during research for this paper looked broadly at the situation; some attempted to understand the problems of Aboriginal men. Would the status of a male elder over time be diminished if he was to 'confine women in violent situation[s] within communities'? The role of the family⁵⁰ in Aboriginal society goes unacknowledged in the statement 'a man's right to beat his wife, 'morally justified violence', is something between the two of them'. It neglects the kin-based nature of Aboriginal society.⁵¹ An example given from the east Kimberley to counter the notion that such actions are private or sanctioned in Aboriginal culture, is the assertion that mother-in-laws traditionally looked after young wives, this was explained as part of Aboriginal tradition. One senior woman explained that her mother-in-law told her to leave the marriage to her son; because of his violence toward her, the new husband was regarded as not ready for a wife and not seen as mature or capable enough to discharge the responsibilities that marriage entails. Lloyd and Rogers refer to the ideal models of social behaviour in central Australia stating that in fights between spouses, the families of both parties would protect the husband and wife.

Families—in particular the woman's brother, mother's brother and father's sister—would speak out on behalf of a woman and protect her interests. People then understood and respected the boundaries of customary law. The women acknowledge that there are problems in adhering to these laws and maintaining social harmony but they say 'we still have that law (traditional) in our hearts'.⁵²

Throughout her work Kimm uses the term 'moral violence' in association with Aboriginal men and violence against women. There is an assumption that this type of behaviour is sanctioned in Aboriginal culture and, by extension, under Aboriginal law. However, there is no attempt to show what aspect of Aboriginal law sanctions the abuse of women, it is simply regarded as inherent in Aboriginal law and culture.

Kimm's solution is to extend the general law as a means of 'educative deterrent' which could in fact create a culture of alienation for Aboriginal men and result in more violence suffered by Aboriginal women. Determining whether particular acts are part of Aboriginal law is difficult when considered away from its cultural context in a court setting. The history of contact with police and courts for Aboriginal people, particularly women⁵³ have silenced women's voices. This silence does not always mean that Aboriginal women have nothing to say.

Room to speak – Aboriginal women's voices

In a 1988 case in the Northern Territory Supreme Court, Justice Maurice asked:

Why should we only hear from the men? If we're going into this question of what's culturally acceptable behaviour, why shouldn't we hear from some female, some female leaders of the community at Port Keats? Why should it be men who are arbiters of what's acceptable conduct according to the social and cultural values of Port Keats?⁵⁴

48. Kimm, above n 2, 108.

49. Ibid.

50. Toohey notes the factions and family divisions in Aboriginal communities. Family division and the hierarchy of family factions may affect the support an Aboriginal woman or her family can expect in situations of family violence. See Toohey, above n 1, 8.

51. See Edwards WH, *An Introduction to Aboriginal Societies* (Sydney: Social Science Press, 2004)

52. Lloyd J and Rogers N, 'Crossing the Last Frontier: Problems Facing Aboriginal Victims of Rape in Central Australia' <<http://www.aic.gov.au/publications.proceedings>> (accessed 15 September 2004).

53. During consultations young women told how some police were 'real itchy', which translates as 'wanting sex'. They told stories of girls being taken for drives out of communities so that police could facilitate the sex act.

54. Cited in Kimm, above n 2, 109.

The role of women as moral arbiters, instead of being accepted, has to be reasserted every time an aspect of Aboriginal social organisation is assessed from the outside. Any silence of women is interpreted as symbolic of a lack of information.

Bird Rose articulated this problem well when she said:

It seems that while the men's domain is readily accepted as an integral part of Aboriginal social and cultural reproduction, the existence of a women's domain must be argued afresh in each instance, and its relationship to the reproduction of Aboriginal society and culture must be demonstrated.⁵⁵

Bird Rose discusses the symbolism of women's silence within Aboriginal systems of knowledge. Women not speaking out or not being heard does not equate to a lack of knowledge. She interprets the knowledge structures of Aboriginal society and shows how 'freedom of information' is not a part of Aboriginal culture. She explains that knowledge is not free-floating in Aboriginal society, ready to be consumed by any interested person. Knowledge needs to be held and passed to the rightful keepers of such knowledge. In this form of cultural logic, silence may imply knowledge, rather than being symbolic of its lack.⁵⁶ Bird Rose cites Eric Michael's work with the Warlpiri, showing that 'knowledge is currency' and that silence can represent the withholding of knowledge rather than its absence.⁵⁷

Bird Rose distinguishes between active silence and passive silence. The latter is described as a tool of colonisation, described as the 'deployment of power to stifle or destroy people and their knowledge'.⁵⁸ The 'voice' of Aboriginal women is not readily recognised, resourced or strengthened by mainstream Australia. The lack of protest by Aboriginal women, or silence about such issues is at times construed as symbolic of a lack of power or knowledge. As Justice Maurice's comment shows, there is a need to hear from Aboriginal women.

The native title process provides relevant examples of how court proceedings can be modified to allow Aboriginal women 'room to speak'. The process also shows the centrality of women in Aboriginal social organisation. At the start of the native title process affiliation to land was regarded as the domain of men, patrilineages dominated the interpretations of connection to country. Women's role in family and continuity of affiliation to land following European occupation came to the fore during native title research, not through benevolence, but through the pragmatics of proving connection to land.

Aboriginal women and the native title process

The inclusion of women in the native title claim process was not a matter of goodwill; as the process evolved women's inclusion became a matter of necessity in proving connection to land. Brock pointed out the gulf that existed between what researchers were finding about women's knowledge and power and the practical operations of the judicial system and the bureaucracy in relation to land. In 1989 she wrote:

It is important for the future of Aboriginal women that past views of their status and cultural roles are reviewed and revised, because in the past 10 to 15 years a new issue has emerged to complicate the already complex question of knowledge and authority in Aboriginal society. That issue is rights to land, as set out not in Aboriginal law, but in legislation and conservation practice. An Aboriginal person, who has rights to land and can speak for the land, has authority both in Aboriginal and white society, and ultimately perhaps some economic return. So, at a time when researchers are acknowledging the full extent of women's knowledge and power in Aboriginal society, the judicial system and the bureaucracy are dealing with Aboriginal men over rights to land. ... This attitude is further undermining the status of women throughout Aboriginal Australia.⁵⁹

Brock was writing before the High Court's *Mabo* determination and before research into native title claims. Relatively early on in the native title process Langton asserted the role of 'Grandmother's Law' in Aboriginal social relations.⁶⁰ She stressed the important position that senior women hold in native title research and their critical role in proof of affiliation to country. Early research about continuity of land ownership was focussed on continuing traditional connections to country via patrilineages or patrification. Women were not regarded as central at first, but rather as something of an

55. Bird Rose D, 'The Silence and Power of Women', in Brock P (ed) *Words and Silences: Aboriginal Women, Politics and Land* (Crows Nest, NSW: Allen and Unwin, 2001) 93.

56. Ibid.

57. Ibid 98: 'In Aboriginal societies knowledge is land-based; personal authority, personal achievement, the authority of seniors, and the integrity and autonomy of local groups depend on the control of knowledge through restrictions on its dissemination. Such a system is subverted through any form of 'freedom of information'. If there is one thing that is absolutely not free, in Aboriginal society and culture, it is knowledge'.

58. Ibid 92.

59. Brock, above n 31, xxii.

60. Langton, above n 34.

'add on' to be incorporated if time and money allowed. The result was that Aboriginal men were gaining expertise in negotiating over country and the opportunity to assert themselves in the absence of women.

Proving connection to country soon reflected what was apparent in the broader research relating to Aboriginal women – patrilineages and patrification were relevant in proof of native title; however, cognatic descent was essential in proving Aboriginal law ownership of land. Connection to country needed to be shown through both men and women.

Langton points out that Aboriginal women were often denied the opportunity to present evidence to native title hearings and that appropriate circumstances for the hearing of women's evidence were often not arranged.⁶¹ When proper procedures were in place for the giving of women's evidence the information was forthcoming. As Langton states:

Women witnesses have often been silenced by the conduct and organisation of land claims, and thus much of the significance of 'women's business' in the general affairs of society has been missed. When women law holders have been given an appropriate forum in which to speak, they have given partial exegeses of their life-enhancing rituals and myths (often shared in a gendered fashion with the male law holders) and thereby expanded our understanding of customary land systems.⁶²

When women were given the opportunity to speak the value of their role and contribution to the process was obvious. Langton argued that the importance of Aboriginal women's role in native title claims is, in part, a product of colonisation. She wrote:

The paradigm in which men's evidence is the cornerstone in proving the existence and rules of customary land corporations will be less efficacious in native title claims in those areas where the massacres, epidemics, forced removals and impact of alcohol abuse, imprisonment, employment in the pastoral industry and itinerant labouring have resulted in female gerontocracy of the remnant clans and of amalgamated customary land corporation such as 'tribes'.⁶³

Both Aboriginal men and women have been severely affected by colonisation; however, as Dodson states, women often hold on to their 'culture bearing' capacity.

Whilst forced cultural change has had a substantial impact on the traditional role of Aboriginal men, Aboriginal women even though they have been exposed to the same cultural forces have basically retained the role of gatherer and child carer. This is despite the application of external forces in all manners and forms via the processes of government which could have severely undermined the role of women as it has done the men.⁶⁴

It is now ten years since the *Native Title Act 1993* (Cth) came into force. Aboriginal women have shown mainstream Australia the importance of their role in Aboriginal law and culture in relation to land. It is formally recognised in the sense of women's sites and areas of the landscape that are gendered through Aboriginal law. Bird Rose has written that:

Dreamings travelled; they were sometimes in human form, and sometimes in animal or other form. But whatever the form, they were almost inevitably either male or female. Dreaming men and women sometimes walked separately and thus created gendered places. There are now women's places and men's places: places which are associated with one or the other because Dreaming made it that way. There are varying degrees of exclusion: places where men can go but must be quiet, places where they can look but not stare, where they can walk but not camp, and then there are places where men cannot go at all, ever. There are places where men cannot drink the water, cannot even look at the smoke that rises from women's country. And of course the same is also true with respect to men's places, men's country.⁶⁵

Secular women's business is now becoming more readily accepted. Women's sites or the gendered nature of particular areas of country are acknowledged in heritage protection and native title.

During native title research women particularly showed their power in terms of family histories (genealogies). The 'private' area of family expressed its importance in the very major role of women in genealogies and aiding to put family history to the point of European occupation. Areas of Aboriginal women's ritual observance that relate both to land and broader Aboriginal law were summarised by Langton as:

61. Ibid.

62. Ibid 88.

63. Ibid 92.

64. Dodson P, *Regional Report of Inquiry into Underlying Issues in Western Australia*, RCIADIC (Canberra: AGPS, 1991), vol 1, 376.

65. Bird Rose, above n 55, 36.

- Place-specific or regional celebrations of Stories or Dreamings which may include song cycles, dance repertoires, ritual objects and body painting, for calling up ancestors and re-enacting their exploits.
- Ceremonial repertoires include those roles which they perform in public ceremonies as well as male-oriented ceremonies such as initiation and rituals for observing important species, particularly plants, and spiritually encouraging their reproduction. The Story or Dreaming places associated with the creative dramas of these species/beings are celebrated in these rituals.
- Extensive knowledge concerning midwifery, birthing rituals and practices, and rituals for investigating spiritual essence and power of particular births in places and trees, and for activating certain powers in new-born infants.
- Rituals concerning both the dangerous and nourishing powers of sexual attraction, courting, marriage and related emotional states, which empower women to control these states and explain their significance to younger women.
- Keeping of practical and spiritual bodies of medicinal and healing knowledge which they apply in ritual acts for the benefit of individuals, groups, sometimes for marriages, and sometimes for states of being within groups which are seen to be detrimental to the wellbeing of people or places invested with the spirits of ancestors. Certain sacred sites are associated with this knowledge and power.
- Specific roles in mourning and mortuary rituals, including funerary rites, coronial inquisitions to determine cause of death, and punishment rituals.
- A range of practical and spiritual practices for aggressive purposes when conflict arises, and can take vengeance on others when they feel aggrieved, through fighting or sorcery. Dispute resolution is achieved through these and specific rituals for peace-keeping.⁶⁶

Langton's summary provides useful insights into the role of women in social organisation that relate to Aboriginal law.

The less obvious role of women in connection to country came to the fore during the native title process; that is, women's role as transmitters of culture (culture bearers). Langton states that 'women are members of the laterally organised land managing groups that are responsible in ritual and ritual-related activity for the management of the landowners' affairs, ensuring fidelity to traditions'.⁶⁷ Even in male rituals such as initiation, women play a role. Where there is not separate women's business, women still hold their status as moral arbiters.

It is important for the Law Reform Commission to work with some of the aspects of native title hearings. The way women's evidence has been given and accepted in particular claims, might provide valuable models for establishing women-friendly court proceedings. As a result of the misinterpretation of women's status in Aboriginal society and the 'largesse' accorded to customary law in favour of Aboriginal males, the obligations that women have under Aboriginal law are often dismissed or neglected.

5. Status of women in Aboriginal society

Promised marriage

The issue of recognition of arranged or 'promised' marriages poses certain difficulties for the Commission. Child protection—particularly in view of the usual young age of a promised wife and sexual relations below the age of consent—could be an area for concern in the recognition of Aboriginal law. The *Pascoe* case in the Northern Territory exemplified such issues.⁶⁸ Buti and Young's earlier background paper for the Commission discusses the legal implications and the types of Aboriginal marriages.⁶⁹ The rights of the individual are highlighted in promised marriage. An example was provided to the author by Father Kevin McKelson who was concerned for the rights of a girl who wanted to pursue an education under the Western system; he questioned whether enculturation into arranged marriage systems may prevent this.⁷⁰ Understanding the flexibility of arranged marriages assists in comprehending the rights of the individual in such systems.

Christine Choo interviewed Mary Ruruala Pandilo born at Kalumburu Mission, who explained the following about young girls and promised husbands:

66. Langton, above n 34, 88–89.

67. Ibid 94.

68. The *Pascoe* case highlights the complexities of promised marriage and carnal knowledge. The case is discussed in McIntyre G, 'Aboriginal Customary Law: Can it be Recognised', Background Paper No 9, above p 341, 344.

69. Buti T & Young L, 'Family Law and Customary Law', Background Paper No 4, above p 143, 147–148.

70. In a personal communication with the author.

- MP: Promised one, they used to keep them. 'Now you are big enough, you go out and stay with your husband', they tell them like that. This is the bush way... They used to live with them but they didn't do anything [they did not have sexual relations] ... The old man never do anything until e [she] grow a little bit bigger like one or two years then they [start].
- CC: What happens if the girl doesn't want to go to the man?
- MP: I don't know. They'd kill em [her]. Good thing I was in the mission.⁷¹

The quote reflects the attitude towards sex with a girl at an early age. Choo goes on to describe that the threat of killing the girl was not carried out. If she ran away she was returned to the husband, if it happened a number of times the marriage might be abandoned and compensation sought by the husband.⁷² The problem of interpreting the rights of women in arranged marriages has in part to do with conceptualising women as mere 'objects' in the marriage exchange, depriving them and the families involved of any agency in making and breaking such arrangements.

The complexities of arranged marriage systems are misunderstood when they are reduced to the concept of bartering of a woman (or girl) as an object. In fact, arranged marriages create a network of exchange, bonding groups into relationships of reciprocity and responsibility. Sandy Toussaint, interpreting the work of Phyllis Kaberry stated the benefits gained for women in marriage:

Women were not oppressed by marriage, which brought with it a certain status, companionship, protection and settled existence that was sanctioned by all members of the community.⁷³

Kaberry, recorded the role of mothers of girls the subject of arranged marriages; she showed that mothers have a large part in the arrangement of marriages and that women were not simply 'objects' being bartered by their men.

The mother receives a share of the gifts distributed at the circumcision and subincision of her sons, and presents are handed over to her by her son-in-law during his marriage to her daughter. Some of these she later passes on to her own relatives. She has a part in the marriage negotiations of her daughters... These facts are important because they show that the marriage gifts do not establish the man as the absolute owner of his children.⁷⁴

It is difficult to assess the number of Aboriginal people today that marry traditionally through a promised or arranged marriage. The impact of missions and government policy regulating Aboriginal marriages is profound.⁷⁵ Apart from the obvious rituals of arranged marriage, women still play a role as moral arbiters in relationships, arranging and keeping relationships together⁷⁶ or pulling them apart.

Women Elders

An East Kimberley woman (approximately 30 years old) at Broome Regional Prison described how the law system worked for her. When asked questions about the two systems of law she stated that she only thought in one system of law, Aboriginal law. When questioned about the status of 'elder' she described it this way:

You can only be an elder if they [other women elders] allow you to be, pass it on to you, tell you gotta be boss when I'm gone, they're alongside of you at first, make sure you do it properly. In Law the old people want it their way, can't make any changes. They tell you what to do, your job you go do it. Girls go to law, come from main old people. If young girls try and change law, old people know and growl you [discipline you or become angry].

Old people guide you over who to chase, wrong skin, drinking, any issue that's forbidden the old people will guide you on. They can arrange where you go in life [kind of mentoring], if a man is a work person [active, a worker] old people admire them, keep him, if you don't treat him properly in the relationship the old women may growl you, in their eyes he's a good person. Should stay with him.

The old girls guide you on how to look after children, not looking after them, they growl you, give them [children] a hiding too much they growl you. If a woman can't be chased out of the community for whatever reason you live there as an outcaste.

The women guide in health, bush medicines, show the ways that they grew up. Use bush medicines when not much white medicines, easier and better way.

71. Choo C, *Mission Girls, Aboriginal Women in Catholic Missions in the Kimberley, Western Australia 1900–1950* (Perth: University of Western Australia Press, 2001) 191.

72. Ibid 192.

73. Toussaint S, *Phyllis Kaberry and Me: Anthropology, History and Aboriginal Australia* (Melbourne: Melbourne University Press, 1999) 43.

74. Cited in Toussaint, ibid 42.

75. See Haebich A, 'For Their Own Good: Aborigines and Government in the South West of Western Australia 1900–1940' (Perth: University of Western Australian Press, 1988).

76. See Birdsall C, 'All One Family' in Keen I (ed), *Being Black: Aboriginal Cultures in 'Settled' Australia* (Canberra: Aboriginal Studies Press, 1988); Langton, above n 34.

In the same interviews at Broome Regional Prison a woman described the difficulties she was having getting released for a Law woman's funeral. She said that she had put in the application form for release. The funeral was for a woman who she described as 'training her up in the Law' she needed to be at the funeral to show respect, but not only for the deceased; she described her inability to go would be understood as showing no respect for the Law that the woman was guiding her through. She said she would 'get a hiding' when she got home regardless of the reason for not attending the funeral.⁷⁷

History, cultural dynamics and Aboriginal law

The information provided above from the interview at the Broome Prison reflects cultural dynamics. It is clear that outside of formal marriage arrangements in ceremonial settings Aboriginal women are still guiding younger women in their relationships and child-rearing. Culture is not static, it is dynamic, but the cultural logic that underpins change may be distinctly Aboriginal.

Swain and Bird Rose, in the context of anthropological study of the mission experience, state:

Until the 1960s politicians, missionaries and academics all took it for granted that there were but two genuine options open to Aboriginal peoples: complete traditionalism, which was ultimately dismissed as impractical and undesirable, or total assimilation in White Australian society. Responses lying between these polar opposites were described as embarrassing and unfortunate bastards whose existence was best ignored.⁷⁸

The lives of Aboriginal people in the Kimberley have been profoundly affected by the mission and pastoral experience. Around 85 per cent of Aboriginal people now identify as Christian.⁷⁹ Abandoning the idea of binaries is useful in understanding how a population with such a high percentage of Christians can assert the right for self determination through Aboriginal law. Being Christian and upholding Aboriginal law practices are not mutually exclusive.

The mission experience

Many early missionaries viewed Aboriginal religion—and by extension Aboriginal law—with contempt, believing it risked mortal souls. When Kaberry first came to work in Western Australia the friction between missionaries and anthropologists was intense. Schenk, the missionary who established the United Aborigines Mission at Mount Margaret, refused Kaberry entry to camp at the mission. Schenk believed that anthropologists encouraged Aboriginal people to return to their old 'devil devil' corroborees which included evil rituals.⁸⁰ Kaberry was of the belief that such rituals were vital for people's pride. With a style that reflected the era, she wrote:

Yearly participation in these rites will serve as an antidote for the contempt with which some of the station blacks are beginning to regard their own race. The Black will have to change eventually, but if changes are to be beneficial they must be based on pride of race, and in the meantime these ceremonies are keeping that race consciousness alive.⁸¹

The missionaries had a mixed relationship with various governments and Aboriginal people. AO Neville, the Chief Protector of Aborigines in Western Australia at the height of the assimilation era, despised the missionaries. He believed that through perceived acts of compassion they were allowing Aboriginal people to marry other Aboriginal people. In a speech in 1937 Neville stated that:

In my state there are several institutions for the treatment of the native, including eleven missions and a number of departmental establishments. At the mission stations, the natives are encouraged to multiply by marriage, with a consequent increase of population. The missions are thus able to claim that they are doing valuable work for the natives. Undoubtedly they are doing good work, but they keep an increasing number of natives on their properties, whereas the departmental institutions, whilst approving marriages, encourage the natives to mix with the general community [assimilate as whites]... As a matter of fact, for some years now I have been able to supply sufficient youngsters of both sexes to meet the demand for their labour.

In order that the existing state of affairs in Western Australia shall continue, and in order to prevent the return of those half-castes who are nearly white to the black, the State Parliament has enacted legislation including the giving

77. There may have been valid reasons for the woman's inability to attend (or failure to get permission to attend) the Law woman's funeral. The matter was not pursued with prison authorities.

78. Swain T & Bird Rose D (eds), *Aboriginal Australians and Christian Missions Ethnographic and Historical Studies* (Adelaide: Australian Association for the Study of Religions at the South Australian College of Advanced Education, 1988) 2.

79. *Mission Accomplished*, SBS Video, 1997.

80. Choo, above n 71, 189.

81. *Ibid* 190.

of control over the marriages of half-castes. Under this law no half-caste need be allowed to marry a full-blooded Aboriginal if it is possible to avoid it, but the missions do not always take steps to prevent this from occurring; they allow the half castes under their control to marry anybody.⁸²

The impact of government reserves and missions on culture was profound, interrupting arranged marriages and destabilising the law and culture of Aboriginal people. However, it was not to the point of cultural annihilation. The cultural logic used to embrace the Christian message was very Aboriginal; Kaberry gave a glimpse of this when she wrote that people at Forest River 'call Christ, Bundilmiri, and God, Wolara'.⁸³ The government project of assimilation resulted in failure.

The mission experience came up often in discussions with Aboriginal people. One woman stated that the Christian dormitory institutions that many Aboriginal people grew up in were intensely sex-segregated. The same woman regarded this as the beginning of sexual division and domination rather than seeing the separation of the sexes in this way as inherently Aboriginal. The dormitory systems of the missions were also cited as causing dysfunction in Aboriginal mothers, depriving them of positive family role models and the parenting skills required to raise their children in an Aboriginal way.

The pastoral experience

Some pastoral stations were also government reserves, for example Moola Bulla in the East Kimberley. Until the late 1960s Aboriginal people could maintain law and culture while working at pastoral stations: during the off-season they were able to 'go bush' to conduct ceremonies and access country. Changes to the award rates for Aboriginal people and increasing mechanisation of the pastoral industry in the 1960s led to a majority of Aboriginal families being forced off stations into town centres; into what is described as the 'welfare paddock'. People were excluded from country and unemployed. At the same time, drinking rights came in and as a result social problems festered.⁸⁴

History has had an effect on the ability to practice Aboriginal law, but not to the extent that Aboriginal law is now beyond recognition. It has been shown in this paper that the impact of colonisation has affected how Aboriginal law is being argued before the judiciary. Consequently this affects our understanding of Aboriginal law. The law is not regarded as lost, just hampered. The religious nature of Aboriginal law means that it has always been there, embodied in country 'people always teach law, rule for people in this ground, the law is there for people'.⁸⁵ Because Aboriginal law is earthbound law it is a matter of accessing the law system. Strategies to address teenage justice problems, outlined below, reflect how people are using law and culture that exists 'in this ground' to mentor teenagers.

'Bullshit' traditional law

There are problems for the post-1960s generation that grew up with limited access to traditional lands. What they begin to assert as Aboriginal culture often falls under the category of 'bullshit traditional law'. An example of this type of bastardisation of culture was given by a woman working at a women's refuge who believed that 'men are hiding behind culture'. She said that husbands often do acts of supposedly culturally sanctioned violence against their wives with the excuse that dinner was not there for him when he got home drunk, broke and hungry. Ethnographic sources show that women, as gatherers, were stable food providers.⁸⁶ For a woman to neglect her obligation⁸⁷ in this area might have created shame and outrage; however, today the reason for not providing for a husband relates more to social circumstances where gambling, alcohol or drugs have often robbed the household of food. The woman who shared this story was concerned for the next generation, particularly the males, who believe that such acts of family violence are culturally sanctioned. It is not that culture is lost; there is a concern about how it is being interpreted by the next generation. Statements such as, 'he hits me because he loves me' and 'he gets jealous because he loves me' caused older women grave concern for what the young were interpreting as Aboriginal culture.

82. As cited in Aboriginal Legal Service of Western Australia, 'Telling Our Story: A Report by the Aboriginal Legal Service of Western Australia (Inc) on the removal of Aboriginal Children from their Families in Western Australia' (1995) 206.

83. As cited in Swain and Bird Rose, above n 69, 2.

84. Australian Broadcasting Commission. 'Customary Law', *Message Stick* (April 2004).

85. Ibid.

86. See Berndt & Berndt, above n 10; Berndt, above n 21; Bell, above n 9; Merlan F, 'Gender in Aboriginal Social Life: A Review' in Berndt and Tonkinson (eds), *Social Anthropology and Australian Aboriginal Studies, a Contemporary Overview* (Canberra: Aboriginal Studies Press, 1988).

87. The Berndts stated that: 'Men's hunting activities are more uncertain in outcome than women's food-collecting. For this reason, women contribute, overall, the greater part of the food supply. ... a large animal is usually divided up, even to the extent that the main hunter may keep almost none of it for himself. The men need to share through ritual and kin obligations, the women on the other hand are required to focus on themselves, husband and children'. Berndt and Berndt, above n 10, 119–20.

Noel Pearson, writing of the situation at Cape York, expresses the demands that such misinterpretations of culture place on women and children. He speaks of 'welfare poison' and how this has undermined the Aboriginal principle of 'reciprocity'. In relation to men's alcohol consumption Pearson writes:

When you look at the obligations which are set up around the drinking circle, you see the drinkers under reciprocal obligations to contribute to buying the grog. When I have money it's my turn to shout. When your money comes, it's your turn to shout. Outside of this drinking circle are the women and the children and old people and the non-drinkers. The resources of these non-drinkers are used to feed the families – including those who have spent most or all of their money on grog, when they are hungry. But more than that, these non-drinkers are placed under tremendous social and cultural pressure to contribute resources to the drinking circle for buying grog. So the drinking circle becomes the suction hole for the family's resources. Wives and girlfriends, parents and grandparents, are placed under tremendous pressure—social and cultural and ultimately through physical violence: 'Why you wanna stop me from having fun with my brothers?'—to contribute to these pathological behaviours.⁸⁸

Pearson's comments reflect the aberration of fundamental cultural principles such as 'reciprocity'. Pearson's description and the example given above in relation to giving a spouse dinner show culture in crisis. The women interviewed for this paper responded that Aboriginal culture was not 'passing away' but that there was a need to educate the young on what culture means.

During the research for this paper the term 'bullshit traditional law' was not put forward often and when it was it tended to be by non-Aboriginal people with a close association or long working history with Aboriginal people. Women described what could be seen as a type of cultural aberration as the reality for the people that lived it, not crystallised under headings of classical and contemporary systems, or traditional and 'bullshit' law. The older women expressed the need to assert culture and to educate the younger ones about their culture.

In her studies on violence against women in the Northern Territory, Audrey Bolger recorded one woman as stating: 'There are now three kinds of violence in Aboriginal society – alcoholic violence, traditional violence, and bullshit traditional violence'.⁸⁹ Bolger believed that Aboriginal women were subject to all three. She discussed traditional and non-traditional violence in the Northern Territory and stated the 'true traditional violence accounts for only a minority of the incidents of abuse against women'.⁹⁰ She defined traditional law as follows:

By traditional violence is meant the punishments for transgressions which were part of the means of social control in Aboriginal society and were meted out to both male and female offenders. Such physical punishments, which could involve spearing, beating or even death, were not between individuals but were the responsibility of whole communities or relevant groups in those communities, both women and men. There were recognised punishments for specific transgressions and they were carried out by particular people under community control.⁹¹

The difference between the above and 'bullshit traditional violence' is that the latter is 'violence which is not now sanctioned through formal societal mechanisms'.⁹² Bolger's definition of 'bullshit traditional violence' is the assaults that women suffer that take place for illegitimate reasons, where alcohol is often involved and where there is an attempt to justify the violence as a traditional right'.⁹³ She found that men were working law 'two ways': using either perceived traditional law or general law to suit their needs and distorting the understanding of Aboriginal law in the process.

In a case from South Australia involving the rape of a woman in custody by two Aboriginal police aides and a community warden, the judge, relying on the evidence of the Police Sergeant, stated that:

There is no crime of rape known in your community. Forcing a woman to have sexual intercourse is not socially acceptable, but it is not regarded with the seriousness that it is by white people.⁹⁴

The offence was serious, perhaps more serious than the rape of a non-Aboriginal woman. The victim was in a sense defiled twice, once by the rape and a second time by the fact that the perpetrators were related to her: the rape was incestuous. In making the decision the judge took into consideration the probability of swift punishment by the community for the rape; however, the community had given the case to the courts to deal with. In this instance the community was immobilised by drug and alcohol abuse and unable to respond to the violence with appropriate or

88. Rowse T, *Indigenous Futures. Choice and Development for Aboriginal and Islander Australia* (Sydney: University of New South Wales Press, 2002) 154.

89. Bolger A, *Aboriginal Women and Violence* (Canberra: Australian National University, North Australia Research Unit, 1991) 49.

90. *Ibid.*

91. *Ibid.*

92. *Ibid.*

93. *Ibid.* 50.

94. *R v Wangkadi Mingkilli* (Unreported, Supreme Court of South Australia, Millhouse J, 20 March 1991) 2. Cited in Lloyd J and Rogers N 'Crossing the Last Frontier: Problems Facing Aboriginal Victims of Rape in Central Australia' <<http://www.aic.gov.au/publications/proceedings>> (accessed 15 September 2004).

meaningful reference to 'customary law'. The inaction does not translate as the offence not being regarded as serious under Aboriginal culture or law. As Lloyd and Rogers point out:

Once again in this case, attention and significance were given to Aboriginal male values which were reinforced by the values and attitudes of the white male community with no evidence or attention given to Aboriginal women's views of this matter.⁹⁵

The understanding of Aboriginal law is diminished. Aboriginal law was not exercised in addressing the crime and the message it sends about general law is that it condones the abuse of Aboriginal women.

'Largesse' accorded to Aboriginal law and the effect on women

In his regional report for the RCIADIC, Patrick Dodson outlined some of the problems in the application of customary law as being:

[A]d hoc; idiosyncratic to the individual police or judicial officer; confusing to Aboriginal and non-Aboriginal people when seen in the light of variable sentences; potentially open to abuse and over-statement and over-simplification.⁹⁶

Dodson also described the problems associated with Aboriginal law recognition, outlining the degree of 'largesse' bestowed on Aboriginal people in respect of their law.

It may be argued that in respect of informal recognition of customary law, Aboriginal people are accorded a degree of 'largesse' by police and courts, simply because those two agencies are aware of problems in the detection process; problems in the arrest process; problems in the interview process; problems in the 'confession' process; problems in the judicial procedural process; problems in the court hearing process and problems in the evidentiary process for some Aboriginal defendants. One might cynically state that 'largesse' may be so extended to reduce the prospects of appeal, and dispense 'justice' expeditiously. Aboriginal people are certainly not convinced that they receive justice anywhere, expeditiously or not.⁹⁷

Aboriginal women are grossly at risk by the misrepresentation of Aboriginal law and the 'largesse' accorded to certain practices under Aboriginal law. The rape case above shows the level of misunderstanding. The case study that opened the paper also illustrates the problems articulated by Dodson.

Problems associated with Aboriginal women being the 'female other' can mean that acts of gross violence are interpreted as socially acceptable or normal within Aboriginal culture. One non-Aboriginal woman described how the ALS in its (quite justified) attempt to keep Aboriginal people, particularly males, out of prison are building a stock pile of cultural knowledge. The ALS may use these cultural arguments in the defence of their clients. The woman believed that police should be educated about Aboriginal culture so that cultural knowledge could not be transformed into some type of 'excuse' for lack of justice. There are relatively simple but practical steps that may help to alleviate cultural misunderstanding, such as the mandatory use of interpreters from the moment people come into contact with the system, not just in court when the arguments for prosecution and defence have already been solidified. In this way both sides can be educated about the two competing systems of law.

A problem for Aboriginal women is that customary law is being argued as an excuse for violent acts committed against women. It is said that such violence is 'moral', implying that the behaviour is socially sanctioned under customary law. Issues of access and equity for Aboriginal women within the legal system can mean that their views on such matters do not enter court.

In the court setting, only segments of Aboriginal law are being put forward, in an Australian court setting Aboriginal law is out of its cultural context. The result being that any understanding of Aboriginal law in its legitimate form is diminished. The potential of child sex abuse under the guise of cultural practices (such as preparing girls for sexual maturity) was argued in part by the ALS in a case from the Kimberley in the late 1990s. The fact that such an act happened in the privacy of a home without ritual or ceremonial context, and therefore no social sanction should imply that it is not a part of Aboriginal law. Although there is ethnographic material on this type of activity, each case needs to be contextualised to see if this is in fact socially sanctioned behaviour. The formation of the Peninsula Women's group in 2002 (described below) shows women collaborating to dispel this type of segmented and decontextualised cultural interpretation. The Peninsula Women's Group shows that Aboriginal women regard the protection of children as paramount.

95. Lloyd and Rogers, *ibid*.

96. Dodson P, above n 64, 191.

97. *Ibid* 192.

6. The role of the family in support and discipline

The RCIADIC found that:

One of the most important mechanisms of social control in all Aboriginal societies is the reliance placed on the responsibilities of close kin. This is probably one of the major mechanisms of social control in Aboriginal societies, but one that is least recognised or tolerated by the broader legal system.⁹⁸

During consultations for this paper, a Fitzroy Crossing woman stated that there is a gender division in responsibilities in Aboriginal culture: that women deal with family and men deal with public punishment. She said that Aboriginal law (which seeks to protect families and resolve disputes) was treated as 'second rate' and that white institutions actively discriminate against the Aboriginal way of doing things. The courts and the welfare system were said to disempower Aboriginal people's abilities to deal with their own social problems.

According to Blagg, people do not go to the police or welfare services by reflex.⁹⁹ In fact such services are under-utilised by Aboriginal people, primarily because their actions do not incorporate Aboriginal cultural logic. Women stated that often when they approached police for assistance they were told to go home and think the issue through and come back the next day. There is little appreciation that the police might not be the first to be called; an Aboriginal family usually attempts to resolve the situation at first instance and when they request police assistance they wish to be taken seriously.

The welfare system was described as incredibly narrow in its focus, looking at the individual and individual rights. It was stated that in the Aboriginal way, rights and responsibilities take the focus beyond the individual to look at the broader family picture. An example was given of child-rearing, what could be interpreted as inaction—a neglected child being left with a mother—may be the family's way of dealing with the situation. Rather than removing the child, the logic is to empower the person to deal with their problems. The problem is closely monitored by the family, particularly the grandmothers, to ensure the safety of the child. Welfare was described as looking at short-term interventions (such as placing a child in foster care) and giving financial incentives, but these interventions often create long-term dysfunction for both the child and its family.

Problems associated with this Western focus on individuals were also identified in education. At school the children are separated by age, at home they are told by their parents to look after their younger siblings. When older Aboriginal children attempt contact with their younger siblings at school they are told by the teachers to go back to the older children's side. This was described as going against the Aboriginal way of teaching responsibility for family (interestingly Kimberley Aboriginal Medical Service Council (KAMSC) research on child trauma found that bullying was the only area where Aboriginal statistics were lower than non-Aboriginal statistics).¹⁰⁰

Disciplining children

The issue of recognition of cultural practices and the disciplining of children entered discussions often during consultations with Aboriginal women. Aboriginal people believe that their right to discipline children has been intruded upon by welfare agencies. Women did speak about mothers taking stress out on children: a senior woman gave details of a mother who had beaten her child so badly he had to be taken to hospital. Grandmothers especially will intervene if they know a child is being senselessly beaten. Apart from this type of physical contact with children, women spoke about their right to discipline children.

The most pronounced ritual style of disciplining children was described by Balgo teenagers. They stated that two girls had been taken in front of a group and publicly 'got a hiding' from their parents. A policeman watched but did not intervene. The girls had broken into the shop and were also known to be petrol sniffers. When questioned about the hiding and asked if they thought it was for the shop theft or the sniffing they answered that it was probably more for the sniffing. Mentoring of the girls continued after the physical punishment had been conducted.

Parents also spoke of welfare agencies taking children away after they had been physically punished by their parents. Women said that there was a lack of adequate consultation by these agencies and that their actions would ultimately

98. RCIADIC, above n 43, volume 2, [11.10.13].

99. Blagg, above n 17, 7.

100. Kimberley Aboriginal Medical Services Council Inc, 'True Words – Real Life: A Study of the Social and Emotional Wellbeing of Young People in the Kimberley. Plain Language Report on the Preliminary Findings' (undated) 15.

cause more trouble. The children were being disciplined, not abused and the distinction between these actions was not appreciated by authorities.

Teenagers were regarded as particularly at risk from lack of discipline. Strategies are being developed by Aboriginal people to address the problem of teenagers. Balgo teenagers spoke of bush camps at *Killi Killi* with senior man Jimmi Chooga. The petrol sniffers were the main group targeted. The purpose of removing them was to abate their destructive behaviour in the community and educate them about their culture.

Sentencing controlled from outside the community was consistently put forward as a problem for young people. Sending young people away to receive punishment was said to change them, jail terms gave them a 'badge'. Young people boasted of their time away as a rite of passage—'I'm a jailbird'—implying that they are now tough. When, or if, they came back to the community they were often more destructive towards themselves and others. When young people are taken into custody they are still regarded by Aboriginal people as being under the responsibility and mentoring of parents and grandparents. The older generation in particular told of how they were not informed of police actions against their family, word had to get back to them through the Aboriginal network. One woman stated that when young people are sent out of the community for punishment they get them back in a box [coffin].

Like Balgo, Fitzroy Valley is conducting bush trips with teenagers to address their troubled behaviour through the use of culture. The Kurungal Yirraman track was walked by a group of teenagers, regarded as affected by 'drugs, alcohol and American movies', as a form of punishment. The teenagers were made to find and carry their own water and hunt for food. The walk educated the teenagers about resourceful use of country (eg, bush foods and medicines) and passed on knowledge of cultural sites. They were shown how to light fires, build windbreaks and serve meat properly. Within a couple of days their behaviour was described as changed. They started to bond with, and show respect for, the elders guiding the walk; they did as they were instructed and then did things without even being asked. They brought the experience of the walk back to the school and did a school project related to the walk. While on the track the teenagers forgot about the alcohol and drugs and understood more about their elders, their country and their cultural heritage. The walk was mainly organised by women; the senior women would like to see the duration of the walk extended to three months.

7. Aboriginal women's initiatives

Peninsula Women's Group

The Peninsula Women's Group was established in 2002 through the support of KAMSC. KAMSC have a policy of not intruding into people's affairs and can only act upon request. There was knowledge of the level of child sex abuse taking place in many communities, but they were unable to act until a request was made for assistance. One community woman asked KAMSC for help in dealing with the sexual abuse of her child and this request enabled KAMSC to act on child sex abuse as a community health issue. Meetings with prominent Aboriginal women elders in Broome were conducted and ideas and plans about addressing child sex abuse were canvassed.

At the Peninsula Women's Group bush meeting on the Dampier Peninsula in 2002 issues of child sex abuse were workshopped in detail. At this first meeting women were incredibly angry; the cultural logic to address the issues was very Aboriginal. A senior woman regarded as being knowledgeable in law issues addressed the meeting and stated that child sexual abuse is not part of Aboriginal culture. Strategies were discussed for dealing with the issue. Ideas emerged such as involving the families; getting people together for meetings; having the 'story' collected and 'right'; ways of keeping children safe; and ostracisation of perpetrators from the community for a certain period of time as punishment for child abuse. The role of non-Aboriginal support agencies was canvassed as well.

The momentum of the Peninsula Women's Group continued after this first meeting and the women banded together to address child sex abuse in their communities. The women's refuge in Broome sent staff to educate women about how to recognise the symptoms of child sex abuse. Culturally appropriate literature was designed and printed for children so they could learn to speak out about the issue. The Peninsula women set up a network with the women from Bidyadanga, south of Broome. As the momentum continued the attitude to child sex abuse changed from outrage to attempts to find solutions. Mothers of 'perpetrators' spoke of their pain and the initial hostility softened into ways of addressing the problem. People stated that they did not want to jail the perpetrators of child abuse; instead they regarded the perpetrators

as suffering from a sickness and wanted them sent away for treatment. ATSIC was asked for funding to keep the momentum of the project, but the group was told that funding would be problematic.

In 2003 a second bush meeting was organised which included magistrate Sue Gordon and representatives from bureaucratic agencies. The T-shirts printed for the meeting read:

Oorang Arr Arral Jugarrda Bowa,
(Women Look After Your Children).
Child sexual abuse is not a part of our culture.

The women again requested funding and ATSIC offered funds on the provision that the Group become incorporated. The Peninsula Women's Group was asked if they wanted a group to cover the ATSIC Kullari region. The request for funds was made in October 2003, the women waited for ATSIC's funds approval. They kept the momentum, organising a street march through the largest community on the Peninsula in protest of child sex abuse and continuing education programs on the recognition of child sex abuse. Funding was secured around April or May 2004 for a regional group; ATSIC wanted the group incorporated with a constitution by mid-June. What started as a grass-roots initiative using Aboriginal authority structures and senior women in the form of the Peninsula Women's Group metamorphosed into the Kullari Indigenous Women's Aboriginal Corporation (KIWAC). Networking started to focus on government departments (such as the Department of Justice and the Department of Community Development) and the police. KIWAC members worked hard but came under a lot of criticism. Because of its obligations under its constitution and its responsibilities to the funding body it lost its flexibility to an extent, becoming slower to act, more bureaucratic and authoritative in its relationships with women. One woman criticised KIWAC after it was founded saying: *'KIWAC can't tell us what and what not to do, we can ask them for help but they can't tell us what to do'*. In 2004 another bush meeting took place on the Peninsula; however, the solidarity of the women was diminished, the bureaucratisation of the project and the implied 'top down' approach had bred animosity.

KIWAC remains an important voice for Aboriginal women in the West Kimberley. The history of KIWAC highlights the difficulty of governance in Aboriginal women's initiatives. KIWAC needs to serve two masters, the Aboriginal women it represents and the funding agencies that demand a bureaucratic focus resulting, to an extent, in bureaucratic control.

Fitzroy Valley Action Group

Another example of social initiatives that have their conception in women's groups is the Fitzroy Valley Action Group. The group was formed through discussions in the local women's group. Alcohol related problems were targeted by the group; the sobering-up shelter and the women's shelter were seen as a necessary part of the community, but they were regarded as addressing merely the symptoms and not the cause of social problems. Rather than seeing social problems as insurmountable, the group targeted alcohol as a major factor in community dysfunction. The group accessed hospital records to obtain 'hard data' on the causes of trauma proving the major contributing factor to be alcohol. It was decided to hold a public meeting to discuss alcohol, with the proposition of selling light beer only in Fitzroy Crossing.

The community response to the meeting was extraordinary. Over 200 people attended the public meeting. People were asked to think about when they argue, and were called upon to take responsibility for their behaviour – alcohol was not a licence to hit women or take money from elders. The response to the meeting encouraged people to take further action. The group canvassed ideas to have the police work with the Fitzroy Valley Action Group, to look at an alcohol and drug strategy. A meeting was arranged with the magistrate in the hope of the community influencing the ramifications of his court decisions.

Fitzroy Crossing currently relies on a visiting service from Broome to conduct alcohol education, the Fitzroy Valley Action Group proposed to find money to fund their own local service to address the special needs of the area. Night patrols are now operating in communities in the Fitzroy Valley, ensuring that people stay outside the community to do their drinking. The night patrol is comprised of councillors, elders and young people, both men and women, dedicated to keeping alcohol related problems out of the community.

These kinds of community actions are 'energy centres' that need resources to maintain momentum. The Department of Justice is currently coordinating community justice plans throughout the Kimberley; it will be interesting to see the way that grass-roots initiatives like the Fitzroy Valley Action Group get a voice in the community justice plans.

8. Conclusion

The stereotyping of Aboriginal women since colonisation haunts the perspective of Aboriginal women today. Their perceived role or status in culture is diminished and this in turn has affected how decisions are made about their inclusion or exclusion from processes in the state's legal system and the bureaucracy that accompanies it.

From the interviews conducted with Aboriginal women in the Kimberley the recognition of customary law was far from inimical to their human rights. The perception of women and children as needing protection from Aboriginal law did not come through in the research. Aboriginal women in the Kimberley strongly believed that their right to identify as Aboriginal was of paramount importance. They believed that cultural knowledge and information was being misrepresented and abused.

Some women argued for the need for cultural revival because men were inflicting violence on women and children and 'hiding behind culture' to escape punishment from either system. Impressive strategies are being developed by Aboriginal women to combat social problems through the assertion of culture. Establishing proper mechanisms where Aboriginal women have a say in what is culturally sanctioned and acceptable behaviour within their communities and educating the legal system about Aboriginal culture within specific communities will help to overcome some of the misconceptions.

Overall, there was a definite argument for empowerment for Aboriginal women through culture, not liberation from Aboriginal law or the culture that sustains it. Aboriginal women play a significant role in determining their status and position within Aboriginal law mechanisms.

background paper 14

Aboriginal customary law in the context of Western Australian constitutional law

Steven Churches*

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1. Introduction

Australian law—and, by extension, Western Australian law—accepts as axiomatic that all persons must be treated equally in the eyes of the law. The law is of equal application to natural persons, and corporate and governmental 'persons' in so far as is practicable or appropriate. Although the common law has long allowed special preferences for government (the Crown), it frowns on distinguishing between citizens in terms of their rights under the law.

That having been said, the position of Western Australia's Aboriginal population is clearly one distinguished from that of the remainder of the state's citizens, as a consequence of colonial and later historical events, and the fact that the Aboriginal population may be—at least in a substantial proportion—differentiated by appearance. Cultural differences between the majority and the Aboriginal minority have not been bridged, as is evidenced by the poor position of Western Australia's Aboriginal population in prospects for their health, education and frequency of criminal convictions.

If it is accepted that a readily distinguishable minority (about 3.2% of the state's population) is persistently ill-served by the cultural and governmental structures of the majority, then it may be appropriate to explore the possibility of placing the minority group in a special legal position, and in particular a position in which the legal apparatus of the state recognises that the minority is in need of special attention. Such special position may well extend not merely to recognition, but to the acceptance that a minority needs to take a measure of control over management of its own community, attracting also special measures of responsibility within that community.

Some Western Australian Aboriginal people have tribal attachments which carry obligations under Aboriginal customary law. In these circumstances, the above general comments should be considered. To what extent Aboriginal customary law may be integrated into or recognised by general law is itself a constitutional issue.

The LRCWA reference limited to exploring Aboriginal customary law in a constitutional context

It is immediately apparent that recognition of the special position of the Aboriginal minority is a constitutional problem separate from recognition of customary law. The former relates to all who hold themselves out to the world as, or are recognised as, Aboriginal. The latter is focused on matters which directly impinge on only a sub-class of Western Australian Aboriginal people, being those still sufficiently attached to tribal culture to recognise or be bound by—even if involuntarily, at the behest of others—customary law.

It is the latter issue to which the Law Reform Commission of Western Australia (LRCWA) reference attaches, and consequently this paper will focus on Aboriginal customary law in a constitutional context, although some broader issues will be touched on attendant on that focus.

2. Constitutional issues

The Constitution of Western Australia (the Constitution) serves as the basal document for the structure of government in Western Australia. The processes of parliamentary democracy, the exercise of executive power, and the work of an independent judiciary may all be tested, to some degree, against this standard. But the Constitution is not a *Grundnorm* in the sense of a charter of absolute sovereignty. Western Australia is a component part of the Australian federation and, in common with other federations such as Canada and the United States of America, power is diffused in the Australian polity. Furthermore, the Constitution is still substantially in the form in which the British government bestowed it on the colonists in 1890. It has no grand design as to restraint on the forces of government. It is still a Westminster boilerplate, dependent on the 'genius' of the common law as the ultimate restraining mechanism.

No absolute sovereignty

The fact that the Constitution is not a charter of absolute sovereignty makes the concept of involving Aboriginal customary law in the operation of the Constitution more acceptable. A basal document for the processes of unitary government might be thought impervious to inclusion of any reference to a legal system other than that prescribed as the one law for all. But Western Australia is a component state in a federation: the resulting federal body being the sovereign, the Commonwealth of Australia. Federation is the beginning of the acceptance of the limitation of the power of the 17th and 18th century European states that first embodied the concept of sovereignty; itself vested at that time in a king.

Sovereignty was bound up with the historical drive to uniformity of law and administrative standard in European nation-states. It was fundamental to the growing importance of kings (the Crown) in such polities that law be common throughout the realm. Such commonality of law was the very mark of royal power exercised throughout the realm, evenly and without exception.¹

In a polity of limited power such as Western Australia it is possible to conceive of legal systems operating in respect of recognisable communities; such legal systems differing from the norm of the general law which otherwise applies throughout the state. The heart of the problem, once such a possibility is accepted, is how the ambit of such alternative legal systems might be determined – to whom might they apply and in what circumstances?

That the Constitution is a charter of government in a non-sovereign context sits well with the modern understanding of the limits of sovereignty, in which

there has been an evolution in meaning away from the view of Bodin (and of Thomas Hobbes in his *Leviathan* which was published in 1651)—that a sovereign has *absolute, monopolistic and irrevocable* power—to a more *qualified* understanding of the term. Under this modern 'realist' conception, sovereignty is divisible and capable of being shared or pooled across different entities or locations.²

Non-sovereignty raises issues as to self-determination for Aboriginal peoples

Just as 'sovereignty' has reflected different meanings in Western legal thought over the last 400 years, it has a different meaning to Aboriginal people. The possibilities of meaning to them will matter as to how their customary law may be involved with the Constitution. Brennan, Gunn and Williams note: 'For others, sovereignty describes their capacity to make decisions across the range of political, social and economic life'.³

Sovereignty can be demonstrated as Aboriginal people controlling all aspects of our lives and destiny. Sovereignty is independent action. It is Aborigines doing things as Aboriginal people, controlling those aspects of our existence which are Aboriginal. These include our culture, our economy, our social lives and our Indigenous political institutions.⁴

The critical material in the quotation above concerns the references to 'our culture' and 'our social lives', as those concepts provide the springboard for understanding of Aboriginal customary law. It is such understanding that may make the contemplation of a place for customary law in the Constitution a matter of real worth with tangible outcomes for Aboriginal people. It is apparent from the above material, revealing Aboriginal views on sovereignty, that the possible role of customary law (in so far as it embodies controlling elements over Aboriginal communities in respect of culture and their social lives) must be addressed, and addressed in the context of providing an alternative—not necessarily an exclusive—mode for dealing with the necessary 'political' operation of such communities. It is at this point that the Constitution must be perceived as flexible and not monolithic. Referential inclusion of Aboriginal customary law will raise issues of self determination.

Brennan, Gunn and Williams quote Richard Ah Mat on the Cape York view of self-determination:

[S]elf-determination is about practice, it is about actions, it is about what we do from day to day to make changes, it is about governance. It is about taking responsibility for our problems and for our opportunities: because nobody else will take responsibility for our families, our children, our people. We have to do it ourselves.⁵

The Western Australian Department of Indigenous Affairs included in its Statement of Commitment the following:

Aboriginal people have continuing rights and responsibilities as the first people of Western Australia, including traditional ownership and connection to land and waters. These rights should be respected and accommodated within the legal, political and economic system that has developed and evolved in Western Australia since 1829.⁶

1. The reality, for example in pre-revolutionary France, was quite otherwise, but the trend was apparent and made abundantly clear in the 19th century.
2. Brennan S, Gunn B & Williams G "Sovereignty" and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307, 312 (emphasis in original).
3. Ibid 314.
4. National Aboriginal and Islander Health Organisation, *Sovereignty* (1983), quoted in Behrendt L, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Sydney: Federation Press, 2003) 100.
5. Rh Mat R, 'The Cape York View' (Paper presented at the Treaty Conference, Murdoch University, Perth, 27 June 2002), quoted in Brennan, Gunn & Williams, above n 2, 316.
6. Western Australian Department of Indigenous Affairs, 'Statement of Commitment to a New and Just Relationship Between the Government of Western Australia and Aboriginal Western Australians' (4 June 2004) <<http://www.dia.wa.gov.au/Policies/StateStrategy/StatementOfCommitment.aspx>>.

The principles enunciated in the Statement of Commitment appear at first blush to be too broad, or focused on land title issues specifically excluded from the remit of this paper, to be of assistance. However, Aboriginal customary law must now be examined in the light of possible connection to the Constitution.

3. Customary law – nature and content

Terms of reference to the LRCWA as to content of Aboriginal customary law and interaction with existing Western Australian law

The terms of reference to the LRCWA are relevantly that:

[T]he Commission is to have regard to:

- matters of Aboriginal customary law falling within State legislative jurisdiction including matters performing the function of or corresponding to criminal law (including domestic violence); civil law (including personal property law, contractual arrangements and torts); local government law; the law of domestic relations; inheritance law; law relating to spiritual matters; and the law relating to evidence and procedure;
- relevant Commonwealth legislation and international obligations;
- relevant Aboriginal culture, spiritual, sacred and gender concerns and sensitivities;
- the views, aspirations and welfare and welfare of Aboriginal persons in Western Australia.

Use of the term ‘customary law’ in Western Australian legislation: what is the meaning attached?

The references to customary law in Western Australian statutes are set out as follows:⁷

(1) The *Aboriginal Heritage Act 1972* provides in ss 7 and 8:

7. Traditional use

(1) Subject to subsection (2), in relation to a *person of Aboriginal descent who usually lives subject to Aboriginal customary law*, or in relation to any group of such persons, this Act shall not be construed –

- (a) so as to take away or restrict any right or interest held or enjoyed in respect to any place or object to which this Act applies, in so far as that right or interest is exercised in a manner that has been approved by the Aboriginal possessor or custodian of that place or object and *is not contrary to the usage sanctioned by the Aboriginal tradition relevant to that place or object*; or
- (b) so as to require any such person to disclose information or otherwise to act *contrary to any prohibition of the relevant Aboriginal customary law or tradition*.

8. Availability for traditional use

Where the Committee is satisfied that a representative body of *persons of Aboriginal descent who usually live subject to Aboriginal customary law* has an interest in a place or object to which this Act applies *that is of traditional and current importance to it*, and which is in the custody or control of the Minister, the Minister after consultation with the Committee shall make that place or object available to that body as and whenever required for *purposes sanctioned by the Aboriginal tradition* relevant to that place or object.

(2) The *Aboriginal Affairs Planning Authority Act 1972* (WA) provides in s 35(2):

A regulation made for the purposes of this section shall, so far as that is practicable, provide for the distribution of the estate *in accordance with the Aboriginal customary law* as it applied to the deceased at the time of his death.

(3) The *Community Services Act 1972* (WA) provides in s 3:

‘relative’ in relation to a child, means –

- (a) [western familial relationships]; and
- (b) in relation to a child of Aboriginal descent, includes a *person regarded under Aboriginal customary law* as an equivalent relative in relation to the child as a person mentioned in paragraph (a).

(4) The *Adoption Act 1994* (WA) provides in s 4(1), by reference to western type familial relationships:

- (b) in the case of an Aboriginal person, a person regarded under the *customary law or tradition of the person’s community* as the equivalent of a person mentioned in paragraph (a).

7. Emphasis has been added in extracts from the statutes.

In the above statutes there is no definition of 'customary law' or 'Aboriginal customary law'. It is apparent that the Western Australian parliament accepts the existence of Aboriginal customary law, but has not set out to define it. Dispute as to its existence attracts questions as to method of proof. Such questions are not germane to this paper, which proceeds on the simple assumption that customary law exists, at least relevantly to those Aboriginal members of the Western Australian community who live in a traditional manner or still have sufficient ties to Aboriginal culture to affect their conduct.

The view of Aboriginal customary law from majority Australian legal culture

The Northern Territory Law Reform Committee described Aboriginal customary law as 'an extremely broad and complex set of rules and unwritten legislation governing social relationships, economic rights, land ownership, wildlife conservation, land management and intellectual property rights'.⁸

In the *Gove Land Rights Case*,⁹ Blackburn J held that the clans in the Gove Peninsula area had a recognisable system of law which he described as

a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called a 'government of laws, and not of men', it is that shown in the evidence before me ... Great as they are, the differences between that system and our system are, for the purposes in hand, differences of degree. I hold that I must recognise the system revealed by the evidence as a system of law ... [T]he fundamental truth about the aboriginals' relationship to the land is that, whatever else it is, it is a religious relationship.¹⁰

In *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston*¹¹ an essay entitled 'Aboriginal Customary Law'¹² contained the following:

Law and religion were intimately bound up in Aboriginal society ... and any attempt to identify certain segments of Aboriginal life as 'legal' involves the imposition of alien categories of thought on the tribal society. Some modern Aborigines have made comparisons between their law and the Australian legal system on the basis of common notions of rules and sanctions for their breach but they have also interpreted the word 'law' to mean 'way of life' and 'religion' ... This is not to deny that there was a system of 'law' in traditional Aboriginal society. I am using a functional definition of 'law', one which places primary emphasis on law as a means of social control ... The use of the word 'law' to describe measures of social control in Aboriginal society is justified ... by the belief that every society must have means for settling disputes, and must have law in this sense, no matter how difficult it might be to identify binding rules or institutions corresponding to the legal system in our own society.¹³

The restrictive aspects of the LRCWA terms of reference: no native title or heritage issues

It is apparent that the limitations on the terms of reference to the LRCWA are important and are relevantly restrictive.

[The LRCWA] 'is to enquire into and report upon Aboriginal customary laws in Western Australia *other than in relation to Native Title and matters addressed under the Aboriginal Heritage Act 1972* (WA).'¹⁴

It would seem that in the absence of reference to land ownership and heritage aspects of Aboriginal customary law, the focus of this reference must be on (i) familial and social relationships, (ii) land management and associated intellectual property rights and conservation regimes under customary law, and (iii) Aboriginal community governance.

It may be noted at this juncture that in *Yanner v Eaton*¹⁵ a majority of the High Court applied the terminology of the *Native Title Act 1993* (Cth) to find the right of the Aboriginal appellant in 'hunting' (a class of activity prescribed in the Act) to be available despite the adverse wording of the relevant Queensland legislation.¹⁶

8. Northern Territory Law Reform Committee, *Towards Mutual Benefit: Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 42, now found in *Report of the Committee of Inquiry into Aboriginal Customary Law 2004*, Appendix A to Report, prior to Background Papers.

9. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

10. Ibid 267–268. This paragraph has been quoted by other judges: see *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 39 (Brennan J), 186 (Toohey J); *Ward v Western Australia* (1998) 159 ALR 483, 512 (Lee J). See G Neate 'The "Tidal Wave of Justice" and the "Tide of History": Ebbs and Flows in Indigenous Land Rights in Australia' (Paper presented at the 5th World Summit of Nobel Peace Laureates, Rome, Italy, 10 November 2004) 30 ff.

11. Hanks P & Keon-Cohen B (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (Sydney: Allen & Unwin, 1984).

12. Maddock K, 'Aboriginal Customary Law' in Hanks & Keon, ibid 212.

13. Ibid 230–232.

14. Emphasis added.

15. (1999) 201 CLR 351.

16. See reference to the *Native Title Act 1993* (Cth), p 9 below.

The content of Aboriginal customary law recognisable by majority Australian legal culture (and hence capable of inclusion into the framework of the Constitution)

The Northern Territory Legislative Assembly Sessional Committee on Constitutional Development in its Discussion Paper stated:

It is said that customary law is perceived by Aboriginal people as a wider system of social control than non-Aboriginal Australians would normally conceive law to be. Aboriginal customary law includes elements which could normally be described as 'private law' (eg: interpersonal relations and dispute resolution), 'public law' (community government), and religious beliefs and practices. These aspects of social control are inextricably mixed in a traditional Aboriginal community.¹⁷

The Discussion Paper went on to note that:

Many aspects of Aboriginal customary law are inaccessible to others, for a variety of reasons. These include the fact that the law varies from community to community, that it is usually not recorded in writing, that some of it is secret or confidential, that it can usually only be learnt orally in the relevant Aboriginal language, and that it is based on ideas and concepts radically different from 'Western' ideas and concepts.¹⁸

The Discussion Paper listed a number of instances of Northern Territory legislation that refer to Aboriginal customary law, focusing on land rights, heritage and family relationship issues – thus mirroring in part the Western Australian legislative references set out above.¹⁹ However, Northern Territory legislation refers to Aboriginal customary law in respect of 'traditional use of land and water', in the context of Crown or other public lands.

It is a commonplace that Aboriginal customary law may be taken into account in the sentencing process.²⁰ However, the Discussion Paper noted that, in addition:

Northern Territory courts have taken Aboriginal customary law into account in a variety of other contexts. For example, in the protection of secret Aboriginal ceremonies from disclosure by publication,²¹ in the immunity of confidentiality information about Aboriginal sacred sites from use in evidence,²² in taking into account Aboriginal traditional status and the ability to participate in ceremonies in determining damages for injuries²³ and in one unreported case in having regard to tribal marriages for purposes of adoption.²⁴

Commonwealth legislation, in the form of the *Native Title Act 1993* (Cth), has recognised the existence of aspects of Aboriginal customary law, which it deals with by referring to the exercise of those aspects of customary law in relation to land. The inhibition in the present reference to the LRCWA in regard to native title should not be taken to occlude inference as to the existence of, and recognition of, Aboriginal customary law (the *class of activity*) in this Commonwealth legislation.

The *Native Title Act 1993* (Cth) provides in s 211 as follows:

Preservation of certain native title rights and interests

Requirements for removal of prohibition etc. on native title holders

(1) Subsection (2) applies if:

- (a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3));²⁵ and
- (b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and
- (ba) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and
- (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

17. Northern Territory Legislative Assembly, Sessional Committee on Constitutional Development, 'Recognition of Aboriginal Customary Law', Discussion Paper No 4 (August 1992) 4-8 (d).

18. Ibid 9.

19. Ibid.

20. Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', Background Paper No 1, above p 1, 9ff.

21. Foster v Mountford and Rigby (1976) 14 ALR 71.

22. Aboriginal Sacred Sites Protection Authority v Maurice (1986) 65 ALR 247.

23. Roberts v Devereux (Unreported, NT Supreme Court, 22 April 1982).

24. Northern Territory Legislative Assembly, above n 17, 10.

25. Emphasis added.

Removal of prohibition etc. on native title holders

- (2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:
- (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
 - (b) in exercise or enjoyment of their native title rights and interests.

Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.

Definition of class of activity

- (3) Each of the following is a separate class of activity:
- (a) hunting;
 - (b) fishing;
 - (c) gathering;
 - (d) a cultural or spiritual activity;
 - (e) any other kind of activity prescribed for the purpose of this paragraph.

From the above extracts it would seem that Aboriginal customary law going to 'use' of land, rather than claiming title in land, is within the instant reference to the LRCWA, and that Aboriginal customary law going to 'use' involves land management going to both the exploitation of resources on a non-commercial basis and the limitation of the exploitation of such resources.

Geographically fragmented and variable nature of customary law

It is axiomatic that the particularity of customary law will vary from tribal group to tribal group, but the generality is common in origin and outline. This is apparent from the Background Paper written for this reference by the Hon John Toohey.²⁶ It is enough for the purpose of this paper that Aboriginal customary law be accepted, in the words of Toohey, 'as a body of rules, accepted as binding by the society and enforced by recognisable constraints'.²⁷

It should also be noted that differences may arise among those of the same tribal grouping as to the nature of, or indeed the existence of, Aboriginal customary law. This situation was exemplified in the South Australian saga surrounding Hindmarsh Island. The solution appeared to be that both viewpoints (as to the existence or otherwise of particular 'secret women's business') were based in good faith,²⁸ but that Aboriginal peoples who, while still proud of their heritage, were substantially westernised in outlook, would not have been exposed to the tribal lore and law, and hence would deny its existence. Such existence will, in the event of contest, need to be proved by evidence.²⁹

Recognition in the Constitution must be at a general level

Recognition of Aboriginal customary law in the Constitution may proceed unhindered by any concerns as to tribal or geographical variation, as such recognition is conceptual only, and the particularity of Aboriginal customary law will need to be dealt with in discrete legislation. For example, customary law regarding allowable relationships for the purpose of marriage may vary greatly across the state. It may not be appropriate to recognise each individual customary variation on marriage relationships, but the particularity of customary law operating on that subject might be recognised in, for example, state legislation on superannuation which must attempt recognition of 'marriage-like relationships' for the purpose of ascertaining a survivor of such relationship as beneficiary. It would then be for claimants to establish by evidence that they had been in such relationships according to the customary law to which they were subject.

26. Toohey J, 'Aboriginal Customary Laws Reference – An Overview', Background Paper No 5, above pp 173–212.

27. Ibid 5.

28. Simons M, *The Meeting of the Waters* (Sydney: Holder Headline, 2003).

29. Eg, *Aboriginal Customary Laws (Recognition) Bill 1986* (Cth) set out in Australian Law Reform Commission, *Report into the Recognition of Aboriginal Customary Laws*, Report No 31 (1986). This report dealt substantially with criminal law issues and is consequently not germane to the instant paper.

Clause 26. A question concerning the existence or content of the customary laws of an Aboriginal community is a question of fact and not a question of law.

Clause 27. (1) Evidence adduced in a legal proceeding (whether in respect of a matter arising under this Act or not) as to the existence or non-existence, or as to the content, of the customary laws of an Aboriginal community in relation to a matter is not inadmissible in the proceeding only because it is hearsay evidence or is evidence of an opinion if the person giving the evidence: (a) has special knowledge or experience of the customary laws of the community in relation to that matter; or (b) would be likely to have such knowledge or experience if such laws existed.

(2) Sub-section (1) applies notwithstanding that the evidence relates to a fact in issue in the proceeding.

4. Limitation on those aspects of customary law that may be recognised and how they may be applied

Some aspects of Aboriginal customary law are too contrary to mainstream Australian legal culture and so cannot be invested in the Constitution

Recent events, particularly resulting from an Inquiry into Aboriginal Deaths in Police Custody in November 2004 at Palm Island in Queensland, have provided a timely reminder that some aspects of Aboriginal customary law are simply unacceptable to mainstream Australian legal culture. I refer in particular to the comments from the Aboriginal spokesman, Murrandoo Yanner, to the effect that customary law countenanced 'payback' against the police in general if the particular police officer who was involved in the relevant fatality could not be found.³⁰ 'Payback' on a communal basis is a staple of most tribal law amongst Indigenous peoples anywhere in the world, as it was of Anglo-Saxon law in its earliest forms, but it is completely antithetical to modern mainstream culture.

Therefore, I am of the view that it is not necessary to itemise those portions of customary law that are not acceptable. The columnist, Janet Albrechtsen,³¹ attacked recognition of Aboriginal customary law in the criminal field. However, judicial recognition of customary law in the sentencing process has a well-established history in this country.³² Concepts of 'group payback' or relationship practices that are unacceptable do not need to be itemised as excluded from recognition. Filter mechanisms exist for dealing with such aspects of customary law in the shape of judicial discretion, or provision in the Constitution that where customary law is inconsistent with state legislation, to the extent of the legislation, state legislation will prevail.³³

The business of sentencing must, however, be differentiated from the remainder of the criminal law, which is an example of an area in which mainstream Australian legal culture must apply universally:

English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.³⁴

An inconsistency provision in the Constitution will ensure that the state's *Criminal Code* will continue to apply universally for the purpose of framing charges and defining them.

Inconsistency between Aboriginal customary law and mainstream Australian legal culture can be managed

Ensuring paramouncy of one stream of law to the extent of inconsistency, where there are two or more such streams, is illustrated in the *Australian Constitution*.³⁵ However, two issues arise at this juncture – would the inconsistency of any Aboriginal customary law be measured against state legislation alone, or against the common law as recognised in the state, or Commonwealth law as well? The last is a matter for the Commonwealth, but the other distinction may be important. In addition, inconsistency may be too broad a sword for dealing with the issue of unacceptability. It may be appropriate to entrench in discrete legislation the non-offensive aspects of customary law that require preservation:³⁶ (i) familial and social relationships, (ii) land management and associated intellectual property rights and conservation regimes, and (iii) Aboriginal community governance.

Some aspects of customary law can only apply amongst Aboriginal peoples, while other aspects such as intellectual property and conservation must have general application

A troubling aspect of any multi-streamed legal system is determining those in the community to whom various aspects of the law should apply. Questions of familial and social relationships and of Aboriginal governance would appear to be substantially of application to Aboriginal communities only;³⁷ but matters of land management and

30. *The Australian*, 1 December 2004, 1.

31. *Ibid.* 15.

32. See Northern Territory Legislative Assembly, above n 17.

33. As to ensuring the existence of Aboriginal customary law in particular matters such as those serving as the parameters of this paper, see p 12 below.

34. *Walker v New South Wales* (1994) 182 CLR 45, 50 (Mason CJ).

35. Section 109.

36. As in at least portions of the fields enumerated above, pp 536–37.

37. Although, for example, the litigation that ensues on the death of a party to a marriage between Indigenous and non-Indigenous as to the rituals attending on death, serves to remind that there is always the potential for intersection between those under mainstream cultural law and those under Aboriginal customary law.

conservation regimes, as well as matters of intellectual property rights, involve connection with those aspects of general life shared by all Australians. It may be appropriate in discrete legislation on particular subjects to itemise whether the recognition of Aboriginal customary law is to apply throughout the entire Western Australian community. That is not a matter which affects the general recognition of customary law in the Constitution.

Recognition of Aboriginal customary law in the Constitution is one thing: the application of customary law will require consultation with Aboriginal people

The following comments gleaned in the course of work on this reference, from the Aboriginal community at Fitzroy Crossing, should be borne in mind as representative of the need for consultation about the use of and reference made to customary law:

The Fitzroy community voiced considerable concern about both the Aboriginal Justice Plan and the Justice Department's Kimberley Plan. The Aboriginal Justice Plan appears to be a 'top down' initiative. They wanted to know: Who was to be on the regional group? How were they to be chosen? Who decides? *It would be preferable to begin with a local reference group of elders and build a justice strategy from the bottom up.* The examples of Ali Curong and Lajamanu in the Northern Territory were offered as examples to be studied. Community Justice Mechanisms need to develop from within community structures.

The meeting also said that the Aboriginal Justice Plan and the Kimberley planning process would fail if they attempted to impose structures on the Fitzroy Valley they did not want. The locality had its own structures for Law and Justice issues, such as KALAC. Initiatives should be based on these. An Elders Panel of some kind should be a fundamental local mechanism. This constitutes the most up to date thinking in relation to the delivery of services to areas such as Fitzroy – do not set up new structures, rather 'add value' to structures already in place and piggy back on existing resources. Those developing the Aboriginal Justice Plan should not try to 'reinvent the wheel' when it comes to community based justice structures, rather work with those who are already involved in law and justice.³⁸

Those comments lead inevitably to the realisation that any system of 'law' requires methods of enforcement or regulation, and that for customary law to have any meaningful place in the state's legal system Aboriginal people must be empowered in respect of such enforcement and regulation.

Aboriginal people are born into the law, they maintain it as their choice. Authority comes from their Elders and comes from the community.³⁹

5. The inclusion of Aboriginal customary law in the Constitution

Whether limited aspects of Aboriginal customary law only should be invested under the instant reference

For the reasons set out above,⁴⁰ the reference to Aboriginal customary law in the Constitution should be kept entirely general, leaving issues of ambit and application to particular statutes. However, it may be appropriate to allow for mainstream law to override for inconsistency, so long as this is not structured in a manner that makes any reference to Aboriginal customary law entirely nugatory.

The position in other jurisdictions on inclusion of customary law

South Africa

Chapter 12 of the *Constitution of the Republic of South Africa 1996* provides as follows:

Recognition

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

38. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 47 (emphasis added).

39. *Ibid.*

40. See above pp 538–39

- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.⁴¹

Role of traditional leaders

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –
- (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
 - (b) national legislation may establish a council of traditional leaders.⁴²

It is apparent that South African legal theory accepts the existence of customary law and intends that it be recognised, not merely in the abstract, but specifically by recognition of 'traditional leadership' – the means of ascertaining and enforcing such customary law. The application of customary law may be deflected by legislation which will prevail to the extent of specific annulment or inconsistency.

New Zealand

The Treaty of Waitangi, dating from 1840, provides a very different basis, than is the position in Western Australia, for setting Indigenous rights up in a constitution. However, the modern jurisprudence regarding the treaty is very different from that which prevailed for the first 140 years of the treaty's existence.⁴³ The treaty, as it happened, dealt only with possessory rights in land as opposed to the protection of any cultural aspects of the Maori.⁴⁴

It was apparent from 1986 that a special Maori code had developed in dealing with Maori matters at government level.⁴⁵ The interest in Maori affairs evident from that time was displayed in the work of a Royal Commission on the electoral system.⁴⁶ The commission concerned itself deliberately with the issue of Maoridom in the context of the New Zealand Constitution (itself an inchoate English-style document), but the concern showed in concrete constitutional proposals for democratic representation. (It must be remembered that in New Zealand the Maori constitute a significantly greater proportion of the population than do Aboriginal people in Western Australia.) Advocating overhaul of the constitutional structure, the Royal Commission wrote:

[T]he Maori people's position would be much more secure if our constitutional and political systems were to reflect the diversity in our society and, more particularly, the special position of the Maori.⁴⁷

It is not apparent that the New Zealand experience provides any template for dealing with Indigenous customary law outside the issues of land claims and water rights, and to that extent does not carry the instant reference any further. On the other hand, the dishonouring until recent times by the Crown (and mainstream non-Indigenous culture) of the terms of the Treaty of Waitangi in regard to self-determination or sovereignty of the Maori (*te tino rangatiratanga*)⁴⁸ serves as a reminder of how fragile the terms of a written compact may be between two peoples different in numeric proportion and of widely differing cultures sharing the same space.

Canada

Canada and, before the creation of the Dominion, the relevant British colonies, have a long history of recognition of the position of the Indigenous people, stretching back to the end of the Seven Years' War in 1763.⁴⁹ Sovereignty, however, always remained with the British and successor central governments.

41. Constitution of the Republic of South Africa 1996, s 211.

42. Constitution of the Republic of South Africa 1996, s 212.

43. 'The Treaty was not properly respected or implemented for many years, even though the courts ruled early on (in *R v Symonds* (1847), [1840–1932] NSPCC 387 (NZSC)) that the treaty as well as the common law recognised the Aboriginal title of the Maori. Part of the rationale for this deficiency was the failure of the treaty to be ratified by parliament coupled with the absence of any written constitutional guarantees in a unitary state such that the Diceyan view of parliamentary supremacy allowed the government to ignore its treaty obligations. The Chief Justice of New Zealand subsequently ruled in 1877 that the treaty was unenforceable as he refused to recognise the Maori as possessing sufficient legislative sovereignty to enter into binding treaties (*Wi Parata v Bishop of Wellington*, 3 JUR (NS)): BW Morse 'Comparative Assessments of the Position of Indigenous Peoples in Quebec, Canada and Abroad' [2002] AILR 37, New Zealand 3.

44. Treaty of Waitangi, Article the Second. See Joseph PA, *Constitutional and Administrative Law in New Zealand* (Sydney: Law Book Co, 1993) 39.

45. Sharp A, *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (Auckland: Oxford University Press, 1990) 236.

46. New Zealand Royal Commission on the Electoral System, *Towards a Better Democracy* (Wellington: Government Printer, 1986).

47. Ibid 87, 110, quoted in Sharp, above n 45, 237.

48. Ward A, *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington: Bridget Williams Books, 2001).

49. See references to the Royal Proclamation of that year, in cases such as *R v Sparrow* [1990] 1 SCR 1075.

The Canadian experience has been very different in detail from that in Australia, making comparisons difficult, although outcomes in the present may be useful comparators. The British, colonial, federal and provincial governments signed hundreds of treaties with Indigenous peoples as the Canadian frontier expanded west and north, but most were disregarded, leading to a wide measure of Indigenous distrust of authorities.⁵⁰ The modern trend has been to look to political structures to provide shelter for Indigenous rights. For example, the establishment in the early 1990s of the new Province of Nunavut, the population of which comprised 30,000 Inuit in north eastern Canada.

British Columbia, on the other hand, held a referendum in 2002 with the specific aim of gaining a clear electoral majority to register their desire that all persons in the Province be treated equally (ie, that there be no differentiation of law in favour of the Indigenous peoples whatsoever). This plan petered out into no more than a Memorandum of Understanding in late 2002, as Canadian federal constitutional law had evolved over the previous 20 years to lock in already recognised rights of Indigenous peoples.

The *Constitution Act 1982* (Canada) contained two particular provisions pertaining to the protection of Indigenous rights. The first, s 25, being in Part I: *Canadian Charter of Rights and Freedoms*; and the second, s 35, being in Part II: *Rights of the Aboriginal Peoples of Canada*. The former provides:

- 25 The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including
- (a) any rights or freedoms that have been recognised by the Royal Proclamation of 7 October 1763; and
 - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

The latter is as follows:

- 35(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed.

These provisions operate to protect Indigenous rights from being undermined by 'equal rights' lawsuits launched by members of Canada's majority non-Indigenous population.

The *Indian Act 1985* (Canada) made provision for bands of Indigenous peoples to be self governing at a local level, and the scope of the by-laws power under s 81 is extensive. Only a sample is set out here, to illustrate the possibilities for local Indigenous communities to protect their position within a limited geographical area. This does not go directly to recognition of customary law, but does illustrate the capacity for self-management of a local area, which might facilitate the recognition and protection of customary law. Section 81 reads (in part) as follows:

81(1) Powers of the Council

By-laws

The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

- (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
- (b) the regulation of traffic;
- (c) the observance of law and order;
- (d) the prevention of disorderly conduct and nuisances.⁵¹

While the Canadian experience does not concern itself with the discrete issue of protection of customary law, the agitation over the past 40 years to put Indigenous issues on the Canadian political landscape is credited with raising the profile of Indigenous peoples internationally, to the point of germinating the *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169) and the United Nations *Draft Declaration on the Rights of Indigenous Peoples*.

Article 8 of the ILO Convention 169 provides as follows:

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.

50. Morse, above n 43, Canada 3.

51. This is very similar to the powers invested in Aboriginal communities in Western Australia under the *Aboriginal Communities Act 1979* (WA) s 7.

Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

The first signatory to this convention was Norway, which has a population of approximately 50 000 Sami (Laplanders), a distinguishable minority group numbering less than one per cent of the population.

Norway

In 1988 the Norwegian Constitution was amended to affirm a special status for the Sami by declaring that: 'It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life'.⁵²

In 1990, Norway signed the ILO Convention 169. In 2001, the Norwegian Supreme Court, in a test case concerning a Sami charged with not keeping his dog on a leash, indicated that:

[I]t was prepared to accept that Sami customary law was part of the Norwegian legal system as a result of Article 8 of the International Labour Organisation's Convention 169; however, the evidence in that case as to the specifics of Sami customary law on this topic was too unclear.⁵³

Australia is not a signatory to this Convention, so the very little reference in Australian law provided for conventions signed but not statutorily incorporated⁵⁴ has no application.

It is noticeable that writers on both the Canadian and Norwegian experiences place at the forefront the recognition of Indigenous peoples' necessity to maintain their economic integrity. That translates in practical terms into control, if not ownership, over land and marine territories that have been controlled under Aboriginal customary law. The preservation of customary law is then assumed to be able to flow in the wake of such control.⁵⁵ The control over land and marine resources is, of course, beyond the scope of this reference.

Queensland

Queensland has no constitutional references to Aboriginal customary law, but the Queensland Constitutional Review Commission has looked at the possibilities of reserved seats in the Queensland parliament for Aboriginal people, or the possibility of their own assembly.⁵⁶ Nothing has come of these proposals. However, in May 2004, the Queensland Anti-Discrimination Commission delivered a report on the utility of a preamble to the state Constitution with the purpose of reflecting Indigenous interests. The report is worth setting out in full:

Response to Legal Constitutional and Administrative Review Committee, 'Hands on Parliament' Report No 42

PREAMBLE TO QUEENSLAND CONSTITUTION

1. Should the Queensland Constitution contain a preamble?

The Anti-Discrimination Commission Queensland (ADCQ) supports the proposition that the Queensland Constitution contain a preamble. The Commission agrees with the view that both as a component of reconciliation, and an important aspect in Indigenous peoples' participation in Queensland's democratic processes, it is essential that Indigenous people are recognized and acknowledged in the preamble to the Constitution.

The ADCQ would also urge the Committee and the Government to reconsider the proposal that the Constitution contain a prohibition against discrimination on the basis of race, particularly in light of the decision of LCARC'S 1998 recommendation that Queensland should not adopt a Bill of Rights in any form. While the ADCQ agrees with the present Committee's view that such a provision is most appropriately based in a Bill of Rights, in the absence of such a Bill, discrimination based on race is a breach of a fundamental human right. It is appropriate for the Queensland

52. Norwegian Constitution, s 110(a).

53. Morse, above 44, 'Nordic Countries' 3.

54. See the High Court's decision in *Teoh v Minister for Immigration* (1995) 183 CLR 273.

55. Eg, Bjorklund I, *Sapmi – Becoming a Nation: The Emergence of a Sami National Community* (Tromsø, 2000) Part III: Resource Crises and Demands for Rights.

56. Struthers K, 'Hands on Parliament' (2003) 5 *Indigenous Law Bulletin* 3.

Constitution to refer to such a fundamental right, as being an absolute foundation principle of democracy in Queensland.

If any changes to the Queensland Constitution are made, it should be quite clear and explicit that any such legislative changes shall not have the intention or effect of diminishing or compromising any Indigenous rights, which may or may not have been recognised by the law in Queensland at the time of the amendments.

2. What elements should the preamble contain?

The ADCQ considers the following to be important elements of the preamble.

- A society that values and respects the dignity and diversity of its people, and provides justice and equity to all.
- Equality of all persons before the law regardless of their race, origin, gender, faith, age, sexuality, impairment, political belief, parental status or family responsibility, or trade union activity.
- The importance of the rule of law.
- *Recognition of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of the land and sea; with their own customs, lore and laws.*
- The responsibility of all to respect and care for the land and environment, for present and future generations.

3. How should the wording around those elements be developed?

The use of words and concepts and their symbolic meaning are extremely important in whatever becomes part of the preamble. The draftsperson/s given responsibility for the development of the wording should be briefed carefully, after a full consultation by the committee with stakeholders, and in particular with Indigenous stakeholders, on the inclusion or omission of important and symbolic words and concepts in the preamble. There should possibly be two phases to the drafting, a preliminary phase of gathering together key words and concepts, followed by a second phase of consultation on a draft of the proposed preamble as recommended by the committee.

4. How should the committee consult with communities, particularly Indigenous communities, regarding this issue?

If consultation with both the Indigenous and non Indigenous community is done in a comprehensive and considered way, the process of the people of Queensland finding the right words, and Parliament then moving to insert a preamble into the Constitution, could help achieve two significant aims. A discussion in the greater community about recognizing Indigenous peoples in the Constitution should contribute to the aims of reconciliation; and the discussion with Indigenous people about recognition and acknowledgement of them in the Constitution sets an important symbolic platform which can assist in the aim of an increased participation and the inclusion of Indigenous peoples in Queensland's democratic processes. The process may also be an opportunity to inform and educate the wider community on the structures, institutions and workings of the democratic process in Queensland, and allows for a partnership in contributing to the implementation of the 'Hands on Parliament' recommendation on the preamble.

The ADCQ suggests that consultation with Indigenous peoples could occur through the existing peak bodies, community networks, and negotiation table processes presently utilized by DATSIP; including the remaining regional councils of ATSIC; and the remaining ACC and ICC structures. In addition, the Indigenous media should be utilized so that Indigenous people across Queensland are made aware of the issues that the committee is considering, and are informed of how they can make their views known to the committee. It is important that information is provided in an accessible way both orally and via written material, and that Indigenous people are given opportunities to provide their views to the committee through oral means as well as through written submissions.

Given that 2004 is the end of the International Decade of the World's Indigenous People, the symbolism of the recognition of Indigenous peoples in the Queensland Constitution, is an opportunity the committee may wish to consider in the timing of the consultation and implementation phases of the recommendation.

5. ADCQ's response to Queensland Government response to Report No 42

The Commission is pleased at the Government's overall positive reply to the twenty-five recommendations proposed by the Legal, Constitutional and Administrative Review Committee's 'Hands on Parliament' Report No. 42.

In particular, the Commission commends the Government's support of Report No. 42 recommendations 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 19 to encourage all political parties to examine measures to increase Aboriginal and

Torres Strait Islander peoples' participation in the political process; enhancement of civics education for all students in Queensland schools, inclusive of Indigenous perspectives of Indigenous systems of governance and the training of all teachers in relation to Aboriginal and Torres Strait Islander studies, encouragement of Indigenous youth participation in local and state government machinery processes and the ongoing monitoring and evaluation of those recommendations.

The Commission notes that recommendation 14 in relation to the role of ATSIC and efficient service delivery to Aboriginal and Torres Strait Islander peoples needs to be thoroughly reconsidered by the government to ensure efficiencies in service delivery for Aboriginal and Torres Strait Islander people across the levels of government in Queensland in light of the recent decision by the Commonwealth to abolish ATSIC and the impact this decision will have on Aboriginal and Torres Strait Islander Queenslanders.

The Commission requests the Government to reconsider its response to recommendation 21 concerning funding to appoint Parliamentary Indigenous Liaison Officers, where it states that 'there is insufficient justification for the appointment and that existing staffing levels within the Parliamentary Service are sufficient for the provision of advice to Committees concerning Aboriginal tradition and Island custom.' The response fails to recognize the value such a role could contribute to the Queensland Parliament. Aboriginal and Torres Strait Islander people are best placed to provide specialist advice in relation to advisory, education and protocol functions relating to Aboriginal and Torres Strait Islander peoples. While not only providing specialist advice to Parliament and its Members, these positions would also address the need to provide equal employment opportunities for Aboriginal and Torres Strait Islander people across the spectrum of employment experience. Having Indigenous people working in and observing the Parliament, may have significant flow on benefits in making Parliament a much less daunting place to Indigenous people.

The Commission notes the Committee's and government's response to recommendations 22 and 24 regarding the issues of an Aboriginal and/or Torres Strait Islander Assembly and dedicated seats. While the Committee notes minimal support expressed during public consultations for these two concepts the Commission is conscious of the ongoing participation of Aboriginal and Torres Strait Islander Queenslanders in human rights and international laws forums and the evolution of contemporary Indigenous governance which may continue to require the government's consideration of alternative forms of Indigenous representation and participation within our political processes.

Furthermore the decisions by the Commonwealth government to abolish ATSIC and the Queensland government to abolish its Aboriginal and Torres Strait Islander Advisory Board has created uncertainty [sic] within the Aboriginal and Torres Strait Islander communities as to their future involvement in government advisory processes and their future generally.

It is essential that Indigenous communities with their unique needs have a means to enable their continuing participation in the parliamentary decision making process, about matters that have a direct impact on them and their communities.⁵⁷

The concepts addressed by the above report are apt to an agenda aimed at general reconciliation, but they are very short on specifics going to Aboriginal customary law and its recognition in a constitution. The report eventually circles back to a report of some years earlier recommending dedicated seats in Parliament for Indigenous members, a proposal which was not accepted. Rather than aim at economic determinism as in Canada and Norway, the proposals in Queensland are focused on inclusion in the political process. No particular lessons are provided as to the inclusion of Aboriginal customary law for the Western Australian experience.

Northern Territory

The Northern Territory's Discussion Paper of 1992 has already been canvassed.⁵⁸ Nothing further has emerged from the Northern Territory on this topic.

Victoria

In August 2004 the Victorian Parliament passed the *Constitution (Recognition of Aboriginal People) Act 2004*, and on 10 November 2004 that Act came into force. This amendment to the Victorian Constitution does not deal with Aboriginal customary law, but consists of a new section 1A to the Constitution which recognises the status of the Aboriginal

57. Anti-Discrimination Commission (Queensland, 28 May 2004) (emphasis added).

58. See above p 537.

people as the descendants of Australia's first people and their unique and irreplaceable contribution to Victoria. It further goes on to provide that nothing in this section is to create legal rights or alter the interpretation of any statutes.

This amendment to the Victorian Constitution adds nothing to the debate on the place of Aboriginal customary law, and no further reference is appropriate.

New part to the Constitution: recognising Aboriginal customary law (detail of the application of customary law in separate legislation)

The Constitution contains a number of provisions that have become outdated and lacking in any utility.⁵⁹ Section 76, 'Operation of Act', which is concerned with the non-application of two 19th century Imperial Acts to the Constitution (meaningless after the commencement of the Constitution in 1890), might, along with other like measures, be repealed and replaced with 'Recognition of Aboriginal Customary Law'.

The new s 76 could provide that Aboriginal customary law, in so far as it extended to:

- (i) familial and social relationships;
- (ii) land management and associated intellectual property rights and conservation regimes under customary law; and
- (iii) Aboriginal community governance,

is to be recognised as part of the legal structure of Western Australia. The concepts of recognition, paraphrased (as to (i) and (ii)) from the *South African Constitution*,⁶⁰ in general form, allowing for detailed legislation to deal with specifics, would read as follows:

- (i) An Indigenous community⁶¹ that observes a system of customary law may function in accordance with such customary law, subject to any applicable legislation.
- (ii) The courts must apply customary law when that law is applicable, subject to this Constitution and any legislation that specifically deals with customary law.
- (iii) Persons not associated with an Indigenous community may be required to comply with the terms of customary law only so far as legislation specifically provides.

6. Preservation of the recognition of Aboriginal customary law

The history of reservation of special position for Aboriginal people in the Constitution

The Constitution, in the form despatched by the Western Australian colonists to London in 1889 to be made law as a schedule to an Imperial Act setting up the Western Australian Parliament contained—at the urging of the British government—s 70, which provided that one per cent of public revenue would go to the welfare of the Indigenous peoples. This section was guarded against simple repeal by the new legislative body being created by the Constitution, the Western Australian Parliament, by s 73, which provided that a Bill to repeal s 70 and a few other sections (including s 73) could not be presented to the Governor for assent, but required the assent of the British government.

Indigenous peoples in the late 19th century had no vote in Western Australia, so their position was not merely that of a minority group (and they were then far less a minority than they are today). The colonists took until 1894 to send a Bill to the United Kingdom seeking the repeal of s 70. It lapsed for breach of constitutional provisions and the colonists sent a second Bill in 1897. This Bill was assented to by the British government, but in 1905 the British law officers advised that the Bill had not been proclaimed in constitutional form and the repealing Act was bad at law. The colonists' third Bill for repeal of s 70 was assented to in 1905 and came into force in 1906.

59. As a result of the repeal of s 70 which had provided for 1% of public revenue to go to Aboriginal welfare (see *Yougarla v WA* (2001) 207 CLR 344) and the introduction of the *Australia Acts 1986* (Cth) and (Imp).

60. Set out at above p 540.

61. And the existence of at least some such communities is presently recognised under Western Australian law: see the *Aboriginal Communities Act 1979* (WA).



That Act was the subject of litigation in *Yougarla v Western Australia*,⁶² in which the High Court found the repeal of s 70 to have been valid. The point of the story is that even an entrenching clause, operable only by a polity removed from Western Australia, was not a protection to the minority Indigenous peoples who had been the subject of such concern from one British government in 1889 but disregarded by British governments from 1897 onwards.

The existing machinery for scrutiny of change to the Constitution and the inadequacy of such machinery to ensure the position of Aboriginal customary law in the Constitution

The original machinery of s 73 providing for reservation to the British government of amending Bills regarding some sections of the Constitution was made obsolete by the *Australia Acts 1986* (Cth) and (Imp). But in 1978 the sections had been amended to provide that, with respect to major changes to the parliamentary system or the role of Governor, absolute majorities of both Houses and of a referendum were necessary.

On the example of the repeal of s 70, it seems unlikely that a constitutional provision concerning Aboriginal customary law, even if entrenched under the 1978 terms of s 73, would survive a determined attempt at repeal. Such is the grim reality of the position of a minority group comprising about three per cent of the state's populace. In the absence of an entrenched Bill of Rights, putting the position of Aboriginal customary law beyond removal by simple majority, customary law must always be vulnerable to removal from the Constitution. Its survival would depend on acceptance in the Western Australian population at large as having utility in the wider community.

62. (2001) 207 CLR 344.

background paper 15

Aboriginal people, criminal law and sentencing

Philip Vincent*

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Introduction

Readers will appreciate that the subject matter of this background paper is bound to raise difficult and controversial questions – indeed, some of the most difficult and controversial that our community faces. Nevertheless, they must be faced squarely. We see an alarming picture when we examine the full impact of the current Western Australian justice system upon the lives of Aboriginal people. The major impact falls upon Aboriginal people themselves, as victims of crime and as people caught up in a system that is totally alien, yet to which they are hostage. It also, of course, affects the wider community.

Consultations with Aboriginal people by the Law Reform Commission of Western Australia (LRCWA) have shown that the current justice system insofar as it affects Aboriginal people is simply not working, other than in a negative way, and that significant changes are needed to make justice relevant to and effective for Aboriginal people. These changes involve the recognition and utilisation of Aboriginal customary law.¹

One of the most alarming features of the current situation, which indicates the need for serious reform, is the over-representation of Aboriginal people in the prison system compared with non-Aboriginal people. Although Aboriginal people comprise only 3.2 per cent of the state's population,² they make up approximately 41 per cent of the state's prison population.³ This level of over-representation of Aboriginal people in the prison system (12.81) is even worse than at the time of the Royal Commission into Aboriginal Deaths in Custody in 1991.⁴

In terms of current rates, Western Australia has a greater rate of Aboriginal imprisonment than any other state or territory of Australia, standing at around 2,400 Indigenous persons per 100,000 of the adult Indigenous population.⁵ The national rate is 1,800 per 100,000.⁶

The recent Gordon Inquiry into family violence and child abuse in Aboriginal communities in Western Australia⁷ reported that in this state during the period 2000–01 Aboriginal children were 7.6 times more likely to be subjected to substantiated child abuse than non-Aboriginal children⁸ and that family violence is endemic in many Aboriginal communities.⁹ The Inquiry concluded that this type of violence and child abuse is not something sanctioned by Aboriginal customary law,¹⁰ and that the loss and destruction of Aboriginal culture has contributed to the current crisis in which many Aboriginal people find themselves.¹¹

Aboriginal people thus suffer twice – as an imprisoned population and as victims of their own offending. This bleak picture means, amongst other things, that mainstream law (i.e. non-Aboriginal law, sometimes also called 'whitefella law') has failed as a system to properly address problems in Aboriginal communities and other alternatives are now clearly necessary.

In its consultations with Aboriginal communities as part of this project the LRCWA heard time and again that Aboriginal customary law was still strong and could be useful in dealing with Aboriginal offenders, particularly young people, but that it has been 'cut back' by mainstream law and not given a chance.

At Laverton, LRCWA representatives were told that 'Aboriginal law is strong and is being actively practised. But white law does not recognise this and does not respect Aboriginal customary law'.¹² In the Pilbara, Aboriginal people said that: 'The Elders know their law and are able to control the behaviour of young people when they were on the community'.¹³

In a report to the Western Australian and Commonwealth governments on community–government affairs, the Ngaanyatjarra Council, which has responsibility for the large central reserve area of Western Australia, stated:

1. For those who wish to do so, the views expressed in the consultations can be accessed on the LRCWA's website: <www.lrc.justice.wa.gov.au>.

2. Australian Bureau of Statistics, *Census* (2001).

3. Policy Planning and Review, Department of Justice, *Number of Aboriginal Persons in Prison by Percentage and Gender from January 2000: Monthly Graph Report for November 2004* (December 2004).

4. See Biles D & McDonald D (eds), *Deaths in Custody Australia 1980–89: The Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody* (Australian Institute of Criminology, 1992) 92, Table 6.3 'Aboriginal Over-representation in Prison'. This shows a level of over-representation in Western Australia of 11.49 based on a percentage Aboriginal population in the state of 2.69 with an Aboriginal prison population of 30.91%.

5. 'Crime and Justice Article – Indigenous Prisoners' in Australian Bureau of Statistics, *Year Book Australia* (2002), Table 11.31 'Indigenous Imprisonment – 30 June 2002'.

6. Ibid.

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

8. Gordon Report, ibid 41.

9. Ibid 48.

10. Ibid 70.

11. Ibid 71.

12. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, [1].

13. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, [4].

There is also strong interest in greater recognition of customary Ngaanyatjarra law and in how Ngaanyatjarra people can work with the Government through the WAPS [Western Australian Police Service] and the DOJ [Department of Justice] to make sure that customary Ngaanyatjarra law and Australian or mainstream law and order can both be applied on the Ngaanyatjarra Lands.¹⁴

In this paper I look at the place of Aboriginal customary law (sometimes called Aboriginal 'traditional' law or, more usually, by Aboriginal people themselves, simply 'the law') in mainstream law and examine some changes that might be considered to make customary law stronger to deal with community problems. This would, according to Aboriginal people consulted by the LRCWA, be in the interests of Aboriginal people and also in the interests of the rest of the community as it would cut down on offending and the vicious cycle of imprisonment.

Part I: Aboriginal customary law today

Aboriginal customary law continues

The LRCWA, in its consultations for this project, was told of the continuing strength of Aboriginal customary law in Western Australia. In Laverton the Commission was told that 'Aboriginal law is strong and is being actively practised. But white law does not recognise this and does not respect Aboriginal customary law'.¹⁵

Anthropologists Ronald and Catherine Berndt in a chapter on 'Law and Order' in their book *The World of the First Australians* explain customary Aboriginal law:

The pattern or blueprint of behaviour is everywhere in traditional Aboriginal Australia framed in terms of the past. To put it a little differently, the mythical characters instituted a way of life which they introduced to human beings; and because they themselves are viewed as eternal, so are the patterns they set.¹⁶

Thus aspects of Aboriginal law embrace a wide range of matters, including how to relate to kin (there are avoidance rules), marriage rules, places where people can and can't go, behaviour at funerals and burials, the distribution of food, the showing of respect, the ownership and care of land, procedures for entering other people's country, ritual matters, the passing on of knowledge and a host of other aspects.

Aboriginal law and culture have historically been subject to attack and degradation by the non-Aboriginal society ever since colonisation. It is only in more recent times that the understated uniqueness of Aboriginal culture has become appreciated. Its value in terms of sustainability of community, Australia's fragile environment, sensitive spirituality, art, dance and song is now internationally recognised.

In our minds, reinforcement of the continuing existence and importance of Aboriginal law and culture in Western Australia has in recent times come about through the series of cases heard in the Federal Court of Australia under the *Native Title Act 1993* (Cth). Although it is not necessary under the terms of reference of this project to report on native title, the findings of the courts dealing with the issue and the outcomes of native title applications are highly relevant. Recognition of native title under the Act must be based, amongst other things, on a finding that the native title rights and interests are possessed under 'the traditional laws acknowledged, and the traditional customs observed' by the Aboriginal people concerned.¹⁷

There are to date 10 determinations where native title has been held to exist in Western Australia. They cover vast community areas.¹⁸ Cases in other areas are yet to be heard. By way of example, in the north-east Kimberley case brought by the Miriung Gajerrong people in the Full Court of the Federal Court, Lee J concluded:

[T]he evidence was 'clearly sufficient' to hold that the Miriung and Gajerrong community retained a form of practice of traditional laws and customs that showed that, as far as practicable, the community had a connection with the land attributable to an ancestral community. His Honour said he had no doubt that the community relied upon links with forbears for the right to enjoy, or the obligation to perform, the numerous activities identified in the evidence.¹⁹

14. Ngaanyatjarra Council, Aboriginal Corporation, *Doing Business with Government* (Alice Springs, July 2003) 33.

15. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, [1].

16. Berndt RM & Berndt CH, *The World of the First Australians, Aboriginal Traditional Life: Past and Present* (Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal Studies, 1988) 336 (emphasis added).

17. *Native Title Act 1993* (Cth) s 223.

18. National Native Title Tribunal <www.nntt.gov.au> 'current determinations'.

19. *Western Australia v Ward* (2000) 99 FCR 316, 360.

Activities identified in the evidence referred to by his Honour included:

- almost without exception members of the Miriuwung and Gajerrong community retain, and are known to each other by Aboriginal names, in addition to European names;
- the subsection or 'skin' names still form part of the organisation of the community;
- marriage rules based on the subsection system have yielded to the influence of the surrounding European lifestyle, but the avoidance rules and taboos of that system remain relevant to community behaviour and are adhered to;
- avoidance of places according to the requirements of traditional laws is observed, and the names of the recently deceased are not spoken;
- traditional ceremonial practices are still followed, including initiation ceremonies;
- the passing down of ritual knowledge incrementally from elders to others continues to be followed; rules on the restriction of access to such knowledge are rigidly applied;
- Ngarranggarni stories are known and referred to regularly and the elder members of a community regard themselves as obliged to transfer this knowledge to the younger members. (His Honour referred to important Ngarranggarni stories relating to the claim area, which were spoken of in evidence);
- rules relating to control of knowledge of separate men's and women's law are followed and regarded as important in the organisation of a community;
- there is a deep community interest in the preservation of Miriuwung and Gajerrong languages;
- traditional skills handed down through generations remain; for example, the making of spears still serves a purpose in fishing in riverine pools; and members of the community continue to hunt fish and gather traditional foods;
- the members of the Miriuwung and Gajerrong community retain substantial knowledge of the location and use of bush foods and bush medicines; and
- hunting and fishing practices are not only motivated by the desire for sustenance but by the desire to maintain a connection with the land and with ancestors: there was evidence of specialised knowledge of the methods for hunting certain animals, and for the proper or customary way to prepare and cook them.²⁰

Other cases in Western Australia where native title has been held to exist have involved similar findings by the court or have been consented to by the respondent parties, which in all cases have included the state government. The importance of these cases is that a determination of native title necessarily rests upon the legal recognition of a community or society that is living under a legally recognised system of law. Thus, in the High Court in the case *Members of the Yorta Yorta Community v State of Victoria*,²¹ judges explained that 'to speak of rights and interests possessed under an identified body of laws and customs is ... to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group'.²² They explained that the word 'society', in the context of native title, is to be understood as 'a body of persons united in and by its acknowledgement and observance of a body of law and customs'.²³

Aboriginal people have said—in the LRCWA consultations and elsewhere—that it is now time to fully respect Aboriginal law and culture and allow it to have proper operation in the field of human relationships and social order. If this is not done, the destruction of Aboriginal society will continue through the ravages of alcohol and self-destructive violence which have been referred to earlier.

Community aspect of customary law

There are differences between the approach taken in Aboriginal customary law and mainstream law. Anthropologist Robert Tonkinson explained:

[T]he Aborigines see a wholeness in their cosmic order, which comprises human society, the plant and animal world, the physical environment and their spiritual realm... To maintain this unity and ensure a continual outpouring of power or life-force from the withdrawn spiritual powers, each generation of Mardu is charged with the regular and proper performance of rituals and obedience to the Law.²⁴

20. Ibid 360–361 per the Full Court on appeal, which did not disturb these findings. Nor were the findings disturbed in the further appeal to the High Court.

21. [2002] HCA 58 (12 December 2002).

22. Ibid [50].

23. Ibid [49].

24. Tonkinson R, *The Mardudjara Aborigines: Living the Dream in Australia's Desert* (New York: Holt, Rinehart & Winston, 2nd ed., 1991) 22, n 3.

According to Tonkinson, despite its wide operation, Aboriginal law is concrete and 'mineable'. In discussing Mardu people Tonkinson wrote that:

[T]his legacy [of the dream time past] is now connoted in [the Mardu's] use of the English word 'law', the coining of which suggests that they see parallels in terms of obedience to a set of powerful dictates and of punishment for non-conformity since, in both systems, human agents are involved in the punishment process.²⁵

Anthropologist Geoffrey Bagshaw has similarly described the Law of the Karajarri people of the south-west Kimberley in the following terms:

Karajarri Law can be said to exist and operate as an objectified, integrated and highly prescriptive expression of normative cultural meanings, values, beliefs and practices. From this purely analytical point of view, the Law constitutes the principal ideological mechanism by means of which Karajarri culture both images and regulates itself.

... Karajarri Law implicates and conditions diverse aspects of the natural and social worlds. Such aspects include, inter alia, the origins, attributes and maintenance of floral and faunal species, the nature and form of social organisation (including kinship, marriage and the section system of social classification), human relationships to country (including knowledge of cultural geography, economic resources and technology), the conduct of traditional religious activity (including initiation rituals), and the constitution of personal and group identity.²⁶

These extracts suggest that Aboriginal law plays a part in maintaining the natural order of all things, not just of a particular individual. This is reflected in the description often used of the operation of Aboriginal law as a 'healing' or 'restorative' process with a community focus. Thus, offending against the community is seen as being caused by a type of sickness. Mainstream law, on the other hand, tends to focus on the misdeeds only of an individual and punishes largely on the basis of a tariff—that is, what the offence deserves—whilst looking also at mitigating factors personal to the offender.²⁷

Aboriginal law also differs in its approach to causes of offending. For example, during its consultations the LRCWA representatives were told that '[e]veryone involved in a fatal car accident is liable to Aboriginal law punishment – not only the driver'.²⁸ I was once told about a driver being punished under Aboriginal law when a woman passenger stepped out of his parked car and was run over by a passing vehicle. The explanation given to me was that the driver should not have taken the woman away in the car in the first place.²⁹ This, of course, is not the way the mainstream law would look at the matter, but it has its own logical basis in looking at social causes of the incident rather than the merely immediate, mechanical causes.

Mainstream law looks only in a limited way to community responsibility for wrongs. The *Criminal Code*, which sets out the law on criminal matters, limits the class of offenders to those who actually commit the offence, aid in its commission, advise or help bring about the offence or conspire together to commit a wrong.³⁰

The place of kinship

Crucial to the operation of Aboriginal law are kinship relationships. Anthropologist AP Elkin explained:

[T]he obligations of kinship govern a person's behaviour from his earliest years to his death, and affect life in all its aspects: in conversation, visiting and camping; at the crises of life, namely child-birth, initiation, marriage, sickness and death; and in quarrels and fights.³¹

Ronald and Catherine Berndt refer to Aboriginal kinship as:

[T]he articulating force for all social interaction [in being] in effect a shorthand statement about the network of interpersonal relations within that unit – a blueprint to guide its members. It does not reflect, except in ideal terms, the actuality of that situation; but it does provide a code of action which those members cannot ignore if they are to live in relative harmony with one another. And kinship, in this situation, pervades all aspects of social living.³²

25. Tonkinson, *ibid.*

26. Bagshaw G, *The Karajarri Claim: A Case Study in Native Title Anthropology*, published as 'Oceania Monograph 53' (Sydney: Oceania Publications, 2003) 80–81 (footnotes omitted).

27. See, for example, the sentencing criteria set out in the *Sentencing Act 1995* (WA) s 6.

28. Law Reform Commission of Western Australia, 'Thematic Summaries of Consultations: Cosmo Newbery' (6 March 2003) [4].

29. Personal communication with the author.

30. *Criminal Code* (WA) ss 7, 8, 558.

31. Elkin AP, *The Australian Aborigines: How to Understand Them* (Sydney: Angus & Robertson, 3rd ed., 1954) 112.

32. Berndt & Berndt, above n 16, 90.

Kin relationship is still strong in Aboriginal life in Western Australia. In its Kalgoorlie consultations the LRCWA heard that 'Aboriginal law has a complex set of protocols governing family relationships'.³³ In Wiluna/Meekatharra the Commission was told that 'family is everything'.³⁴

It is important in this context to remember that by family or kin relationships, Aboriginal people use family terms in an extended way to refer also to 'classificatory' kin or family and some also refer to 'skin group' relations. This was explained by Merkel J in the native title determination his Honour made in favour of the Yawuru people at Broome. He said:

Central to the kinship system is the concept of skin groups. There are four different 'skin groups' in the community, and the skin group to which Yawuru persons belong places them in a certain kin relationship with everyone else. A Yawuru person at birth takes his or her skin relationship from the person's mother. Skin determines who the person may marry and governs the person's role in rituals and ceremonial activities, such as burials, as well as behaviour towards others. An important aspect of the skin concept is the obligation of skin brothers to take responsibility for putting young men through the law.³⁵

Arising from its importance, there are various offences based on kin under customary law, such as marrying the 'wrong way', breaking rules about communicating with certain relations, neglecting or harming members of the family or treating them badly, fighting or 'humbugging' and causing shame. These types of offences are not always recognised in mainstream law, yet the rules are crucial to Aboriginal community wellbeing. Ironically, and sadly, people's responses to these breaches of Aboriginal custom often result in their being brought to court under mainstream law because of their response to the breach. Sometimes a response is regarded as disproportionate to a situation in mainstream legal terms, but is perfectly understandable when the Aboriginal cultural context is taken into account.

For example, some offences under Aboriginal law have an extra dimension. They relate to important breaches of sacred law, often relating to special places or objects, as well as to behaviour. For reasons of Aboriginal law it is not appropriate to discuss such matters in this paper. However, it is important to note that they are significant matters, which Aboriginal people deal with in traditional ways within their own society.

Punishments

Some non-Aboriginal people express concern that Aboriginal punishments (generally thought incorrectly by them to solely involve spearings) are 'barbaric' and should be abolished. International human rights covenants involving prohibitions against cruel and degrading punishments are sometimes mentioned in this context.³⁶ On the other hand, Aboriginal people often see their treatment at the hands of the mainstream justice system as inhumane. At the LRCWA's consultations at Wuggubun, Aboriginal delegates stated that the international obligations relating to physical punishments needed to be looked at from the Aboriginal point of view. For them, they said, prison is cruel and inhumane.³⁷

In some communities, for serious offences, people may get hit or be speared as punishment. For this to happen in a proper way, permission is required from the appropriate authority and the degree of punishment is supervised. A person to be punished will often give themselves up for punishment because they believe that it is the right thing to do.³⁸

Aboriginal law differentiates between physical punishment that is done properly and with proper permission and physical punishment that is done outside of proper processes—for example, by a person who has a grudge or is intoxicated. It is recognised that if the latter happens it can cause more trouble with the close relatives of the person who has been hurt and the initial problem is not solved.

In the LRCWA's consultation at Kalgoorlie, Aboriginal delegates impressed upon the Commission that:

33. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, [3(a)].

34. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wiluna and Meekatharra*, 27–28 August 2003, [2(a)].

35. *Rubibi Community v Western Australia* (2001) 112 FCR 409, 437.

36. For example, the *International Covenant on Civil and Political Rights* Art 7, which prohibits torture or cruel and degrading treatment or punishments. The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* has provisions to the same effect. The United Nations *Rules for the Protection of Juveniles Deprived of Their Liberty* and United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules') have brought in standards to this effect for dealing with and punishing juveniles. On the other hand, the *International Labour Organisation's Convention Concerning Indigenous and Tribal Persons in Independent Countries* (ILO No 169) provides in Article 8 that in applying laws and regulations to indigenous peoples due regard shall be had to their customs or customary laws. Article 10 provides that in punishing Indigenous persons account should be taken of economic, social and cultural characteristics, and preference should be given to methods of punishment other than imprisonment. It should be noted that Australia's stated dedication to international legal precepts has declined in recent years.

37. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, [6].

38. See for examples the descriptions in Berndt & Berndt, above n 16, 351. During consultations, the Warburton community referred to spearing as being something that people agreed to ('offering a leg'), but advised that there was also a wide range of other non-physical punishments used: see Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, [5(a)].

It is most important to realise what tribal punishment is not: it is not wanton destruction of property, nor is it done drunk, and it does not produce feuds. It is ritualised, measured, final and relentless, without limitation periods.³⁹

Aboriginal society in fact has a variety of ways of dealing with people who break the rules. As with non-Aboriginal Australian society in more recent times, children are shown and told how to behave, often through stories, but it is rare for them to be physically punished to any large degree. The initiation process is designed to introduce young people to the responsibilities of adult life and the law and to the implications of breaking it through a system of 'pre-punishment'. The age at which boys begin their initiation is not uniform throughout Australia, ranging apparently from as early as six or eight years to about 16 years.⁴⁰

[A]lthough there is so much variation in these rituals, the majority contain some common themes: in simplest terms, removal from the main camp and total or partial enforced segregation; performance of some rite to emphasise the fact of transition; revelation of secrets of a religious nature; and finally, return to the main camp as a social adult.⁴¹

At the level of kin offences, shaming people or speaking strongly to them by 'growling' is often used. Mythological ('dreamtime') stories, some of which are secret, are used to teach young people about how they should behave and about the dangers of not following the law. May O'Brien has produced a series of books of non-secret mythological stories of the Wongatha people, which well illustrate this educational technique.⁴²

Often difficulties arise for Aboriginal people because the mainstream law does not recognise Aboriginal customary law and those who punish under it can put themselves at risk of action in the courts. This may be so even though the person punished consents to the punishment. This breaks down Aboriginal authority structures and leads to adverse social consequences. This is a topic discussed in Part III.

Part II: Special laws

Parliament and the courts

The High Court has held that the legal existence of Aboriginal customary criminal law is not recognised by Australian mainstream law as having continuance in the legal system, as it has been 'extinguished' (abolished) by the introduction into Australia of mainstream criminal law.⁴³ Efforts to support Aboriginal people within the legal system have been piecemeal, inadequate and often counter-productive. At one time a 'protectionist' approach was adopted; for example, by requiring Aboriginal people to obtain the permission of the government 'protector' to marry or to move within the state. These days such laws would be regarded as paternalistic and inappropriate. Little, if anything, has been done to reflect the actual Indigenous legal system.

Recognition of Aboriginal customary law by mainstream criminal law is confined to some isolated special laws from parliament and some decisions and practices of the courts. Such laws include: the *Aboriginal Heritage Act 1972* (WA) relating to the protection of places and objects of importance to Aboriginal people; the *Aboriginal Affairs Planning Authority Act 1972* (WA) which has replaced earlier native welfare legislation; and the *Aboriginal Communities Act 1979* (WA) which was introduced to enable Aboriginal communities to make and administer their own by-laws schemes. This system has received criticism as being relatively weak and ineffective. There are also legislative provisions according certain protections for Aboriginal people to hunt, fish and gather.

Protection of Aboriginal sites and objects

It will be clear from Part I of this paper that land is of great importance in Aboriginal customary law and that there are some places (or 'sites') that are particularly significant. Likewise, certain objects are also important, but are usually so secret that they cannot be discussed.

The *Aboriginal Heritage Act 1972* (WA) is designed to protect Aboriginal sites from destruction and also to protect Aboriginal cultural objects from destruction, disposition or alienation from the state. The Act's regime puts such

39. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, [1].

40. Berndt & Berndt, above n 16, 166.

41. Ibid 180.

42. See O'Brien ML, illustrated by Wyatt S, *Barn-Barn Barlala, the Bush Trickster*, (Fremantle: Fremantle Arts Centre Press, 1992); *Wunambi the Water Snake*, (Perth: Aboriginal Studies Press, 1991); *Why the Emu Can't Fly*, (Fremantle: Fremantle Arts Centre Press, 1992).

43. *Walker v New South Wales* (1994) 182 CLR 45

places and objects under the control of the relevant state minister, who acts on the advice of the Aboriginal Cultural Material Committee. Persons who disturb or destroy Aboriginal sites or destroy, sell, alienate or conceal Aboriginal objects without the permission of the minister commit an offence and are liable to a penalty. For a first offence the maximum penalty is a fine of \$20,000 or 9 months imprisonment, and for a subsequent offence a fine of \$40,000 or 2 years imprisonment, or both.⁴⁴

The state regime for Aboriginal heritage protection is 'backed up' by the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), which gives the ability to the federal minister to make emergency declarations to protect Aboriginal sites and objects that are threatened.

Although the terms of reference for this project specifically exclude dealing with matters under the *Aboriginal Heritage Act 1972* (WA), it is important to mention the existence of these laws in discussion. It gives an understanding of where this important aspect of Aboriginal customary law finds some protection in the mainstream law. However, any debate about whether the *Aboriginal Heritage Act 1972* (WA) is strong or effective enough will need to be carried out in another forum.

Protection from interference

Aboriginal communities often express the wish to be able to get on with their community life undisturbed by outsiders. Such disturbing influences can include developers, tourist operators, taxi drivers bringing in alcohol,⁴⁵ hawkers and others.

Those of us who have heard evidence in native title claims will have heard that there are also issues of customary law that make protection from disturbance even more important.⁴⁶ These include the privacy that is required at ceremony times and during 'sorry time' after a death.

Further, under Aboriginal law, certain Aboriginal grounds must not be entered upon or viewed by uninitiated people. This is particularly important when ceremonies are being prepared or conducted. Aboriginal people generally know about these rules, but some outsiders are ignorant of them and can break rules either deliberately or through ignorance.

There are other areas which are dangerous because of association with mythology or because they are otherwise significant. Strangers may not know the dangers associated with such places.

Aboriginal people often express their concern that outsiders may fall ill or die if they enter areas that are forbidden under Aboriginal law. Some limited protection for Aboriginal communities from unwanted intrusion has been provided under Western Australian law. The *Aboriginal Affairs Planning Authority Act 1972* (WA) and the regulations under the Act provide for a permit system in respect of certain Aboriginal reserve lands. The system requires non-Aboriginal people to obtain permits from the minister before entering Aboriginal reserves that have been proclaimed under the Act. Going onto such a reserve without a permit is an offence for which penalties of \$1,000 or nine months imprisonment for a first offence and \$5,000 or 12 months imprisonment for a subsequent offence are set.⁴⁷

In practice, the minister seeks advice through the Department of Indigenous Affairs on whether a particular permit for entry onto land should be given. The Department, in turn, seeks the views of the local Aboriginal community; however, these views are not binding and can be overridden by the minister. In situations where mining companies seek permits to undertake mining development on a reserve, it is not uncommon for a minister to override the local Aboriginal community's wishes.

In consultations with the LRCWA, the Kimberley communities at Wuggubun complained that the entry permit system was not being enforced.⁴⁸ By-laws can be made by Aboriginal communities under the *Aboriginal Communities Act 1979* (WA). These can provide for prohibition or regulation of entry onto Aboriginal land and provide for a penalty of up to \$5,000 for breach and \$250 compensation for any damage.⁴⁹ It is usual in community by-laws for entry to be subject to

44. *Aboriginal Heritage Act 1972* (WA) s 57.

45. The author has heard many complaints against taxi drivers from Aboriginal communities.

46. Such issues are commonly expressed by indigenous witnesses in their evidence.

47. *Aboriginal Affairs Planning Authority Act 1972* (WA) ss 31 and 50.

48. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, [4].

49. As to matters that can be addressed in by-laws made under the Act and the penalty that may be provided, see *Aboriginal Communities Act 1979* (WA) s 7.

approval by the community council.⁵⁰ Again, regulation of entry can be overridden in the case of mining or other development, as the Act provides⁵¹ that the by-laws do not make something unlawful if it is done under some other statutory power. An example of such an override would be a prospector entering land under a prospecting licence issued under the *Mining Act 1978* (WA).

I have heard complaints from Aboriginal community representatives on many occasions that penalties under the by-laws are too inadequate to enable them to have any real control over entry and other matters. The by-laws scheme under the *Aboriginal Communities Act 1979* (WA) is discussed further in Part VI.

The right of Aboriginal communities to prohibit unwanted access on their lands needs to be strengthened. This may mean giving Aboriginal communities and traditional owners—rather than the minister—the direct right to say who can come and go on their lands and providing for significantly higher penalties to ensure compliance.

Protection of Aboriginal rights to hunt and gather

Traditionally, Aboriginal people have hunted and gathered bush foods and medicines on their lands at will, subject only to their own customs and law. There is now a mass of laws and regulations that prohibit or regulate the taking of fauna and flora.

Some statutory measures within these laws recognise and protect Aboriginal traditional rights to hunt and gather. To some extent courts have also recognised such rights by way of defences. This recognition has come about in light of developments in the law relating to native title. These defences are discussed separately in Part III.

Under the *Wildlife Conservation Act 1950* (WA) all fauna is protected—unless gazetted as being exempt from protection—and cannot be taken except under a licence. The Act also provides that all flora is protected. A licence for the taking of flora from Crown lands and the permission of the owner for the taking of flora from private lands is required. Certain rare flora cannot be taken from any land, even by persons holding a licence or by the person who owns the land. A \$4,000 fine applies for breach of the Act.⁵²

The *Wildlife Conservation Act 1950* (WA) provides a qualified exemption to Aboriginal people from the operation of these provisions.⁵³ Under the Act people of Aboriginal descent can take fauna and flora from Crown land, other than a nature reserve or wildlife sanctuary, and from unoccupied private land without a licence or permission for the purposes of food for themselves or their family, but not for sale. The protection is augmented by s 104 of the *Land Administration Act 1997* (WA) which provides that Aboriginal people 'may at all times enter upon any unenclosed and unimproved parts of the land under a pastoral lease to seek their sustenance in their accustomed manner'.

However, the Governor can, by regulation, generally suspend or restrict the operation of the rights given to Aboriginal people under the *Wildlife Conservation Act 1950* (WA) if satisfied that it is 'being abused' or if species are being unduly depleted. Therefore, Aboriginal people's protection from prosecution in respect of hunting and gathering is in reality only discretionary and not absolutely guaranteed. By way of example, it is noted that by regulations made on 14 August 2001⁵⁴ the government indefinitely suspended Aboriginal people's right to hunt dugong, six varieties of turtle, and saltwater and fresh water crocodiles, and to take all flora declared 'rare'.

Further, the right under the Act to hunt and gather is only for the purpose of sustenance for a person's family. This rules out the ability of Aboriginal people, without being subject to a penalty, to trade in flora and fauna pursuant to traditional law and custom and to provide food to members of their community, such as to old people who are not members of their family.⁵⁵ Also, the collection of flora for use as bush medicines or in ceremonies significant under customary law is not covered.⁵⁶

50. See, for example, *Warmin Community (Turkey Creek) Inc By-Laws* reg 4.

51. *Aboriginal Communities Act 1979* (WA) s 13.

52. See *Wildlife Conservation Act 1950* (WA) ss 14, 16, 23B, 23D, 23F and 26.

53. *Wildlife Conservation Act 1950* (WA) s 23.

54. *Wildlife Conservation Regulations* reg 63.

55. Tonkinson, for example, refers to the importance of trade in foodstuffs, including vegetables amongst the Mardu in that it 'affirms and reinforces a continuing bond' within the group: above n 24, 53.

56. Marcia Langton explains the place of medicine and healing in Aboriginal women's traditional law in these terms: 'Keeping of practical and spiritual bodies of medicinal and healing knowledge which [women] apply in ritual acts for the benefit of individuals, groups, sometimes for marriages, and sometimes for states of being within groups which are seen to be detrimental to the wellbeing of people or places invested with the spirits of ancestors': Langton M, 'Grandmothers' Law, Company Business and Succession' in Edwards WH (ed), *Traditional Aboriginal Society* (South Yarra: Macmillan Education Australia, 2nd ed., 1998) 112.

The *Conservation and Land Management Act 1984* (WA) makes it an absolute offence to take fauna and flora from any nature reserve or marine park, with a penalty of \$10,000 or one year's imprisonment for breach.⁵⁷ No special provisions are provided for Aboriginal people against this prohibition. The extent of nature reserves and marine parks is entirely within the power of the government to determine.⁵⁸

Under the *Fish Resources Management Act 1994* (WA) Aboriginal people are not required to hold a recreational fishing licence 'to the extent that the person takes fish from any waters in accordance with continuing Aboriginal tradition if the fish are taken for the purposes of the person or his or her family and not for a commercial purpose'.⁵⁹ This has the same limitations that affect Aboriginal people's rights under the *Wildlife Conservation Act 1950* (WA). It does not permit fishing by Aboriginal people in areas prohibited under the *Conservation and Land Management Act 1984* (WA).

Protection for Aboriginal people against prosecution for hunting, gathering and fishing pursuant to Aboriginal law and custom needs to be strengthened to ensure that the protection is granted absolutely by parliament and is not merely discretionary to the government of the day. The protection should also take account of needs under Aboriginal law and custom to trade, to distribute to other members of the community and to use bush medicine.

Consideration of Aboriginal customary law by courts

Courts have grappled with Aboriginal customary law in various aspects of criminal law, including in relation to defences and sentencing. Aboriginal customary law, language and culture is relevant in procedural matters such as bail, the need to suppress names of parties, fitness of a person to plead to charges, the question of interpreters and whether police-generated confessions or admissions should be allowed to stand. These matters are dealt with in specific parts below.

In addition, there are a multitude of government programmes run by various departments and agencies that are designed to divert Aboriginal people from the justice system.⁶⁰ Unfortunately, these programmes have not shown any decrease in the high rate of Aboriginal imprisonment.

Part III: Defences to criminal charges

Consideration of Aboriginal customary law has been given by courts from time to time in the context of defences to criminal charges under mainstream law. However, it needs to be understood that as the law currently stands there is no separate and distinct defence of Aboriginal customary law, other than in certain limited circumstances where native title can be shown. Generally, in order for customary law to be considered as a defence it must be shown to somehow 'fit' into one of the mainstream defences at law.

In Western Australia, the *Criminal Code* provides a code for criminal matters, including available defences. Some decisions in other states and territories also have relevance.

Honest claim of right

Section 22 of the *Criminal Code* provides that a person is not criminally responsible for an act done, or not done, relating to property in the exercise of 'an honest claim of right' and without an intention to defraud.

In some cases it has been argued that an Aboriginal person may have been acting under an 'honest claim of right' based on his or her traditional law and therefore has a defence. To be able to take advantage of the defence it is necessary for Aboriginal defendants to show that they had a belief that they were entitled to do what they did under Aboriginal customary law and that the relevant customary law was recognised by mainstream law.

57. *Conservation and Land Management Act 1984* (WA) s 101C.

58. *Conservation and Land Management Act 1984* (WA) s 41; s 13 (marine nature reserves and marine parks); *Land Administration Act 1997* (WA) s 6 (nature reserves).

59. *Fish Resources Management Act 1994* (WA) s 6.

60. These include anger management, substance abuse, sex offender and mediation programmes of various types.

Such a matter went on appeal to the High Court of Australia in a case involving an Aboriginal man charged over the shooting of a bush turkey,⁶¹ which was protected fauna under the *Fauna Conservation Act 1974* (Qld). The court, by a majority of judges, held that although it was open for an Aboriginal person to claim a right under traditional Aboriginal law and qualify for a defence of 'honest claim of right', the offence under the *Fauna Conservation Act 1974* (Qld) was not an offence 'relating to property' which was a pre-requisite to the operation of the defence. Other cases in which 'honest claim of right' based on rights claimed under Aboriginal traditional law have also largely been unsuccessful.⁶²

I have met many Aboriginal people who hunt, fish and collect bush plants on their lands under their own system of law, without any thought that they are not permitted to do so by some law made by white people. Given the spirit of the defence of 'honest claim of right' and the High Court's in-principle endorsement of it in relation to customary law, it would be appropriate and fair for the defence, subject to some limitations as to nature and severity of acts done, to be extended to all circumstances where a person acts pursuant to Aboriginal customary law. This would provide real protection for persons who genuinely live under their own system of customary law, with no understanding of the implications of their actions under mainstream law.

Limitations on certain actions under traditional law would need to be included in any scheme in order to meet now commonly accepted norms of behaviour in both Aboriginal and non-Aboriginal society. These would include acts of murder, doing or intending grievous bodily harm and—although it is likely that it forms no part of currently practised Aboriginal traditional law, but to put it beyond doubt—sexual assault.

Consideration should be given to broadening the benefit of the 'honest claim of right' defence in s 22 of the *Criminal Code* from those limited to offences 'relating to property' to all types of acts and omissions sanctioned by Aboriginal customary law, subject to appropriate limitations consistent with current norms recognised by both Aboriginal and non-Aboriginal society such as murder, grievous bodily harm and—to put it beyond doubt—sexual assault.

Defence of 'native title'

Defence of native title is similar to the defence of 'honest claim of right', but differs in that it is based upon the defendant's entitlement to do the thing complained of because under native title he or she has a right at law to do it—not just an honest belief in a right. 'Native Title' is excluded by the terms of reference from this project. However, it is important to note that this defence has been recognised in the mainstream criminal courts, quite independently of the *Native Title Act 1993* (Cth).

The basis of the defence of 'native title' stems from the recognition in the famous case of *Mabo (No 2)*⁶³ that Australia was not terra nullius (vacant land) at the time of European settlement, but a land in which Aboriginal people lived and exercised their own system of laws. At common law, this system of laws is recognised where it still operates and where it has not been 'extinguished' (abolished) by the exercise of some law or act of the government.

The Supreme Court of Western Australia has explained that if a person wishes to raise 'native title' as a defence, the onus is on the person charged to give evidence of the details of the native title to the extent that a reasonable doubt can be cast on guilt.⁶⁴ In the case referred to, the native title claimed was the right to fish.

In another case involving prosecution for breach of oyster regulations in New South Wales, a judge set out what would need to be shown to support the defence; namely, that traditional laws and customs gave a right to fish to the defendant's ancestors prior to sovereignty, that the laws and customs had continued to be observed to the current time, and that the fishing was an exercise of those laws and customs.⁶⁵

The High Court has held that legislation that merely regulates the taking of fauna—and by extension, fishing and the like—does not necessarily extinguish native title rights to hunt, and therefore the defence of 'native title' is still available

61. *Walden v Hensler* (1987) 75 ALR 173.

62. See, for example, the cases referred to in Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', Background Paper No 1, above p 1, 44–46.

63. *Mabo v Queensland (No2)* (1992) 107 ALR 1.

64. *Dershaw v Sutton* (1996) 17 WAR 419.

65. See *Mason v Tritton* (1994) 34 NSWLR 572, 584 (Kirby P).

in such cases.⁶⁶ Naturally, it would still be up to a defendant to show the existence of the traditional laws and customs which give them such a right and that they were being acted on at the time. Unfortunately, this is not a simple matter. In recent times stringent tests have been administered by courts for proof of native title.⁶⁷

It is unsatisfactory for Aboriginal people in exercising their rights of hunting and gathering under customary law to have the risk of prosecution under mainstream law and then be obliged to rely on the uncertain defence of native title, especially when there is such well-documented evidence of the crucial importance of traditional bush foods to the health of Aboriginal people.

Authors, J Taylor and N Westbury, report:

There is considerable evidence for a significant shift in Aboriginal diet and nutritional status as a consequence of European colonisation and the subsequent sedentarisation of Aboriginal peoples. A key element was the move from consumption of 'slow release type' carbohydrates of traditional diets to the 'fast release type' carbohydrates of contemporary Western diets, and from a low fat, low salt diet to a high fat, high salt diet. The nutritional impact of this shift is well illustrated by the demonstrated effect of temporary reversion to reliance on hunter gathering, which generally leads to significant weight loss as well as a reduction in biochemical abnormalities and in risk factors for cardiovascular disease and diabetes.⁶⁸

Another expert, Dr Gracey, has stated:

The rapid transition of Australian Indigenous people from a hunter-gatherer lifestyle and diet to a predominantly westernised one has had detrimental effects on their health and wellbeing. Among Indigenous children, poor growth and weight gain are consequences of poor nutrition experienced in the first few years of life. A deficit of systematic, longitudinal information on growth of Indigenous children from age 5 years to teenage years points to a need for more attention to be directed to eating patterns among Indigenous children, and the consequences of these patterns on growth, nutritional status and long-term health.⁶⁹

Uncertainty as to legal ability to access bush foods by Aboriginal people will continue to lead to high rates of morbidity and mortality amongst them. Recommendations to strengthen the right to hunt, gather and fish have been made in Part II.

Consent

It is sometimes the case that Aboriginal people will 'give themselves up' to traditional punishment when they have committed some wrong under Aboriginal law.⁷⁰ However, if they get hurt in the course of that punishment, the persons who have inflicted the punishment may end up being prosecuted under the mainstream law for assault, unlawful wounding or similar offences. The police may decide upon the prosecution of such matters without necessarily taking into account the wishes of the person who has been punished.

In cases brought as forms of assault, consent of the person to the punishment may be a defence. Under the *Criminal Code* the definition of assault includes that the force—or threat of force—is without the other person's consent.⁷¹ This defence in the context of Aboriginal customary punishment has been used in at least one Western Australian case.⁷²

For other cases, which may not be brought as assault cases, such as unlawful wounding⁷³ or occasioning grievous bodily harm,⁷⁴ consent is, by law, not available as a defence. Whether a charge is brought as a form of assault (such as assault occasioning bodily harm)⁷⁵ where the defence of consent is available or in the form of a different charge (such as unlawful wounding) where the defence is not available is up to the police or prosecutor.

It is worth noting in this regard that assault occasioning bodily harm (defence of consent available) and unlawful wounding (defence of consent not available) have the same maximum penalty and, therefore, were regarded by parliament to be

66. See *Yanner v Eaton* (1999) 166 ALR 258.

67. As reflected, for example, in such cases as *Members of the Yorta Yorta Community v State of Victoria* (2002) 194 ALR 538.

68. Taylor J & Westbury N, *Aboriginal Nutrition and the Nyirranggulgung Health Strategy in Jawoyn Country*, CAEPR Research Monograph 19 (Canberra: ANU, 2000) 29 (footnotes omitted).

69. Gracey M, 'Historical, Cultural, Political and Social Influences on Dietary Patterns and Nutrition in Australian Aboriginal Children' (2000) 72 *American Journal of Clinical Nutrition* 1361S–1367S.

70. See the advice from Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003.

71. See *Criminal Code* (WA) s 222, but note that s 223 refers to the fact that some assaults may be unlawful even though done with the consent of the person assaulted.

72. *R v Judson* [1996] (unreported, District Court of Western Australia, O'Sullivan J, 25 April 1996), referred to by Williams, above p 42.

73. *Criminal Code* (WA) s 301.

74. *Criminal Code* (WA) s 297.

75. *Criminal Code* (WA) s 317.

as serious as each other. In practical terms, a spearing inflicted under Aboriginal law and custom would usually only amount to a wounding. Thus, there is certainly an argument for extending the defence of consent at least to the charge of unlawful wounding.

However, it could be argued that it is unfair for a person carrying out Aboriginal customary punishment to be charged for an offence and then be obliged to rely on the defence of 'consent' to justify the system of law. A broader basis of justification needs to be available. A possible alternative is referred to below.⁷⁶

There are other benefits from the decriminalisation of consensual punishment. These are in relation to bail (a topic dealt with later in Part V) and sentencing (Part IV). Courts could be reinforced in their desire to order defendants to return to their communities to undergo traditional punishment as a condition of bail or sentence in the knowledge that such punishments are no longer unlawful.

It is unsatisfactory that the defence of consent to traditional punishment is required to escape liability for its imposition, in particular that it is dependent upon the nature of the charge that has been brought. If there has been consent by the person punished under traditional Aboriginal punishment, through their acknowledgment of customary law, the law should be consistent in stating that this is a defence to a charge arising out of its imposition.

Compulsion

The mainstream criminal law provides several grounds of defence under the heading 'compulsion'. In the *Criminal Code* these are made available when:

- (a) an act was committed in execution of the law; or
- (b) was in obedience to the order of a competent authority; or
- (c) was done to resist actual and unlawful violence to oneself or another person; or
- (d) where there are immediate threats of death or serious harm.⁷⁷

The defences are not absolute and limitations apply. For example, wilful murder and certain other serious offences are not necessarily covered. Defences of the type referred to in paragraphs (c) and (d) above are sometimes referred to as defences of 'duress'.

In a case in South Australia⁷⁸ defendants relied on the defence of duress, saying that they had given a man a beating because they were required to do it under Aboriginal law and would be punished if they did not do so. The South Australian Supreme Court, on appeal, upheld their right to bring such a defence, but restricted the basis for the defence to type (d) above – that is, they were merely afraid of the consequences of not carrying out the beating, not that there was some lawful obligation on them to administer it. The basis also contains the restriction that threats of retribution for failure to carry out a punishment must be immediate.

This approach does not give actual recognition to Aboriginal customary law or the right or duty to act under it. Indeed, to get the benefit of a defence under type (c) or (d) above it is necessary to assert that the violence threatened to the person carrying out the traditional punishment was unlawful. This does not give the respect to Aboriginal traditional law that is required by Aboriginal people.

The fact of the matter is that Aboriginal traditional punishment is usually carried out not because of threat of retribution if it is not carried out, but because the system of traditional law is accepted as legitimate and proper. For this reason one can agree with the Australian Law Reform Commission's view that the defence of duress is inappropriate to cover situations of customary law.⁷⁹ By way of reform, it would be better to provide for a scheme that specifically authorises traditional punishment where it is accepted that Aboriginal traditional law applies. Some limitations as to the nature and severity of authorised punishments would need to be included in order to meet norms now commonly accepted by both Aboriginal and non-Aboriginal sectors of society. These are discussed below.⁸⁰

76. See below pp 562–63.

77. *Criminal Code* (WA) s 31.

78. *R v Warren Coombes and Tucker* (1996) 88 A Crim R 78.

79. See the discussion on this dilemma in Northern Territory Law Reform Committee, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 35.

80. See below pp 562–63.

Rather than having to rely on the defence of duress it would be preferable to provide that—subject to certain limits as to the nature and severity of the punishment—where Aboriginal customary law is accepted as being applicable, those persons who are authorised to order and carry out traditional punishments in pursuance of customary law may do so.

Provocation

A person is said to act under provocation when there is a wrongful act or insult done which causes the person to suddenly lose self control and would be likely to cause any other 'ordinary person' to also lose their self control.⁸¹ As with 'consent', the defence of 'provocation' is available under mainstream law to charges brought as assaults, but not to other similar charges such as unlawful wounding and occasioning grievous bodily harm.⁸² It is difficult to understand why this is so because, as was mentioned above in relation to the defence of consent, assault occasioning bodily harm (defence of provocation available) and unlawful wounding (defence of provocation not available) have the same maximum penalty and therefore were regarded by parliament to be as serious as each other.

Importantly, it should be noted that provocation does provide a defence to reduce wilful murder or murder to the lesser offence of manslaughter.⁸³ The High Court has held that in taking into account the seriousness of a provocation—that is, whether it is 'wrongful'—the ethnic background of a person may be relevant, but it is not relevant in assessing the power of self control of an 'ordinary person', which is also part of the test (see above).⁸⁴

In a Northern Territory case it was held that a breach of Aboriginal traditional law can be properly regarded as a provoking 'wrongful act or insult'.⁸⁵ However, that is as far as it goes.

One of the judges in the High Court has been critical of the restrictive approach taken to the tests used in relation to provocation and has expressed concern about it. In his judgment in one case he stated that:

The ordinary person standard would not become meaningless ... if it incorporated the general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue. Without incorporating those characteristics, the law of provocation is likely to result in discrimination and injustice.⁸⁶

As well as being too restrictive, the test set by the High Court can also be criticised as being confusing in requiring a 'double test'; namely, what an Aboriginal person would regard as being wrongful behaviour but also what an 'ordinary member' of the community—not necessarily Aboriginal—would be likely to do in response to it. The Supreme Court of Western Australia has applied the High Court's approach in a recent case.⁸⁷

It would be useful for the test of provocation to be clarified so that the self-control of an 'ordinary person' is regarded as the self-control of 'an ordinary person of that culture and environment'. This would enable a jury to fully take account of the impact of Aboriginal culture in their assessment.

Specific authorisation of application of customary law

As already mentioned, except in some circumstances where the holding of native title provides a defence, there is presently no specific defence available to persons who act under Aboriginal customary law. This leaves Aboriginal law enforcers extremely vulnerable.⁸⁸

It was suggested under the heading 'compulsion' that rather than rely on defences of duress it would be better to specifically provide that, where Aboriginal customary law is accepted as being applicable, persons are authorised to

81. See, for example, the definition and defence of provocation in relation to assault contained in the *Criminal Code* (WA) ss 245 and 246, and in relation to homicide at s 281.

82. *Kaporonovski v The Queen* (1973) 133 CLR 209.

83. *Criminal Code* (WA) s 281.

84. In *Stingel v The Queen* (1990) 171 CLR 312; *Masciantonio v The Queen* (1995) 183 CLR 58, 66–67 (Brennan, Deane, Dawson & Gaudron JJ).

85. *Lofty v The Queen* [1999] NTSC 73.

86. *Masciantonio v The Queen*, above n 84, 73. McHugh J repeated his comments in *Green v The Queen* (1997) 191 CLR 334, 368.

87. See *Hart v The Queen* (2003) 27 WAR 441.

88. This problem is also mentioned in Northern Territory Law Reform Committee, above n 79.

carry out traditional punishments. This authorisation should be subject to limitations as to the nature and severity of punishments in order to meet norms now commonly accepted by both Aboriginal and non-Aboriginal society. To achieve this scheme, it would probably require amendment to s 31 of the *Criminal Code*, recognising that persons who order punishments or other acts to be done under Aboriginal customary law are 'competent authorities' who may be obeyed in accordance with customary law, without mainstream criminal consequences.

Appropriate limitations as to the nature and severity of punishments could be spelled out in terms similar to the current proviso found in s 31(4) of the *Criminal Code* restricting the ambit of the defence of compulsion (namely, wilful murder and grievous bodily harm) and also extended to exclude from protection any acts of sexual assault (to put it beyond doubt, although it is unlikely that any currently practised traditional punishment would include such acts). There is also the need to protect persons, usually Aboriginal Elders, who order the carrying out of the punishments.

At Wuggubun the LRCWA was told:

We need to know where we stand with our law. We would like to be able to punish cattle thieves in the traditional way, with a flogging. We don't want to be sued for practising our law.

Police in our community have watched on as traditional punishment is administered. Sometimes, when we cannot spear, but must sing, this makes the problem worse.⁸⁹

The *Criminal Code* already provides that a person is not criminally responsible for acts and omissions carried out in execution of 'law'.⁹⁰ The situation could be put beyond doubt by including a provision that 'law' in this situation includes Aboriginal customary law, where Aboriginal customary law is accepted as being applicable.

Whether Aboriginal customary law is accepted as being applicable by the parties—including the victim—in any particular case, and whether the acts were genuinely in accord with Aboriginal customary law, will be a matter for prosecuting authorities to be satisfied about or if, there is a doubt, determined by the court. As the delegates at the consultations at Wuggubun explained: 'Aboriginal people are born into the law, they maintain it as their choice. Authority comes from their Elders and comes from the community'.⁹¹

This explanation as to the basis of law (namely, its common acceptance by members of the community) is not unlike that understood as the basis of mainstream law. It is a question of fact that can be determined in any particular case in ways similar to that of native title.

The *Criminal Code* should be amended to provide that persons who act in execution of Aboriginal customary law, and those who act in obedience to orders from those in authority under and in accordance with Aboriginal customary law, are protected from criminal responsibility. The protection would be subject to limitations that would not permit wilful murder, grievous bodily harm and, to put it beyond doubt, sexual assault.

Part IV: Sentencing

General principles

In sentencing Aboriginal offenders, courts take account of two principles; namely, that a person should not be discriminated against in the sentencing process on the ground of race and also that factors associated with a person's membership of a race—such as social, economic and other disadvantages—are matters that must be taken into account as mitigating factors.⁹² Thus courts are not permitted to sentence a person differently simply because they are Aboriginal, but courts can take into account factors that exist because of their Aboriginality where those factors are relevant to sentencing. In a similar way, it is not permissible to sentence a female differently just because she is a female but if, for example, she were pregnant, then that fact may be relevant.

89. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, [4].

90. *Criminal Code* (WA) s 31(2).

91. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, [1].

92. See *Rogers and Murray v The Queen* (1989) 44 A Crim R 301, 307 (Malcolm J); *Neal v The Queen* (1982) 42 ALR 609, 626 (Brennan J); *R v Fernando* (1992) 76 A Crim R 58, 62–63 (Wood J) (the 'Fernando principles').

One of the accepted matters is the often crushing impact of a sentence of imprisonment on an Aboriginal person.⁹³ It is well known that serious problems, including mental illness sometimes leading to suicide, can result from taking an Aboriginal person away from their land and culture, as well as the fact that imprisonment is a foreign concept under Aboriginal customary law. There are practical consequences for many Aboriginal people from remote areas, especially children, who are imprisoned far away from their families with no likelihood of visits for extended periods of time or even the possibility of telephone calls.

The *Young Offenders Act 1994* (WA) provides that the cultural background of offenders is to be taken into account when dealing with them.⁹⁴ However, apart from this one provision that relates to children, there are no other statutory provisions in Western Australia which require a court to consider the cultural background of an offender, or more specifically, the Aboriginal cultural background.

The position in Western Australia for adults is to be contrasted with that under the *Crimes Act 1914* (Cth) which by s 16A(2)(m) requires cultural background to be taken into account. It would be appropriate for Western Australia to take a lead from the Commonwealth and include cultural background as a mandatory consideration.

Traditional punishments and sentencing

When calculating a sentence, courts in Western Australia today usually take account of the fact that an offender has been subjected to Aboriginal customary punishment or that it is to take place. At the same time, courts are careful not to state that tribal punishment is condoned or encouraged.⁹⁵

The principle of ensuring that a person should not be punished twice for the same offence is also recognised as being important in this context. This feature has been mentioned in at least two cases.⁹⁶ The principle against being punished twice was at one time enshrined in the *Criminal Code*, but the provision has in recent times been repealed.⁹⁷ It is now reflected in a more restricted form in the *Sentencing Act 1995* (WA)⁹⁸ in terms that do not suggest an absolute prohibition against punishing under mainstream law following punishment under Aboriginal traditional law. However, it is still regarded as a principle of fairness and is taken into account in sentencing.

It is useful to understand how the courts have approached sentencing in cases where there is also Aboriginal traditional punishment. In one recent case in Western Australia, the sentencing judge suspended a sentence of imprisonment imposed on an Aboriginal woman for manslaughter on the basis that she genuinely intended to give herself up to traditional punishment and that this was likely to happen.⁹⁹ In another recent Western Australian case, the court took into account as mitigation the fact that the offender had been speared and hit by way of traditional punishment and reduced a sentence for manslaughter.¹⁰⁰

These cases are merely examples of the approach of individual judges to sentencing situations where customary law has been shown to be a factor. However, there is no clear direction either by statute or from the courts as to how punishment under the two systems of law should inter-relate.

Sometimes an Aboriginal community will have definite views on how one of its members should be dealt with in the mainstream justice system and wish to convey this to the court. They may wish to have offenders returned to them for punishment or, on the other hand, have them banished from the community for a period of time as part of punishment.¹⁰¹

Courts have endeavoured to take note of Aboriginal communities' wishes in their sentencing decisions; however, they are cautious in stating that without legislative permission the wishes of the community cannot override the duty of a judge to sentence according to law.¹⁰² Presumably 'according to law' means according to the sentencing criteria that are currently found for adults in the *Sentencing Act 1995* (WA),¹⁰³ for juveniles in the *Young Offenders Act 1994* (WA)¹⁰⁴ and

93. *R v Juli* (1990) 50 A Crim R 31.

94. Section 46 (2)(c).

95. See for example the Full Federal Court decision of *Jadurin v The Queen* (1982) 44 ALR 424, 429.

96. *R v Desmond Gorey* (unreported, Northern Territory Supreme Court, Gallop J, 20 June 1978), referred to in Australian Law Reform Commission, *The Recognition of Aboriginal Traditional Law*, Report No 31 (Canberra: AGPS, 1986) [508]; *R v Minor* (1992) 59 A Crim R 227.

97. Formerly it comprised *Criminal Code* (WA) s 16, but this was repealed by Act No 78 of 1995.

98. *Sentencing Act 1995* (WA) s11.

99. *R v Thompson* (unreported, Supreme Court of Western Australia, Roberts-Smith J, 20 February 2001), referred to in Williams, above pp 16–17.

100. *R v Richter* (unreported, Supreme Court of Western Australia, McLure J, 30 April 2002), referred to in Williams above p 17.

101. See *R v Miyatatawuy* (1996) 87 A Crim R 574; *Mamarika v The Queen* (1982) 5 A Crim R 354 respectively.

102. See for example *Mamarika v The Queen*; *ibid*; *Jadurin v The Queen*, above n 95; *R v Miyatatawuy*, *ibid*.

103. *Sentencing Act 1995* (WA) s 6.

104. *Young Offenders Act 1994* (WA) s 46.

at common law. The statutory criteria do not specifically refer to the effect of Aboriginal customary punishment,¹⁰⁵ or the place of the wishes of the community in sentencing. It would be useful if the matter was clarified by legislation.

There should be a statutory requirement in relation to all offenders—both adults and juveniles—that in sentencing the court must take into account an offender's cultural background and, specifically, any Aboriginal customary law matters which relate to the commission of the offence and sentencing.

Requirement of evidence

Several cases have emphasised the need for evidence of customary punishment to be placed before the court before it can be considered.¹⁰⁶ Such evidence is important so that courts can ensure that traditional punishment has in fact taken place or is likely to take place. It is also received in order to ensure that punishment is actually traditionally sanctioned and is not only in the nature of a personal revenge or vendetta.

Evidence may also be required by courts, even by way of explanation, where customary considerations or belief systems have played a part in generating offences. In a South Australian case, the offence in question had been caused by a fear on the part of the offender that he was being pursued by a kadaitcha man.¹⁰⁷ The appeal court explained that the original sentencing judge would have been greatly assisted if there had been some expert evidence (such as from an anthropologist) as to what a kadaitcha man was. In another South Australian case, evidence was necessary about a belief of the offender, shared by other Aboriginal people, that a spirit existed in a house the offender had burnt down.¹⁰⁸

'Evidence' of such matters involving Aboriginal beliefs has been given in a variety of ways in Western Australia.¹⁰⁹ Courts often seem nervous about receiving such information and usually rely on the Crown's acceptance of statements about traditional punishment before accepting them as fact.

In some cases it can be difficult for a defendant or their representative to produce 'evidence' or information of aspects of traditional law and punishment. This is because some traditional laws are secret. Also, providing details to a court may be difficult because of language and cultural differences or community isolation.

How Aboriginal communities are to have their views taken into account in sentencing is a part of the larger topic of having a system that can give Aboriginal people a greater say in the justice system. However, certain changes could be introduced, even in mainstream law, to obtain greater understanding by sentencing courts of traditional law culture and to provide input into the sentencing process by Aboriginal communities. This could be done by the appointment of Aboriginal people to act as assessors to assist the courts in these matters.

During rounds of consultations by the LRCWA, various Aboriginal delegates referred to the need to ensure the integrity of Aboriginal customary law matters that came before the courts. In Geraldton, people referred to the need to use Aboriginal knowledge within the court regarding traditional punishment, so that the court would know if a defendant was 'pulling the wool over [their] eyes'.¹¹⁰

At Laverton, it was explained by Aboriginal delegates that sometimes lawyers and others use customary law as an excuse or as mitigation in the wrong cases, such as when a person was drunk. They pointed to several key indicators that courts could use to assist them in deciding whether there were truly customary law considerations, such as whether Elders were there, whether the person had gone back to the community or family and whether there was a clear mind.¹¹¹

In the Pilbara, the Aboriginal community told the LRCWA delegates that sometimes actions were taken in the name of traditional punishment, which should not be accepted. An example given was a flogging by someone who was drunk, as traditional punishment must be done sober and administered properly using the appropriate tools and in the appropriate place.¹¹²

105. Although, by s 67 of the *Young Offenders Act 1994* (WA), the court may, in relation to juvenile offenders, refrain from imposing punishment upon being satisfied that such punishment as the court may approve has been or will be given. This section could be used to take customary law punishment into account as a substitute for other punishment.

106. See *R v Brand* [1998] WASCA 279, [8]–[10]; *R v Gordon* [2000] WASCA 401, [22].

107. *Shannon v The Queen* (1991) 57 SASR 14.

108. *Goldsmith v The Queen* (1995) 65 SASR 373.

109. See, for example, the cases referred to in Williams, above n 62, 6–8 where the author refers to 'evidence' being given on occasions by Elders, anthropologists, written statement from relatives and by counsel.

110. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, [6].

111. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, [4].

112. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, [6].

A common theme was the need for more involvement of Aboriginal people in the court process. Involvement of senior Aboriginal people in the adjudication process concerning Aboriginal customary law matters is required and is being called for by Aboriginal people. In Broome, the Aboriginal participants suggested to the LRCWA that Aboriginal Elders should advise the judge before claims relating to traditional law are accepted. In this regard they referred to the practice in Turkey Creek of Elders sitting with the local magistrate.¹¹³ People in Broome also suggested that it would be beneficial if courts could order that offenders undergo a form of training in Aboriginal law as part of a sentence where they have breached both mainstream and traditional laws.¹¹⁴

Later in this paper, in Part VI, I refer to proposals for the establishment of Aboriginal courts dealing with their own matters. However, until they are set up or alongside them, involvement of Aboriginal people in mainstream courts is urgently required to address issues of customary law as and when they arise.

To address the need for providing understanding of traditional law and punishments applicable in particular cases and the views of the relevant community concerning how an offender should be dealt with, it would be useful if court-appointed Aboriginal assessors could be selected to work with the sentencing court in such matters.

Other alternatives

Other alternatives to imprisonment are desperately sought by Aboriginal people, and indeed judges, in order to reduce the scandalously high rate of imprisonment of Aboriginal people in Western Australia. The submissions by Aboriginal people in this regard have been referred to earlier in this paper.

In an article 'The Sentencing of Aboriginal Offenders', John Nicholson SC, Deputy Senior Public Defender (New South Wales), observed:

[T]he Anglo-Australian system is built upon impartiality, authority, and rank obedience in the face of punishment, while the customary law relies upon relationship, traditions, emotions and methods of dealing directly with each other. The Anglo-Australian system of criminal law is based upon a retributive model, while the customary law focus is upon restoration, healing and prevention.¹¹⁵

Nicholson made the point in his article that:

The courts must also recognise that present sentencing law is doing little to lessen the rate of offending. In the face of increased rates of Aboriginal offending how can it be argued that general deterrence is working. It seems worse than futile, indeed pigheaded, to keep applying to a problem a solution that is ineffective or perhaps even counter-productive.¹¹⁶

In her background paper, Victoria Williams stated that there are only two cases—apparently Australia-wide—where courts have imposed sentences upon a convicted person with a structure designed to ensure that traditional punishment takes place.¹¹⁷ This indicates the current constraints experienced by courts in handing down sentences that can positively use Aboriginal culture to reduce offending.

Aboriginal communities often canvass alternative proposals for dealing with offenders, particularly young offenders. These frequently include the proposal to keep them out in the bush under the custody of Elders, where they can learn or re-learn traditional values, laws and skills.¹¹⁸ Experiments with such alternatives have often been successful, but need government support.¹¹⁹ These proposals are certainly in the public interest in terms of reducing crime and the cost savings of lower imprisonment figures.

Areas where mainstream law can co-operate with Aboriginal communities to ensure that Aboriginal offenders are dealt with under customary law are available through such schemes as community-based sentences and early release

113. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, [2(d)].

114. *Ibid* [2(c)].

115. Nicholson J, 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 87.

116. Nicholson, *ibid* 88 (footnote omitted).

117. See Williams, above p 13.

118. Personal communications to the author from many Aboriginal community members.

119. For example, the Wiluna community held a successful programme of taking people from Wiluna to Mangilli (some 500 kms away). However, continued funding has not yet been made available.

schemes. To implement these it is necessary to adequately resource them and to recognise the expertise that is required to accomplish this. In a report in May 2001, the Western Australian Auditor General advised that the supervision of offenders is a specialised activity which most organisations and agencies do not have experience with, and for which they receive insufficient training and support.¹²⁰ This is a problem that many Aboriginal communities experience,¹²¹ although they are keen to involve themselves.

The government needs to assist Aboriginal communities in dealing with offenders through increased support and funding of community-based alternatives.

Part V: Policing and procedures

Police

The history of Aboriginal–police relations in Western Australia has been a vexed one. Reports of harsh treatment of Aboriginal people by police were investigated in the Western Australian Roth Royal Commission (1904) and the Moseley Royal Commission (1934). Inquiries into poor police and Aboriginal relations were also examined by the Royal Commission into Aboriginal Deaths in Custody (1991) and continue to today.

In its rounds of consultations with Aboriginal people in Western Australia the LRCWA heard many descriptions of poor treatment of Aboriginal people by police from both metropolitan and remote communities. Examples included:

Generally speaking the police do not respect Aboriginal people.¹²²

There is disrespectful behaviour from police towards our children.¹²³

The police think they know best, they ignored the view of the Elders.¹²⁴

The police do not give the same resources to the investigation of all crimes. In particular, crimes involving an Aboriginal offender and an Aboriginal victim are not given the same priority as where the victim is non-Aboriginal.¹²⁵

Targeting of Aboriginal youth still occurs.¹²⁶

Police need to be properly trained and understand Aboriginal heritage and culture.¹²⁷

The police come – don't ask permission from the community and don't tell us the reasons. They say 'just open the door and let us in'. We are still waiting to work properly with the police.¹²⁸

On the other hand, it is clear that there are many police in remote areas who work well with Aboriginal communities on a basis of mutual respect and trust. Many police respect Aboriginal law and co-operate to allow Aboriginal customary ways of dealing with offenders to take their course or 'mediate' between the two systems.¹²⁹

However, as can be seen from the type of comments from Aboriginal communities set out above, there are less-experienced officers who do not understand the complexity of Aboriginal law and custom and seek to 'bulldoze their way through' unadvised. More than often these efforts simply cause long-term community harm.

There are a variety of views amongst Aboriginal people, which have emerged from the LRCWA's consultations, as to whether there should be a significant police presence in their communities. Some communities say that they can look after their own affairs and simply wish to be left alone. Others state that they need assistance dealing with community problems and they should have the right to a police presence just as other non-Aboriginal communities do.¹³⁰ The reality of domestic violence and substance abuse in many communities means that assistance from mainstream police will be required at least in the short term until alternative community policing systems are established.

120. Auditor-General of Western Australia, *Implementing and Managing Community Based Sentences* (May 2001).

121. See, for example, Ngaanyatjarra Council, *Doing Business with Government*, above n 14, 33–34.

122. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Derby*, 4 March 2004, [5].

123. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Albany*, 18 November 2003, [12(a)].

124. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, [5].

125. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Midland*, 16 December 2002, [1].

126. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Mirabooka*, 18 November 2002, [3(a)].

127. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, [12].

128. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, [7].

129. For example, the Wiluna community spoke highly of their local sergeant in this: see Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, [11(a)].

130. Compare the LRCWA's various thematic summaries in this regard.

Police officers are often greatly assisted in their duties by Aboriginal Police Liaison Officers ('APLOs'). Over the years there has been some reform of the position of APLOs (formerly called 'Aboriginal Police Aides'), but more reform may be necessary.¹³¹

APLOs should be regarded as specialists who are to primarily provide liaison between police and Aboriginal people. They do not see themselves as having a primary function as frontline police. However, APLOs are attached to local police stations, under the control of the local officer in charge, and are called on to perform ordinary policing duties as an extra pair of hands. Their specialist function is often—depending on the officer in charge—undervalued and underutilised. One unusual feature of the scheme worth noting is that their powers of arrest under their instrument of appointment are limited to only arresting Aboriginal people, unless they act under direction. The discriminatory aspect of this deserves review.

Previously there was an Aboriginal Affairs Directorate within the Police Service, but this was recently abolished. APLOs do not have a promotion stream within the Police Service above the rank of senior APLO (two stripes), for which eight years' service is required. An application for APLOs to be able to attain sergeant rank (three stripes) was refused by the Police Service hierarchy.

The role of APLOs can be crucial in assisting police and judicial officers to gain an understanding of Aboriginal cultural dynamics and also assisting Aboriginal people to understand mainstream legal processes. It is important that their skills are recognised and used to maximum advantage. Also, to ensure the trust of the Aboriginal community, a degree of independence is required.

In consultations at Kalgoorlie the LRCWA representatives were told that:

[T]he role and function of APLOs needs to be reviewed. Currently it is to verify that Aboriginal suspects understand the charges against them and to explore the evidence. However, this role is being compromised by the use of the APLOs as ordinary police. The original conception should be restored, by suitable provisions in the *Police Act*, excluding ordinary policing.¹³²

It was also suggested that 'Police Standing Orders might be revised to require other police officers to bear in mind the advice of APLOs'.¹³³

One means of reinforcing the role of APLOs would be to constitute a separate part of the Police Service under which APLOs operate. Within this they could have their own promotional structure and their own standing, functions and ways of operating.

It was mentioned earlier in this part of the paper that some police make a decided effort in an endeavour to make the two laws—Aboriginal and mainstream—work together. Several communities in consultations with the LRCWA stressed the importance of this approach.

At Warburton it was reported that:

The strongest concern was that the white system does not allow Aboriginal law to take its course in a timely manner. This undermines the authority of Aboriginal law and creates consequences in terms of harmony and good order in the community. There was a strong view that there needs to be more of a balance between the two systems.

'White law is slow, Aboriginal law is swift.' This creates problems when Aboriginal punishments are not carried out before the person is taken away by the white system: 'The police should wait until a person has been through punishment'. The fact that the police take people away before Aboriginal law has taken its course shows that 'the white system does not respect Aboriginal law: it is crucial to get punishment done first' and 'we have no power, no rights to get the police to bring a person back'.¹³⁴

At Fitzroy Crossing it was explained by community members that police do not understand that Aboriginal families will face retribution if offenders do not face punishment. Police fear that the person subject to punishment might die and that they will be held responsible.¹³⁵ It is clear that this problem needs to be addressed in terms of authorising

131. The following information is from an experienced APLO, given to the author on the basis of confidentiality.

132. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, [8(b)].

133. *Ibid.*

134. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, [3].

135. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, [1].

traditional law to be carried out.¹³⁶ By removing the fear of unlawfulness, both Aboriginal people and police will feel more comfortable about positively encouraging and putting in place traditional law sanctions for conduct harmful to the community.

Dealing with these matters requires considerable experience and sensitivity on the part of police officers. Unfortunately, the Police Service does not necessarily reflect and respect that this cultural knowledge is a specialisation in its rules relating to postings. Rules that require constant turnover of staff in remote areas—apparently a maximum stay of only four years—are too inflexible. Such turnovers have been criticised by Aboriginal communities in the course of the LRCWA's consultations.¹³⁷

The special expertise police officers in working with Aboriginal communities' law should be recognised and supported by the Police Service in its postings policy.

Prosecuting practices

The overriding consideration as to whether to prosecute someone is whether a prosecution is required in the public interest. This is clear from the Prosecution Policy and Guidelines made under the *Director of Public Prosecutions Act 1991* (WA).¹³⁸ For instance, there may be situations where, although an offence may technically be made out, a prosecution does not proceed as the public interest does not require it.

The Prosecution Policy and Guidelines set out matters that may be considered as factors to be taken into account and also matters that are said to be irrelevant to the public interest. It is noted that the race, colour, ethnic origin and cultural views of an alleged offender are said to be irrelevant to a consideration of the public interest.¹³⁹ On the other hand, relevant considerations are said to include an alleged offender's antecedents, the likely effect on public order and morale, and whether a sentence has already been imposed which adequately reflects the criminality of the matter.¹⁴⁰

In relation to circumstances where Aboriginal customary punishment has taken place or is sought to take place, it can be argued that the public interest would not require a prosecution as the person is being otherwise punished for the offence in an effective way. This is especially the case where the Aboriginal community concerned, and the victim, endorse the process.

The Prosecution Policy and Guidelines could give specific guidance that a prosecution is not necessary where an offender lives subject to Aboriginal customary law, is likely to be punished under it, and the Aboriginal community and victims are satisfied with a customary law resolution of the matter.

Bail

Many Aboriginal people have considerable difficulty in obtaining bail. Research published in 2001 reveals that of all arrested people who are not released on bail, almost half of them are Aboriginal.¹⁴¹ The question of bail usually comes up for decision first at the police station stage after arrest and later in court pending the hearing of the matter.

The *Bail Act 1982* (WA) sets out various considerations for the granting of bail, including, in appropriate cases, requirements for sureties – persons willing to pledge money to ensure another person's attendance at court. As many Aboriginal people are economically disadvantaged, obtaining a surety with sufficient assets to satisfy monetary requirements is often difficult. Other aspects of compliance, such as having a proper place to stay while on bail or the ability of persons from remote communities to turn up at court when required, also impact upon the suitability of bail schemes.

136. See above pp 562–63.

137. See, for example, the comments at Broome, where there was criticism of the considerable turnover of police: Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, [2(a)].

138. *Director of Public Prosecutions Act 1991* (WA), Statement of Prosecution Policy and Guidelines (1999), Policy Guideline 19.

139. Statement of Prosecution Policy and Guidelines (1999), Policy Guideline 29.

140. Statement of Prosecution Policy and Guidelines (1999), Policy Guidelines 27(c), (o) and (p) respectively.

141. Ferrante AM, Fernandez J & Loh NSN, *Crime and Justice Statistics for Western Australia: 2000* (Perth: UWA Crime Research Centre, November 2001) 47.

These difficulties have been touched upon in various other inquiries, such as the Royal Commission into Aboriginal Deaths in Custody (1991) and, more recently, the Western Australian Legislative Council Standing Committee on Estimates and Financial Operations inquiry in relation to Financial Management of Prisons of 29 June 2000. Some reforms, such as a bail hostel scheme, have been introduced as a result of these inquiries. Nevertheless, difficulties still persist.

Sometimes there may be a conflict between ordinary bail criteria and the obligations of a person awaiting trial to undergo punishment under Aboriginal customary law. Communities prefer the return of a person who has offended as soon as possible, so that punishment can take place straight away. This gives the community the chance to undergo the healing process and get back on track. Long delays while people are in custody waiting trial do nothing for the restoration of community harmony.¹⁴²

The *Bail Act 1982* (WA) sets out various criteria for granting bail,¹⁴³ although they do not specifically include as a reason for granting bail that a person would undergo punishment if returned to their community. In Western Australia it has been held that the *Bail Act 1982* (WA) criteria are not exclusive and common law principles concerning bail apply. This means that a judge has an overriding discretion to grant bail and to take into account all relevant questions and matters in considering the issue.¹⁴⁴

Judges in Western Australia, therefore, have the power to grant bail for the purposes of the defendant returning to the community to receive traditional punishment. Whether they are bold enough to exercise that power is another matter. Indeed, one of the criteria for bail set out in the *Bail Act 1982* (WA), which the court must consider, is 'whether the defendant needs to be held in custody for his own protection'.¹⁴⁵

In at least one case, a court has felt bound to consider this prospect of possible traditional punishment.¹⁴⁶ In this case the judge held that there was, in the circumstances of that case, only a small risk of possible payback as the defendant would be staying in a church centre while on bail. Bail was therefore granted.

If the carrying out of traditional law is specifically authorised, as has been suggested in this paper, then the 'own protection' clause in the *Bail Act 1982* (WA) would not be relevant. Traditional punishment would be lawful.

Where bail is to be granted, the Act permits the court to place certain conditions on the defendant, including conditions as to place of residence and conduct. There is also provision for making it a condition that a person on bail attends courses or programmes for the purpose of addressing 'behavioural problems'. Thus, under the *Bail Act 1982* (WA) a judicial officer can order a person to return to his or her community to live and to abide by the directions of an Elder. It would be useful also if the court could direct that a person on bail attend a programme set by the community under which customary law could be administered. Under the Act such courses or programmes are limited to 'prescribed' ones.¹⁴⁷ This means prescribed by a regulation made by government.¹⁴⁸ Therefore, to enable a 'course' or 'programme' of customary law to be made a condition of bail, the government would need to specifically include them by regulation. This procedure, in reality, is too cumbersome and its need should be dispensed with by amendment of the *Bail Act 1982* (WA).

Fitzroy Crossing communities complained to the LRCWA about the uncertainty of court bail practice. They complained that practices are very ad hoc. Sometimes magistrates will not bail/remand offenders so that they can face punishment and in other instances they will do so.¹⁴⁹

To put the matter beyond doubt, the *Bail Act 1982* (WA) should be amended to include as a criterion for the granting of bail, where customary law is acknowledged to apply,¹⁵⁰ the community's wishes for an accused person to return to the community for the purpose of customary punishment.

142. See the comments from Warburton community, above p 568.

143. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1.

144. *Jemielita v The Queen* (1995) 78 A Crim R 91; *WCVB v R* (1989) 1 WAR 279.

145. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1(b).

146. *Unchango v The Queen* [1988] WASC 186.

147. See *Bail Act 1992* (WA) Sch 1, Pt D cl 2(2b).

148. By reason of s 5 of the *Interpretation Act 1984* (WA).

149. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, [1].

150. See comments on acknowledgment, above pp 21–22.

Additionally, the limitation in the *Bail Act 1982* (WA) that courses or programmes to address behavioural problems be 'prescribed' should be dispensed with. This will enable the court to make submission to customary punishment a condition of bail.

Fitness to plead

Previously, s 631 of the *Criminal Code* provided for an inquiry process in appropriate cases as to whether a person might be unable to understand the court proceedings and, therefore, not fit to stand trial. The test was whether it appeared to be 'uncertain for any reason' that the person was not capable of understanding the proceedings to be able to properly defend him or herself. It was used on occasions to ascertain whether Aboriginal people were unable to understand the proceedings due to cultural, language and other difficulties.¹⁵¹

Section 631 was repealed in 1997 and replaced by the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA). The new provisions restrict the question to unfitness on the ground of mental impairment – defined as intellectual disability, mental illness, brain damage or senility.¹⁵² This is much narrower than the *Criminal Code* section and does not cover people who are unable to understand proceedings due to cultural or language factors.

However, there is authority that at common law on a serious charge the court must be satisfied that the accused person is able to understand the proceedings and the evidence against him or herself so as to be able to properly instruct counsel as to the defence.¹⁵³ This duty would seem to apply in the case of Aboriginal people who are incapable of understanding the proceedings because they come from a background where customary law, language and culture dictate their worldview.

It has not always been clear what should happen to a person who is found to be unfit to plead. There is a danger that such a person could be locked up indefinitely in a psychiatric facility.¹⁵⁴ However, the better view is that the person should simply be discharged. This seems to be the result under the recently introduced *Criminal Procedure Act 2004* (WA) discussed below.

Overlapping with the common law ability of a court to assess an accused person's fitness to plead and discharge the person has been the recently repealed¹⁵⁵ protective provision s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). This was designed to give some protection against a court receiving pleas of guilty, admissions or confessions from Aboriginal people where they did not 'understand the nature of the circumstances alleged, or of the proceedings, or were not capable of understanding that plea of guilt or that admission of guilt or confession'.

An examination under s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) was required whenever it appeared reasonably likely that an Aboriginal person might not understand the matters mentioned in the section.¹⁵⁶ If the court was satisfied that the accused person did not understand the matters referred to in s 49, a plea of guilt was not accepted. Instead, a plea of 'not guilty' was entered. Likewise, any admissions or confessions previously made by the accused person were rejected.

Even if s 49 resulted in a plea of not guilty being entered, it was arguable that the court still had a duty to go further and ascertain whether the accused person was fit to go on trial at all. This was on the basis of the common law duty of a court to ascertain whether the accused person can properly participate in a trial.¹⁵⁷ With s 49 of the *Aboriginal Affairs Planning Authority Act* repealed, in order to see what protections there are for Aboriginal people who may not be able to understand proceedings, one must now look to provisions in the recently introduced *Criminal Procedure Act 2004* (WA).

151. See eg L Davies L, 'The Yupupu Case' (1976) 2 *Legal Service Bulletin* 133.

152. See definition in *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 8.

153. See *Ngatayi v The Queen* (1980) 147 CLR 1, 7–8; *Kunnuth v The State* [1993] 4 All ER 30; *Ebatarinja v Deland* (1998) 444, 454; *Eastman v The Queen* [2000] HCA 29, [59] (Gaudron J).

154. In *Ngatayi v The Queen*, *ibid* [7], Barwick CJ made the point that the *Criminal Code* (WA) s 631 was based on the wording of the English *Lunatics Act 1800* (39 & 40 Geo III c 94) and that an early Queensland case, *R v Willie* (1885) 7 QLJ (NC) 108 where Aborigines who could not understand the proceedings in the absence of an interpreter had been discharged, did not 'disclose any authority, statutory or otherwise, for taking this course'.

155. By Act No 84 of 2004, coming into effect in May 2005.

156. *Smith v Grieve* [1974] WAR 193; *Webb v The Queen* (1994) 13 WAR 257; *Green v The Queen* [2001] WASCA 162.

157. See Wickham J in *R v Grant* [1975] WAR 163, a case decided when s 631 of the *Criminal Code* (WA) was still in place.

Section 59(2) of the *Criminal Procedure Act 2004* (WA) provides that in the lower court, before requiring an accused to plead to the charge, the court must 'be satisfied that the accused understands the charge and the purpose of the proceedings'. However, the section does not instruct on, or indeed seem to contemplate, what is to eventuate if the accused cannot understand these things. Section 59(3) simply states that after complying with s 59(2) the court must require the accused to plead.

By s 90 a superior court hearing a prosecution may stay the prosecution permanently 'in the interests of justice' and discharge the accused. This power is presumably designed to allow for an investigation as to whether an accused is fit to plead or undergo trial; however, it is not made clear. Further, the section is followed by the rather ominous s 91, which provides that a court may require an accused to plead to a charge at any time after an indictment is lodged with the court. This suggests that a decision to stay a prosecution—even 'permanently'—might be able to be revisited at any time, leaving an accused who has been so discharged never free from the threat of a revival of the proceedings.

Section 130 of the Act refers to mental fitness to stand trial. It states that this question must be dealt with under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA). I have already mentioned that the provisions of the latter Act do not pick up the situation of Aboriginal people who may lack comprehension because of cultural and language difference.

Obviously the *Criminal Procedure Act 2004* (WA) is very new and guidance on interpretation of the Act by court decisions can be expected in the future. However, it does seem that the Act provides less protection for Aboriginal defendants than the repealed s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). The new Act does not, for example, highlight the socio-cultural disadvantage of Aboriginal people in the mainstream court process by imposing a specific statutory duty of examination or address the question of the admission of confessional material. It may be that even more reliance will need to be put on the development of common law protections in this area, along the lines referred to above.

Clarity will be required from the courts as to the extent of protection now available for Aboriginal people who are unable to understand proceedings, in light of the recent repeal of s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). This should be monitored with a view to the possible need for reinstatement of legislative protections.

Interpreters

In a Queensland case in 1885, a trial judge ordered the release of four Aboriginal persons who had been charged with murder as there was no interpreter to be found who could adequately interpret for them in the proceedings.¹⁵⁸

General principles requiring procedural fairness in trials suggest that there is a right to an interpreter where required by a defendant to properly understand and participate in the proceedings.¹⁵⁹ However, there is no statutory guidance for courts as to the use of interpreters and this has led to inconsistent use.

Michael Cooke in his background paper for this project advised that interpreters are under-utilised in Western Australian court proceedings and by police in cases involving Aboriginal people, certainly in the Kimberley.¹⁶⁰ In its consultations for this reference the LRCWA was told that in the Pilbara interpreters were needed in court but were only used 'now and again'. Also, there was no interpreter service at the Broome court, despite the need for such a service.¹⁶¹ This under-utilisation of interpreters occurs even though a good proportion of Aboriginal people in Western Australia can only 'get by' at a simple level with English and would not be in a position to adequately address the complex issues of a criminal trial unassisted.¹⁶²

Complexity of language and cultural difference may be masked. The danger of courts working on a veneer of supposed understanding of the court process was highlighted by Dr Diana Eades in her study of a court case involving 'urban'

158. *R v Willie* (1885) 7 QJLJ (NC) 108.

159. See for example *Deitrich v The Queen* (1992) 177 CLR 292, 363 (Gaudron J), 330–31 (Deane J); *Ebatarinja v Deland*, above n 152, 454; *Re East; ex parte Nguyen* (1998) 196 CLR 354, 390.

160. M Cooke, 'Caught in the Middle: Indigenous Interpreters and Customary Law', Background Paper No 2, above p 77, 114–15.

161. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations: Pilbara*, 6–11 April 2003, [12 (c)].

162. Cooke, above n 159, 79–80.

Aboriginal juveniles.¹⁶³ She identified that there was serious disadvantage to the juveniles in the proceedings arising from lack of understanding of cultural differences. Difficulties included: failure to understand the need of the juveniles for a period of silence before answering questions; the cultural trait of avoiding eye contact; and the use of pressure cooker questioning by prosecutors, such as raising of the voice which simply resulted in 'gratuitous concurrence' – agreeing with the proposals put, whether correct or not. In the Northern Territory, Mildren J has highlighted continuing difficulties for Aboriginal people in the court process.¹⁶⁴ He has stated: 'It is widely recognised that the trial process operates unfairly to Aboriginal witnesses and accused, because that process is often outside of their experience'.¹⁶⁵

In terms of the subtlety of these difficulties, Michael Cooke refers to customary law considerations that are even involved in the question of choosing an interpreter and the way the interpreter carries out his or her task. These include considerations of kin relationship and style of language to be used.¹⁶⁶

It is often difficult to obtain accredited interpreters in Aboriginal languages. Courts are reluctant to use interpreters who are not accredited so all parties, including the court, end up being disadvantaged in proceedings as there is no clear understanding of what is being said and done. Therefore, the training and accreditation of more interpreters is required. This will, of course, require resources.

Statutory guidance should be given to judicial officers to ensure that interpreters are used when this is shown to be necessary. The training and accreditation of more Aboriginal interpreters should be resourced.

Juries and gender restricted evidence

At common law juries are required to be representative of the general community and are to be selected at random.¹⁶⁷ This means that a jury for a trial involving Aboriginal people will not necessarily be comprised of, or even contain, any Aboriginal people. This presents problems to Aboriginal persons in having their matters determined by people who have no understanding of their law and customs. Various attempts have been made to challenge juries on the basis of lack of Aboriginal representation; however, they all appear to have been unsuccessful.¹⁶⁸

There are other difficulties in relation to juries. Sometimes it is inappropriate, for reasons of customary law, for persons of a particular gender to hear about a matter that is the subject of a court hearing. Therefore, Aboriginal witnesses may be unable or unwilling to disclose relevant matters in front of a jury comprising the wrong gender. Although there is a right to challenge jurors, the number of challenges available is limited, and an appropriate jury might not be able to be achieved. In some cases, the Crown has consented to an all-male jury,¹⁶⁹ but in the absence of such consent there is no power in the court to order a jury of a specific gender.¹⁷⁰

It is common in native title cases, which are heard by a judge in the Federal Court, for restrictions to be imposed on the gender of persons hearing particular parts of evidence. This has meant that only male (or only female) members of the public, counsel, solicitors and court officers have been able to listen to the evidence. It has been applied to matters relating to men's business or women's business, in which under customary law it would be wrong for a person of the other gender to hear about such matters. The courts have then made consequent orders that restrict the publication of the transcript of such evidence.¹⁷¹ Even these procedures are not totally satisfactory, as the judge (of whatever gender) must hear the evidence and this can restrict what can comfortably be disclosed.

Under the *Criminal Procedure Act 2004* (WA) there is now the ability for a criminal court to exclude all or specific classes of persons from the court in the interests of justice and restrict publication of the proceedings.¹⁷² At this stage the reach of this newly introduced provision is not clear; however, it is unlikely that a juror would be excluded on gender

163. Eades D 'Cross-examination of Aboriginal Children: The Pinkenba Case' 1995(3) 73 *Aboriginal Law Bulletin* 10.

164. Mildren D 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7.

165. *Ibid* 12.

166. Cooke, above n 159, 83, 119.

167. *Cheatle v The Queen* (1993) 177 CLR 541, 560.

168. *Eg R v Grant & Lovett* [1972] VR 423; *R v Walker* (1989) 2 Qd R 79.

169. *Eg R v Sydney Williams* (1976) 14 SASR 1.

170. *R v A Judge of the District Courts; ex parte Attorney General (Qld)* [1991] 1 Qd R 170; cf Australian Law Reform Commission, above n 96, 595, [440], which suggested that the court could exercise its inherent jurisdiction to order a specific gender jury and should do so in certain circumstances.

171. See the appeal to the Full Court of the Federal Court in *Western Australia v Ben Ward* (1997) 76 FCR 492, where the practice was approved. Leave to appeal the decision was refused by the High Court.

172. Pursuant to s 171(4).

grounds under this section. The result is that in criminal trials where an Aboriginal person is unable to give evidence about a particular matter because of customary law, it is unlikely that the court will hear about it even though it may be crucial to the proceedings. This is unfair both to victims and accused persons.

The *Juries Act 1957* (WA) should be amended to permit the judge, in a trial to exercise discretion in a particular case, to order that a jury be drawn from persons of a particular gender.

The giving of evidence

Aboriginal people can feel disadvantaged and even dishonoured when giving evidence in a mainstream court. This came through clearly in the LRCWA's consultations for this project. For example, the Commission's representatives were told that the course of recent evidence taken in native title hearings in Laverton were 'very degrading and are still causing pain for Aboriginal people because of the matters that were revealed and the hearing processes'.¹⁷³ They were also informed that 'Aboriginal people could even be endangering others and themselves by saying some things'.¹⁷⁴

Special issues also arise for witnesses who are victims of family violence or sexual assaults. These types of difficulties have been the subject of an earlier LRCWA report in 1991¹⁷⁵ and a report in Queensland in 1996.¹⁷⁶ Problems of shame arising from the discussion of sexual matters in public, pressure and feelings of lack of support in an alien system were highlighted in the Queensland report.¹⁷⁷

The LRCWA report was followed by amendments to the laws of evidence providing for video evidence, the giving of unsworn evidence and other special arrangements for children or vulnerable adult witnesses in proceedings.¹⁷⁸ Such special arrangements can be made where, amongst other things, cultural factors or the subject matter of the proceedings indicate that witnesses will be intimidated or stressed.¹⁷⁹

These provisions are in addition to s 100A of the *Evidence Act 1906* (WA), which was already in place when the other initiatives were introduced. Section 100A allows for accepting evidence on an unsworn basis where a person does not understand the nature of swearing or giving an affirmation as to the truth of evidence, but otherwise understands the requirement to tell the truth to the court. The section has been used for receiving evidence from traditionally oriented Aboriginal people, who lack understanding of oaths and affirmations.¹⁸⁰ However, the section indicates that the evidence is not necessarily to be regarded as having the same force as evidence given on oath or affirmation.¹⁸¹ This is not the case with evidence given under the procedures introduced for children and vulnerable witnesses and there is no logical reason why there should be a difference.

Section 100A of the *Evidence Act 1906* (WA) is out of step with the amendments introduced after the 1991 Law Reform Commission report in suggesting that unsworn evidence of Aboriginal people given under the section is less reliable than evidence given on oath or affirmation. The section should be amended to do away with that suggestion.

Suppression of names and other information

In many Aboriginal communities it is inappropriate under customary law to refer to the name of a person who is deceased. Aboriginal law can also prohibit the publication of other information, such as the details of a particular person going through the law. The *Criminal Code*¹⁸² gives power to the court to suppress information that may emerge in cases of a certain class; namely, those which involve extortion or blackmail.

As mentioned above, under the *Criminal Procedure Act 2004* (WA) a criminal court has the power to restrict publication

173. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, [3].

174. *Ibid.*

175. Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses*, Project No 87 (April 1991).

176. Queensland Criminal Justice Commission, *Aboriginal Witnesses in Criminal Courts* (June 1996).

177. *Ibid.* 93–96.

178. See *Evidence Act 1906* (WA) ss 106A–106T.

179. *Evidence Act 1906* (WA) s 106R(3)(ii).

180. *Lau v The Queen* (1991) 6 WAR 30, 39, 40.

181. See s 100A(2).

182. In s 399A.

of the proceedings in the interests of justice. This includes all or a portion of the proceedings.¹⁸³ This should enable courts to restrict publication of culturally sensitive material where this is required.

Confessions and admissions

Evidence against an accused person may include statements that were made to police or others confessing the alleged offence or admitting various aspects of it. It is important that these confessions or admissions can be relied upon. If, for example, there were threats or promises involved, a court cannot be sure that what was said was true or whether the accused person 'made up' his statement in order to avoid the threats or to obtain the benefit of the promises.

For these reasons courts are on guard to make sure that confessional material has been given voluntarily and in fair circumstances. Courts are assisted by the fact that interviews of suspects in serious matters must now, by law, be videotaped.¹⁸⁴

Many Aboriginal people encounter special difficulties in the police interview process, due to the alien cultural situation and language differences. Some of these difficulties have been referred to earlier.¹⁸⁵

In addition to s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) which, prior to its repeal, enabled a court to examine an Aboriginal accused person in order to see if he or she understood the nature of the interview process, the courts have adopted guidelines—the Anunga Guidelines (or Rules)—designed to guide police in their dealings with Aboriginal suspects. Although the guidelines originated in the Northern Territory,¹⁸⁶ the courts in Western Australia have adopted them as appropriate guidelines to be considered in examining the fairness and reliability of the police interview process.¹⁸⁷ There is some difference of emphasis between judges in Western Australia as to the extent to which the Anunga Guidelines should be followed. Some judges have emphasised the need for flexibility in their use.¹⁸⁸ While this is understandable, such a direction can have the effect of eventually 'watering down' the effectiveness of these safety measures.

The Anunga Guidelines, among other things, stress the need for interpreters and a support person for the person being interviewed (a 'prisoner's friend'). They also state that the 'caution' (the explanation that the person being interviewed has a right to remain silent) should be carefully explained, that questions are appropriately formulated so as not to suggest the answer (no leading questions), and that the person should be put at ease in various ways.

Mildren J reviewed the effectiveness of the Anunga Guidelines—which are now 28-years-old—and suggested that a review of them is necessary on the basis that they are not being satisfactorily implemented.¹⁸⁹ In regard to the use of interpreters '[did] not think that courts should too readily reach the conclusion that simply because the interview was conducted in simple English the required level of mutual understanding had been achieved'.¹⁹⁰ Mildren J also made the point that the choice of a prisoner's friend is often inappropriate as they may have a similar lack of comprehension of proceedings to that of the person being interviewed.¹⁹¹ He also suggested that the problem of 'gratuitous concurrence' is still prevalent by people agreeing to an interview when the form of caution remains inadequate. Also, leading questions are still used.¹⁹²

Lawyers and judicial officers in Western Australia will recognise the inadequacies referred to by Mildren J in many of the interviews involving Aborigines that come before the courts.

It is time for an updating of the Anunga Guidelines in Western Australia by setting new rules for police when conducting interviews with Aboriginal people. These should emphasise the need for fully informed consent to the interview process and provide safeguards to ensure proper understanding of the process, questions and answers. Adherence should, along with other considerations of fairness, be determinative of admissibility of confessional material.

183. Pursuant to s 171(4).

184. *Criminal Code* (WA) s 570D.

185. See above pp 572–73.

186. (1976) 11 ALR 412.

187. *R v Williams* (1992) 8 WAR 265; *Webb v The Queen* (1994) 13 WAR 257

188. See, for example, *R v Njana* (1998) 99 A Crim R 273.

189. Mildren, above n 163, 8.

190. *Ibid* 9.

191. *Ibid* 9–10.

192. *Ibid* 10–12, 14.

Part VI: Alternative Aboriginal justice schemes

For many years Aboriginal people have called for their right to 'self-determine' their affairs, including those concerning justice. This has been related to the issue of Aboriginal sovereignty. In Geraldton the LRCWA's representatives were told that 'sovereignty was the key issue today and goes to the status of Aboriginal peoples. Aboriginal jurisdiction was [the] key to establishing law again'.¹⁹³ The Ngaanytjarra Council, in its consultations with the LRCWA, asked that it be formally recorded that the 'number one issue is the Constitution' and stated that Aboriginal law must be recognised. They explained that there is a lack of respect for Aboriginal law across Australia and the lack of formal recognition weakens the authority of Aboriginal law.¹⁹⁴

In its consultations in Kalgoorlie, the Commission was advised that 'it is most important for Aboriginal customary law to have Aboriginal judges who can deal with Aboriginal customary law on its own terms'.¹⁹⁵ Similar views were expressed during other consultations conducted by the Commission.

As mentioned in earlier parts of this paper, it is in the public interest, and indeed essential, that Aboriginal ways of dealing with offending be facilitated in light of the evidence that the mainstream law is failing in its role of maintaining protection for Aboriginal communities.

Alternative justice schemes

There have been various schemes introduced in Australia, in both urban centres and remote communities, in which more involvement of Aboriginal people in the justice system at the sentencing stage has been attempted. Elena Marchetti and Kathleen Daly have described the major initiatives as follows:

Examples of the first kind include the Nunga and Aboriginal Courts in South Australia, the Koori Courts in Victoria, the Murri and Rockhampton Courts in Queensland, and Circle Sentencing in New South Wales. The second comprises sentencing circles in more remote parts of Western Australia and New South Wales, and Justice Groups in Queensland. There is some overlap between the two; however, the differences reflect the varied contexts of Indigenous justice practices (urban, country, remote) and the different modes of Indigenous participation in the sentencing process.¹⁹⁶

Attempts in Western Australia still seem to involve the operation of mainstream law and the prime position of a mainstream—usually non-Aboriginal—judicial officer, although with varying degrees of input from Aboriginal community members.¹⁹⁷ In its consultations with the LRCWA, the Wiluna community, which has gone down this track, pointed out that while their form of court system was regarded as an advance, it was nevertheless focused on the non-Aboriginal magistrate with court formalities.¹⁹⁸ All of the courts which have introduced these initiatives only operate in the lowest tier of criminal courts (namely, at magistrate court level) and only in the sentencing process.

At the moment the only scheme available where Aboriginal communities can operate under their own laws is the by-law scheme under the *Aboriginal Communities Act 1979* (WA). The long title of that Act describes it as 'an Act to assist certain Aboriginal communities to manage and control their community lands and for related purposes'.

The act provides the ability for Aboriginal communities to make by-laws about certain matters. Such by-laws are then duly gazetted. Jurisdiction relates to prohibition or regulation of entry onto the community land, regulation of alcohol and some other matters largely in the nature of 'nuisance' offences.¹⁹⁹ By the Act, enforcement of the by-laws is vested in police officers and a maximum penalty of a fine of \$5,000 is set.²⁰⁰ The by-laws only apply within the boundaries of the community land in question²⁰¹ and their operation is subject to other statutory rights and powers.²⁰²

The by-law legislation has been accompanied by an administrative scheme to support it, involving the appointment of Aboriginal wardens (although unless police officers or 'special constables', they have no power of enforcement) and the

193. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, [5].

194. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, [1].

195. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, [8(c)].

196. Marchetti E & Daly K 'Indigenous Courts and Justice Practices in Australia' (2000) 277 *Trends and Issues in Crime and Criminal Justice* 1.

197. Examples include the magistrate courts at Wiluna, Yandeyarra, Geraldton and in the Ngaanytjarra 'lands'.

198. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, [11(b)].

199. *Aboriginal Communities Act 1979* (WA) s 7(1).

200. Section 7(2).

201. Section 9.

202. Section 13.

appointment of community Justices of the Peace to hear and determine charges under the by-laws. The power of Aboriginal Justices of the Peace in relation to *Aboriginal Communities Act 1979* (WA) matters has recently been significantly eroded by the *Magistrates Court Act 2004* (WA) and regulations there under, which effectively place control in the hands of the local magistrate as to when justices can sit.²⁰³

It is clear that Aboriginal communities still see a useful role for the *Aboriginal Communities Act 1979* (WA), but also see that the scheme needs to be significantly strengthened.²⁰⁴ Although the introduction of the by-law system was commendable at the time,²⁰⁵ the scheme now needs serious reform if it is to be effective. On the other hand, if properly reformed, the Act could provide an appropriate vehicle for enabling Aboriginal communities to enjoy significant legal power, including through the use of customary law.

Damien McLean JP, the President of the Shire of Ngaanyatjaraku, in a covering letter to the 'Ngaanyatjarra Community Law and Justice Submission' says:

The survival of traditional Aboriginal law in the Ngaanyatjarra Communities has led to conflicting perceptions of responsibility for the maintenance of law and order. Government has a preference and expectation that Aboriginal Communities will deal with minor matters and reserve the major offending to be dealt with by the Justice system. The Communities have a preference for involvement with the more serious matters in conjunction with the Justice system, leaving the lesser offences to be dealt with by the Justice system alone.²⁰⁶

Reforms to the *Aboriginal Communities Act 1979* (WA) scheme should include:

- (a) extending jurisdiction to Aboriginal communities to more serious matters, including offences involving breaches of Aboriginal custom, violence, sexual abuse, burglary and dishonesty;
- (b) providing for flexible, although significant, ways of dealing with offenders, including the ability for people to be dealt with under customary law;
- (c) extending the range of community areas over which by-laws can operate, including in appropriate cases extra-territorial operation;
- (d) enabling the by-laws to be administered by a range of community members, rather than only by the police and Justices of the Peace;
- (e) ensuring that offenders are not dealt with twice, both under the Act and also under mainstream law; and
- (f) ensuring that the scheme—including the drafting of the by-laws themselves—is flexible to take account of the non-written tradition of Aboriginal communities and also the fact that different communities will seek different ways of doing business.

Resourcing and commitment

It is important that calls for measures in the nature of self-determination within the justice system are not misinterpreted by government as requiring Aboriginal people to do everything for themselves without providing necessary resources. Aboriginal people cannot be expected to deliver justice services to the community free of charge, when everyone else who is involved in justice service delivery (judicial officers, lawyers, departmental officers) is paid. There are also infrastructure and other expenses, such as the costs of training support personnel, which will need to be addressed.

Whatever schemes are introduced in response to the current crisis, adequate resources and support will be necessary. The quality of the justice system should be the same throughout the community.

In a 'Statement of Commitment to a New and Just Relationship Between the Government of Western Australia and Aboriginal Western Australians' signed by the government and Aboriginal peak bodies, the parties set out that the Statement 'commits the parties to work together to build a new and just relationship between the Aboriginal people of Western Australia and the Government of Western Australia'.²⁰⁷ The new and just relationship will be furthered by

203. See *Magistrates Act 2004* (WA) s 7 and *Magistrates Act Regulations* regs 4 and 8.

204. See, for example, Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Mowanjum*, 4 March 2004, [4]; Shire of Ngaanyatjarra and Warburton Community, 'Ngaanyatjarra Community Law and Justice Submission to the Attorney General of Western Australia' (Kalgoorlie, April 2002).

205. The scheme was introduced by the Coalition Government's Attorney-General Ian Medcalf MLC following pioneering work in the area by Terry Sydal SM.

206. Shire of Ngaanyatjarra and Warburton Community, above n 203, ii.

207. Government of Western Australia and ATSIC (10 October 2001) 3.



empowering Aboriginal communities to control their affairs through recognition of, and support for, their own customary laws and processes.

Alternative schemes involving Aboriginal communities in the delivery of justice services will need commitment by government to the principle and be adequately resourced.

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