Law Reform Commission of Western Australia

Aboriginal Customary Laws

Project 94

DISCUSSION PAPER OVERVIEW

(February 2006)

Law Reform Commission of Western Australia

Contents

The Aboriginal Customary Laws Project

In December 2000, the Commission received a reference to 'inquire into and report upon Aboriginal customary laws in Western Australia' and consider whether,

customary laws and family law in Western Australia; matters relating to the care and custody of Aboriginal children; and issues of family violence and the protection of Aboriginal women and children.

Part VIII examines ways to improve the recognition of customary law in relation to hunting, fishing and gathering and associated land access issues.

Part IX investigates ways of making practical changes to procedures of courts, particularly in respect of the reception of evidence of Aboriginal witnesses.

Part X explores Aboriginal community governance and discusses what is being done (and what more can be done) to maximise Aboriginal peoples' participation in the decision-making processes that affect their daily lives.

For the purposes of the Commission's Discussion Paper and this Overview reference to Aboriginal people includes Torres Strait Islander people.

About this Overview

This Overview follows the same structure of the Discussion Paper and addresses the main points of the Commission's inquiry into each of the areas set-out above. The Commission's proposals and invitations to submit are referenced throughout the Overview in square brackets. The text of the proposals and invitations to submit are reproduced at the end of this Overview. Those wishing to read a more detailed explanation of the Commission's proposals or of the arguments or information supporting the Commission's conclusions may do so by turning to the page of the Discussion Paper indicated in square brackets throughout this paper. In order to present the information in this Overview in as concise a form as possible the Commission has excluded explanatory and attributive footnotes.

How to make submissions

The Commission invites interested parties to make submissions in respect of the proposals for reform, invitations to submit or on any other matter contained in its Discussion Paper or in this Overview. The Commission also wishes to hear about any discrete areas of interaction between Aboriginal customary laws and the Western Australian legal system that are not covered by its Discussion

While the Commission employed these questions as a general guide for discussion of law issues, the questions were not always in direct alignment with the issues confronting particular Aboriginal communities. A degree of flexibility in the consultation process was therefore required. [pp 12–13]

From the beginning of the research-gathering phase, the Commission has operated under cultural respect protocols designed by the Commission in collaboration with the Aboriginal Research Reference Council appointed for this reference. The protocols are in the form of a signed Memorandum of Commitment to work with honesty and integrity with Aboriginal people, to protect confidential information and to treat Aboriginal stories, cultural information, narratives and traditional knowledge with respect and honour. A copy of the Memorandum was presented to each Aboriginal community consulted by the Commission. [pp 10–11]

Consultation findings

During the Commission's consultations a number of issues arose that were of particular concern to Aboriginal communities. These included issues surrounding the decline of cultural authority; children and youth; health and wellbeing; Aboriginality and identity; racism and reconciliation; education, training and employment; housing and living conditions; and substance abuse. While these issues may have links to the *customs* of Aboriginal communities, they often have far less clear connections with Aboriginal *law.* Nonetheless, the Commission was of the opinion that these issues fell within its mandate as matters relevant to 'the views, aspirations and welfare of Aboriginal persons in Western Australia' and were crucial to the proper execution of the reference. Part II of the Commission's Discussion Paper discusses each of these issues in detail, tying the voices of Aboriginal people consulted for this reference to the many reports that have sought to draw attention to these issues in the past. None of these issues are new – they have been recurrent themes in Australian Indigenous affairs for at least half a century. And yet, the extent of Indigenous disadvantage in Western Australia confirmed by the Commission's consultations and research

Recognition of Aboriginal Customary Law

What is Aboriginal customary law?

Definitional matters

The Terms of Reference ask the Commission to investigate whether 'there may be a need to recognise the existence of, and take into account within [the Western Australian] legal system, Aboriginal customary laws'. In order to facilitate discussion and determination of this question the Commission found it necessary to address certain definitional matters at the outset; in particular, the terms 'Aboriginal' and 'customary law'.

'Aboriginal'

From its earliest days the Western Australian Parliament has employed a definition of 'Aboriginal' in relevant legislation. Originally the term 'native' was used to describe an Aboriginal person; but, as the category of 'full-blood' native began to break down with the infamous success of government removal policies, the definition of Aboriginal person became more and more inclusive, moving from 'half-caste' to 'quadroon'. It is now clear that as a consequence of government policies, racial integration and the passage of time there are now significantly varying degrees of biological descent amongst people who identify as Aboriginal. Perhaps, for this reason, contemporary definitions of the term 'Aboriginal' are beginning to involve cultural factors such as whether the person self-identifies as Aboriginal and is accepted as Aboriginal by his or her community. [p 47]

There are a number of definitions of 'Aboriginal' found in current Western Australian legislation. Some statutes adopt a threefold test combining biological descent with the cultural criteria of self-identification and community acceptance; while others still employ the potentially offensive protection era terminology of 'full-

cases because infants cannot self-identify as Aboriginal and would therefore not satisfy the threefold test. Parliament has recently rectified this problem by amending the *Adoption Act 1994* (WA) to include a definition of 'Aboriginal person' based on descent alone.

In its 1986 report *The Recognition of Aboriginal Customary Laws* the Australian Law Reform Commission (ALRC) took the view that the definition of 'Aboriginal' should be left sufficiently vague as to be able to be determined on a case-by-case basis. However, it is this Commission's opinion that the application of legislation by government departments and administrative authorities requires a degree of certainty in definition. This must be so to ensure that administrative and departmental discretions are not abused and that all applications of legislation to Aboriginal people are not required to be determined by costly judicial process. Taking into account the arguments discussed at length in its Discussion Paper and being deeply conscious of the concerns of Aboriginal people, it is the Commission's preliminary view that a standard definition of 'Aboriginal person' in terms of descent should be adopted for the purposes of all Western Australian legislation. In order to ensure that the standard definition of 'Aboriginal person' is not unduly restrictive the Commission proposes that the following factors may be of evidentiary or probative value in determining whether a person is wholly or partly descended from the original inhabitants of Australia:

- genealogical evidence;
- evidence of genetic descent from a person who is an Aboriginal person;
- evidence that the person self-identifies as an Aboriginal person; or
- evidence that the person is accepted as an Aboriginal person in the community in which he or she lives.

It should be noted that no fixed proportion of Aboriginal descent is identified and that the weight to be given to each or any of these factors is a matter for the decision-maker and may vary from case to case. [Proposal 3, p 49]

The Commission considers that a broad definition of this nature will remove the difficulties in some circumstances of having to satisfy all three tiers of the threefold test while allowing cultural criteria to be probative in determining Aboriginality. The Commission stresses that the definition of Aboriginal person should be regarded as such only for the purposes of Western Australian legislation or application of government policy. The Commission recognises that identification as an Aboriginal person for social or cultural purposes must be determined by Aboriginal people alone. [pp 47–49]

'Customary law'

During the Commission's consultations with Western Australian Aboriginal communities, Aboriginal people emphasised that their traditional 'law' was a part of everything, was within everyone and governed all aspects of their lives. In other words, customary law cannot be readily divorced from Aboriginal society, culture and religion. The Commission found that Aboriginal customary law, as it is understood and practised in Western Australia, embraces many of the features typically associated with the western conception of law in that it is a defined

system of rules for the regulation of human behaviour which has developed

Who is bound (and who should be bound) by customary law?

The Commission's Terms of Reference require it to determine who is bound, and who should be bound, by Aboriginal customary law. In the Commission's community consultations responses to this question varied. Some suggested that being involved in Aboriginal law today is a choice for families based on their circumstances and their beliefs. However, the Commission was warned that Aboriginal people needed to be consistent about their choice – they should not simply be allowed to 'opt in' or 'opt out' of Aboriginal customary law when it was convenient to them. Others suggested that those Aboriginal people who did not live in the traditional way should not be subject to Aboriginal law at all; yet they stressed that this did not mean that those people do not have respect for Aboriginal law or that they opposed its recognition within the Western Australian legal system. There was also the suggestion that, when people who were not ordinarily subject to Aboriginal law visited traditional Aboriginal lands, they should consider themselves bound by the law practised there.

It is the Commission's view that voluntariness should be the guiding principle in application of customary law to individuals. Just as it is not the Commission's place to determine the precise nature and content of customary law, it is not its place to dictate who should or should not be bound by that law. That is a matter for Aboriginal people: communities and individuals. [pp 53–54]

Recognition of Aboriginal customary law

How should Aboriginal customary law be recognised?

The Commission has weighed the arguments for and against the recognition of Aboriginal customary law and has determined that the continuing existence and practice of Aboriginal customary law in Western Australia should be appropriately recognised. [pp 55–56] The Commission accepts that there are jurisdictional limitations to recognition of customary law. For instance, there are some areas of law (such as the making of treaties and some aspects of family law) that are outside the legislative domain of the Western Australian Parliament. [pp 56–57] The Commission also accepts that recognition of customary law must work within the existing framework of the Western Australian legal system. [p 64] Because of the difficulty of precisely defining what constitutes Aboriginal customary law and the varying content and practice of Aboriginal customary law in Western Australia, the Commission rejects any attempt to comprehensively codify Aboriginal customary law. [p 62]

Forms of recognition

The Commission has considered many different forms of recognition of Aboriginal customary law; among them constitutional recognition, administrative recognition, judicial recognition and statutory recognition. Each of these forms of recognition has advantages and disadvantages. For example, administrative recognition has the advantage of being flexible and therefore being able to adapt to changing circumstances; however, it lacks the transparency and consistency in application of statutory recognition. [pp 62–64] At the same time, statutory recognition

has the potential to disempower Aboriginal people by removing, in some circumstances, Aboriginal autonomy over the content, application and interpretation of Aboriginal customary law. [p 62]

Support for 'functional recognition'

The Commission has therefore expressed its support for the ALRC's approach of 'functional recognition'; that is, recognition of Aboriginal customary law for particular purposes in defined areas of law. This approach allows for a variety of methods of recognition (legislative, judicial, administrative and constitutional) resulting in proposals for recognition of Aboriginal customary law that fall broadly into two categories: affirmative and reconciliatory. [p 64]

Affirmative recognition

In the affirmative category, the objectives of the Commission's proposals are the empowerment of Aboriginal people, the reduction of Indigenous disadvantage, and the resolution of problems and injustice caused by the non-recognition of Aboriginal customary law in the Western Australian legal system. This would be achieved by such changes as:

- the introduction of statutory provisions and guidelines requiring courts and government agencies to take account of Aboriginal customary law in the exercise of their discretions where circumstances require;
- the adoption of a whole-of-government approach to service delivery for Indigenous Western Australians;
- the introduction of models of self-governance for Aboriginal communities;
- the functional recognition of traditional Aboriginal marriage; and
- the empowerment of Aboriginal Elders and other respected community members to play an active role in the administration of justice.

Reconciliatory recognition

In the reconciliatory category, the objectives of the Commission's proposals are the promotion of reconciliation between Indigenous and non-Indigenous Western Australians and of pride in Aboriginal cultural heritage and identity. This would primarily be encouraged by the amendment of the Western Australian Constitution to, among other things, acknowledge the unique status of Aboriginal peoples as the descendants of the original inhabitants of Western Australia and as the original custodians of the land. [Proposal 4, pp 57–60] The Commission considers constitutional change to be vital in the achievement of meaningful recognition of Aboriginal customary law and culture – a belief supported by the many Aboriginal respondents consulted for this reference.

The proposals for affirmative and reconciliatory recognition of Aboriginal law and culture contained in the Commission's Discussion Paper are more than simply symbolic gestures. These proposals are the first step towards the institution of meaningful recognition of Aboriginal law and culture in Western Australia and, it is hoped, towards a more harmonious and respectful relationship between its Indigenous and non-Indigenous peoples. [p 64]

Aboriginal Customary Law in the International Context

In framing its proposals for recognition of Aboriginal customary law the Commission is required by its Terms of Reference to have regard to relevant Commonwealth legislation and to Australia's international obligations. The rights of indigenous peoples or ethnic minorities are recognised in a number of international instruments that have been ratified by Australia. These include the *International Covenant on Civil and Political Rights,* the *International Covenant on Economic, Social and Cultural Rights, the Convention Concerning Indigenous and Tribal Persons in Independent Countries* and the *International Convention on the Elimination of All Forms of Racial Discrimination.* [pp 69–70]

In response to growing international concern during the past two decades about the marginalisation of the world's indigenous peoples, the United Nations has established several mechanisms dedicated to indigenous issues and is working

The Commission has already voiced its opinion that Aboriginal customary laws and culture should be appropriately recognised in Western Australia and that such recognition could take many forms including constitutional, administrative, legislative and judicial recognition. In view of the potential conflict described above, the Commission has taken, as its threshold test for recognition, the consistency of relevant Aboriginal customary laws or practices with international human rights standards. [Proposal 5, p 76] The Commission also recognises that international human rights standards and the decisions of international treaty bodies provide important benchmarks against which the protection and promotion of the rights of Indigenous peoples in Western Australia can be measured.

Aboriginal Customary Law and the Criminal Justice System

Judicial recognition of Aboriginal customary law in the Western Australian criminal justice system has generally focused on recognition of physical traditional punishments during sentencing proceedings. The acknowledgment of Aboriginal customary law in the criminal justice system has been dependent upon the views and awareness of individual judicial officers and others, such as lawyers and police officers, who work within the system. Many of the Commission's proposals in Part V of the Discussion Paper aim to achieve more consistent recognition of Aboriginal customary law as well as encouraging customary law to be understood in its broadest sense.

Any discussion about Aboriginal people and the criminal justice system cannot and should not ignore the issue of over-representation of Aboriginal people within the system. Many of the proposals aim to reduce the level of over-representation of Aboriginal people in the criminal justice system. A significant reduction in the rate of imprisonment of Aboriginal people is required not only because it is necessary for the welfare and aspirations of Aboriginal people but also because the 'mass incarceration' of Aboriginal people in this state is 'destructive of Aboriginal law and culture'.

The Commission has formed the view that Aboriginal customary law processes may assist in solving law and order issues in Aboriginal communities. In particular, the Commission has aimed to enhance the cultural authority of Elders by providing a role for Elders in the criminal justice system. [p 83]

Traditional Aboriginal law and punishment

The Commission has considered forms of 'criminal law' under Aboriginal customary law and compared these, where possible, to Western Australian criminal law concepts. After considering the foundation of and concept of responsibility under traditional Aboriginal law, traditional offences and punishments, and traditional dispute resolution methods the Commission found that there are three main areas of conflict between Aboriginal customary law and the Western Australian criminal justice system. [pp 84–91]

- An Aboriginal person who inflicts traditional physical punishments under Aboriginal customary law may commit an offence against Australian law.
- An Aboriginal person who violates both Aboriginal customary law and Australian law may be liable to punishment under both laws and therefore suffer 'double punishment'.
- There are significant differences between traditional Aboriginal dispute resolution methods and the Australian criminal justice system. For example, family and communities are directly involved under Aboriginal customary law and decision making is collectively based. As a result of these differences Aboriginal people often feel alienated from the criminal justice system. [pp 92–93]

Although many aspects of the practice of traditional Aboriginal law have changed over time, the Commission's consultations revealed that many Aboriginal people in Western Australia remain subject to Aboriginal customary law offences and punishments.

Many Aboriginal communities consulted by the Commission stressed the importance of Elders and some communities referred to the breakdown of the traditional role of Elders. A number of the Commission's proposals aim to assist dispute resolution in Aboriginal communities by creating the means by which the cultural authority of Elders can be recognised and respected. At the same time the Commission is of the view that the exact role of Elders is a matter best determined by the relevant Aboriginal community. Therefore the Commission has formulated proposals with the aim of supporting the authority of Elders without imposing unnecessary restrictions upon the manner in which Elders may resolve disputes in their communities. Where appropriate the Commission has proposed changes to legislation, practices and procedures within the criminal justice system in order that aspects of Aboriginal customary law can be accommodated within the system to assist Aboriginal people to obtain the full protection of (and avoid discrimination and disadvantage within) the criminal justice system. [p 93]

Aboriginal people and the criminal justice system

Historically, Aboriginal people have been discriminated against in the criminal justice system. Currently, Western Australia has the highest rate in the nation of Aboriginal imprisonment (in proportion to non-Aboriginal imprisonment). Although only constituting about three per cent of the state's population, Aboriginal people make up approximately 40 per cent of the adult prison population and between 70 and 80 per cent of juveniles in Western Australian detention centres. Despite various inquiries and reports (since the Royal Commission into Aboriginal Deaths in Custody) addressing the over-representation of Aboriginal people in the criminal justice system, there has been little improvement. The Commission is of the view that meaningful recognition of Aboriginal customary law must be accompanied by a resolute determination to substantially reduce the level of over-representation of Aboriginal people in the criminal justice system in this state. [pp 94–95]

In broad terms, the factors which contribute to the over-representation of Aboriginal people in the criminal justice system can be classified as: offending behaviour; underlying factors such as social and economic disadvantage; and issues within the criminal justice system itself. While offending rates are part of the reason for Aboriginal over-representation, the Commission is of the view that structural racism or bias must account in part for the disproportionate rate of Aboriginal arrests, detention and imprisonment. As explained by the Inspector of Custodial Services, structural racism or bias refers to the discriminatory impact of laws, policies and practices rather than individual racist attitudes. The effect of structural bias is evidenced by the higher disproportionate rate of imprisonment and detention in Western Australia compared to other states and territories. Further, the fact that the level of Aboriginal involvement increases at each progressive stage of the criminal justice system supports the conclusion that

structural bias exists. Similarly, the general under-representation of Aboriginal juveniles in diversionary options contributes to the disproportionate rate of Aboriginal detention. [pp 95–99]

Alienation from the criminal justice system

Aboriginal people feel alienated from the criminal justice system. This sense of alienation stems from the negative history of relations between Aboriginal people and criminal justice agencies; the language, cultural and communication barriers experienced by Aboriginal people; and the differences between traditional Aboriginal dispute resolution methods and Western criminal justice processes.

The Commission is of the view that the general sense of alienation felt by Aboriginal people within the system can be improved by the establishment of Aboriginal courts, the development of more effective cultural awareness programs, and the greater involvement of Aboriginal people in justice issues. These matters are the subject of separate discussion below. [pp 99–100]

Mandatory sentencing

After considering the various criticisms of the mandatory sentencing laws for home burglary in Western Australia—in particular, the discriminatory impact of the laws on Aboriginal children and the ineffectiveness of the laws in reducing the level of home burglary—the Commission has proposed that the mandatory sentencing laws should be repealed. [Proposal 6, pp 100–101]

Legal representation

Because of the alienation felt by Aboriginal people from the criminal justice system adequate legal representation is essential. During the Commission's consultations many Aboriginal people identified problems with legal representation, especially the inadequate funding of the Aboriginal Legal Service. The Commission supports a suggestion for the development of protocols for lawyers who work with Aboriginal people. The Law Society of Western Australia is currently in the process of adapting the protocols which were established by the Law of Society of the Northern Territory in 2004. When completed, these protocols could be used by the Aboriginal Legal Service, the Legal Aid Commission, private practitioners, and lawyers working for the Director of Public Prosecutions.

In addition, the Commission considers that lawyers who regularly work with Aboriginal people should undertake cultural awareness training, preferably presented by Aboriginal people. The Commission is of the view that with adequate resourcing the Law Society of Western Australia would be the most appropriate agency to coordinate cultural awareness training programs for legal practitioners and has proposed that the Western Australian government provide adequate resources for the development of such programs. [Proposal 7, p 103]

Cultural awareness training

Aboriginal people consulted by the Commission expressed the view that all people working for criminal justice agencies should be provided with more effective

cultural awareness training. Proposals for cultural awareness for judicial officers, police and lawyers are considered separately. The Commission proposed that all employees of the Department of Justice who work directly with Aboriginal people (such as community corrections officers, prison officers and court staff) be required to undertake cultural awareness training. In addition, such training should be made available to volunteer workers. In its proposal the Commission has emphasised that cultural awareness training should include programs which are specific to local communities and are presented by Aboriginal people. [Proposal 8, pp 103–104]

Lack of involvement of Aboriginal people in the administration of criminal justice

The Commission's consultations with Aboriginal people supported the increased employment of Aboriginal people by criminal justice agencies. The Commission recognises that the negative relationship between criminal justice agencies and Aboriginal people creates a barrier to employment. The establishment of Aboriginal community justice mechanisms will provide a method for increasing the involvement of Aboriginal people in the criminal justice system without requiring direct employment by justice agencies. The Commission has proposed the establishment of community justice groups (see below). Members of community

Aboriginal community justice mechanisms

The Commission's consultations with Aboriginal people revealed a strong desire for greater participation by Aboriginal people in the operation of the criminal justice system and recognition of traditional forms of dispute resolution. In addition, there was extensive support for Aboriginal community justice mechanisms. The Commission uses the term 'Aboriginal community justice mechanism' to refer to any structure which has been established by an Aboriginal community or its members, with or without government assistance, to deal with social and criminal justice issues affecting Aboriginal people. In this context the Commission has emphasised that community justice mechanisms should be community-owned rather than merely community-based.

In Western Australia there are existing examples of Aboriginal community justice mechanisms, such as night patrols. However, current developments in this area are informal and dependent upon specific individuals and government policy at the time. Further, because there is no formal recognition of their status, there is no provision for Aboriginal community justice mechanisms to operate within the criminal justice system. The Commission has examined in detail other inquiries and reports that have considered Aboriginal community justice mechanisms; the Western Australian government's policies and initiatives with respect to Aboriginal people and the criminal justice system; and existing Aboriginal community justice mechanisms throughout Australia. [pp 109–115, 127–131]

The Western Australian Aboriginal community by-law scheme

The Commission has comprehensively analysed the Western Australian Aboriginal community by-law scheme under the *Aboriginal Communities Act 1979* (WA). The scheme, which commenced in the late 1970s, aimed to assist certain Aboriginal communities to control and manage behaviour on their community lands. After considering the arguments in support of and against the by-law scheme tD0.0011 Tc0.rmn6Abo2Cs8 cs 1 0.119nticthe W1711 o.

matters the Commission has proposed amendments, where appropriate, to ensure that the general law is applicable to the circumstances in discrete Aboriginal communities (that is, the types of communities that are now subject to by-laws).

Disorderly behaviour

The offence of disorderly conduct under s 74A of the *Criminal Code* (WA) is only applicable to conduct that occurs in a 'public place'. The Commission has proposed that the definition of a public place in s 1 of the *Criminal Code* be amended to include a discrete Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' (other than an area of that community which is used for private residential purposes). [Proposal 12, p 121]

Traffic offences

For offences that regulate the manner of driving (such as careless driving, dangerous driving and drink driving offences) the alleged driving must, pursuant to s 73 of the *Road Traffic Act*, occur on a road or in any place where members of the public are permitted to have access. Courts have interpreted this on a case-by-case basis depending upon the particular circumstances. In order to ensure that the definition of driving is applicable to Aboriginal communities, the Commission has proposed that s 73 of the *Road Traffic Act* be amended to include lands of an Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. [Proposal 13, p 122]

Trespass

While the offence of trespass under s 70A of the *Criminal Code* would be relevant to 'outsiders' who enter an Aboriginal community without permission, it is not necessarily applicable to a member of the community who may have been asked to leave. Under the *Aboriginal Communities Act* communities have

law scheme does not appear to have been effective at preventing alcohol abuse in Aboriginal communities. Bearing in mind the problems identified with the by-law scheme generally, the Commission is of the view that a complementary model which encompasses both community and statutory control is the preferable way to deal with alcohol restrictions in Aboriginal communities. After considering strategies in the Northern Territory and Queensland, as well as a recent review of the *Liquor Licensing Act 1988* (WA), the Commission has proposed that the prohibition or restriction of alcohol use in discrete Aboriginal communities should be included in regulations enacted under the *Liquor Licensing Act*. Under the proposal the Director-General of the Department of Indigenous Affairs has the power to apply for regulations on behalf of a discrete Aboriginal community which has been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. The proposal states that an application can only be made if it is supported by a majority of the community. Therefore, any use of alcohol contrary to the regulations would constitute an offence. [Proposal 16, pp 125–126] Of course, Aboriginal communities will be able to develop their own strategies for dealing with alcohol problems. For example, a community justice group may decide as part of its community rules that specified areas of a community should be declared as a dry area.

The Commission recognises the serious implications of the illegal sale or supply

- Formal recognition within the criminal justice system to enable Aboriginal

- the rules in relation to the membership of the group provide for equal representation of all relevant family, social or skin groups in the community and equal representation of men and women; and
- there has been adequate consultation with the members of the community and a majority of the community members support the establishment of a community justice group.

These criteria are considered necessary in order to ensure that Aboriginal women are protected and have a voice in community justice processes and to discourage one dominant group within a community from determining the outcome in any particular case.

The Commission has proposed that an Aboriginal Justice Advisory Council should

participate in the supervision of offenders who are subject to court orders. The Commission also envisages that community justice groups could play a pivotal role in the establishment of Aboriginal courts and provide a suitable panel from which Elders could be chosen to sit with the magistrate. [p 138]

Other matters

The Commission considers it is vital that community justice groups are accountable to the community that they serve but the method by which a particular group is held accountable should be determined by the community itself.

Members of a community justice group should be reimbursed where they provide services (such as patrols), operate diversionary programs, supervise offenders and provide information to courts. Further, members should be indemnified for any civil liability that arises from their roles within the criminal justice system. [p 139]

The potential benefits of the Commission's proposal for community justice groups [Proposal 18, p 140] are that it will:

- assist Aboriginal people to develop their own processes for dealing with justice issues within their community;
- recognise aspects of Aboriginal customary law in a practical way with as little interference as possible by the Australian legal system;
- enhance the cultural authority of Elders;
- reduce offending;
- improve the potential for Aboriginal people to be diverted away from the criminal justice system;
- reduce the rate of Aboriginal imprisonment and detention;
- provide more effective sentencing and bail options for courts;
- enable Aboriginal people to be actively involved in the criminal justice system;
- assist in improving the level of understanding of the criminal justice system in Aboriginal communities; and

Because court-like structures or processes do not appear to be part of Aboriginal customary law, the Commission does not support the establishment of Aboriginal-controlled community courts. Although indigenous-controlled courts do operate in other countries, the Commission agrees with the view of the ALRC that it is preferable to establish structures which do not involve the exercise of western judicial power. Any attempt to create an Aboriginal-controlled court which is

Jurisdiction

Aboriginal courts in Australia operate at a magistrates court level and in some jurisdictions they operate for both adults and children. The Commission is aware that there are plans for an Aboriginal court to commence at the District Court level in Queensland. The Commission sees no reason why in time Aboriginal courts in Western Australia could not operate at the superior court level.

Enabling legislation and establishment

Some jurisdictions, having experienced government support for Aboriginal courts, have enacted legislation to cover the operation of their court. In other places, it appears that Aboriginal courts have developed from the industry of individual magistrates. While this approach has the advantage of flexibility it leaves the entire scheme vulnerable to changes of judicial officer.

Aboriginal court workers

Most jurisdictions have an Aboriginal court worker or Aboriginal justice officer employed by the Aboriginal court, providing an effective link between the general criminal justice system and the Aboriginal community.

Aboriginal Elders

Elders and other respected persons play an important role in all Aboriginal courts. Some speak directly to the offenders, while in other courts Elders provide advice to the magistrate. The presence of Elders or respected persons in court can be effective in imparting a positive and constructive notion of shame and Elders provide valuable information to the judicial officer about the offender and relevant cultural matters.

Because an Elder may have kin and family ties with the offender there may be a potential conflict of interest. The fact that the ultimate sentencing authority is retained by the magistrate provides some protection in these circumstances. It is important to ensure that Aboriginal communities are directly involved in the selection of Elders to sit with the magistrate. The Commission believes that members of a community justice group may provide a suitable panel from which to select Elders.

Effectiveness

While it is still too early to judge the effectiveness of Aboriginal courts, especially in terms of repeat offending, it appears that these courts have achieved significant gains in terms of justice outcomes for Aboriginal people. In particular, Aboriginal courts have reportedly attained substantial improvements in court attendance rates.

Although some people may assume that Aboriginal courts are a ‘soft option’, the Commission is of the view that this opinion is misguided. Aboriginal courts operate within the same justice system and are subject to the same sentencing principles as any other court. Both the defence and the prosecution are entitled to appeal against any perceived sentencing errors. What Aboriginal courts appear

to be able to achieve, through the active involvement of Aboriginal Elders, is a more meaningful court experience. Offenders are more likely to comply with the order of the court and change their behaviour. Aboriginal communities are strengthened by the reinforcement of the traditional authority of Elders.

The Commission's view

The Commission is of the view that Aboriginal courts are not based upon Aboriginal customary law and the proposal for community justice groups is the most appropriate way to recognise Aboriginal customary law justice processes. Nevertheless, the Commission considers that Aboriginal courts have the potential to make the criminal justice system more responsive to the needs of Aboriginal people and assist in reducing the number of Aboriginal people in custody. [p 156]

While the efforts of individual magistrates and others in developing Aboriginal courts in Western Australia is commended, the Commission believes that there should be a formal government policy to establish Aboriginal courts in order to ensure long-term sustainability. The Commission has proposed the development of pilot Aboriginal courts in both the metropolitan area and specific regional areas (subject to consultation with the relevant Aboriginal communities). Aboriginal courts should operate for both adults and children. At this stage legislative change is not required as the *Magistrates Court Act 2004* (WA), *Sentencing Act 1995* (WA) and

However, during the Commission's consultations there was no indication of any support for separate rules of criminal responsibility for Aboriginal people. It was pointed out that 'two laws may be divisive'. The Commission also emphasises that a customary law defence (applicable to all or even a wide range of offences under Australian law) would not provide adequate protection for other Australians, including Aboriginal people. In particular, such a defence could relieve criminal responsibility for violent conduct (including traditional physical punishments) regardless of the individual circumstances. Therefore the Commission does not support a general defence of Aboriginal customary law. [pp 159–160]

Partial defence to homicide

In Western Australia any person convicted of wilful murder or murder must be sentenced to life imprisonment. If an Aboriginal person was convicted of wilful murder or murder as a consequence of complying with Aboriginal customary law there is little scope for taking into account any relevant customary law issues. One option is to provide for a partial customary law defence (reducing an offence of wilful murder or murder to manslaughter). The alternative is to remove the mandatory requirement of life imprisonment for wilful murder and murder. This would allow courts to take into account any mitigatory circumstances (including Aboriginal customary law issues) when determining the appropriate sentence. Because the Commission is concurrently working on a dedicated reference dealing with homicide, it has invited submissions as to whether there should be a partial defence of Aboriginal customary law applicable to offences of wilful murder and murder or whether the penalty for these offences should be changed to a maximum of life imprisonment. [Invitation to Submit 4, p 161]

Specific defences

Although the Commission does not support a general customary law defence, there are circumstances where a specific defence is appropriate. A specific defence may be justifiable if it does not significantly interfere with the rights of other people or result in inadequate protection of other members of society. The Commission has identified two areas where a specific defence may be appropriate:

- In the area of customary harvesting, the exemption of Aboriginal people from the application of general laws dealing with the regulation of harvesting flora, fauna or fish is entirely proper.
- A customary law defence for the offence of trespass under the proposed 'Aboriginal Communities and Community Justice Groups Act' may be appropriate and is the subject of Invitation to Submit 3. [pp 161–162]

Intention

When a judicial officer or jury is required to determine the intention of an accused at the time of an alleged offence, the judicial officer or jury will generally apply their own understanding of human behaviour. In the case of Aboriginal people, wrong assumptions or inferences may be made if there is no evidence before the court about their culture, customs and beliefs. The main issue is ensuring that the rules of evidence do not prevent courts from hearing about

Aboriginal customary law where it is necessary to determine the intention of the accused at the relevant time. In Part IX of the Discussion Paper the Commission makes proposals to eliminate some of the impediments to the admissibility of evidence of Aboriginal customary law. [p 162]

Consent

Aboriginal people who inflict physical traditional punishment may be guilty of an offence under Western Australian law (such as assault, assault occasioning bodily harm, unlawful wounding, grievous bodily harm or homicide). For violent offences that require proof of an assault the consent of the victim may mean that the accused is not held criminally responsible. For other violent offences the consent of the victim is irrelevant. The distinction between offences in which lack of consent is an element and those in which it is not, has significant implications for Aboriginal people who inflict physical traditional punishments. The distinction also has the potential to affect any Western Australian.

Whether a person can 'legally consent' to violence and, if so, to what level of violence or harm, is a complex question and subject to conflicting opinions. The Commission considers, as background to this issue, the common law position in relation to consent to violence and then examines the situation under the Western Australian *Criminal Code.* [pp 163–167] Under the *Criminal Code* consent is relevant to an offence of assault occasioning bodily harm but not to unlawful wounding. Bodily harm requires an injury that interferes with health and comfort. Unlawful wounding has been interpreted as requiring the breaking of the skin and penetration below the outer layer of the skin. [pp 164–166]

The Commission does not consider that the distinction between unlawful wounding and assault occasioning bodily harm in terms of consent is valid primarily because:

- both offences have the same maximum penalty and are therefore regarded by Parliament to be as serious as one another;
- the facts of any particular case will determine whether a specific example of unlawful wounding is more or less serious than an example of assault occasioning bodily harm;
- the concept of unlawful wounding is difficult because it potentially covers a wide range of harm; and
- it is apparent Parliament considers that consent to unlawful wounding may be appropriate in some situations but this is not reflected in the current criminal law of Western Australia. A person who pierces an ear or other body part of another with their consent would, under the present law, be guilty of unlawful wounding. On the other hand, Parliament's acceptance of ear and body piecing is evidenced by the *Health (Skin Penetration Procedure) Regulations 1998* (WA) which regulates skin penetration procedures. [p 166]

Traditional Aboriginal punishments

The Commission recognises that traditional physical punishments, including spearing, are important in many Aboriginal communities. In some circumstances

there is no alternative to spearing under Aboriginal customary law. Depending upon the nature of the traditional punishment an offence of common assault, assault occasioning bodily harm, unlawful wounding or grievous bodily harm may be committed. Some traditional punishments may even cause death. In the case of spearing, whether the injury amounts to unlawful wounding or grievous bodily harm will depend upon where the spear penetrates, how deep the wound is, and how many times the person was speared.

The distinction between assault occasioning bodily harm and unlawful wounding

imprisonment may be considered cruel and inhuman. The question whether physical traditional punishments will breach international human rights standards will depend upon the individual circumstances. [p 170]

Options for reform

The Commission does not support the blanket legalisation of all physical punishments. To do so regardless of the individual circumstances (such as whether the person being punished consents, the age of the person being punished and the nature of the punishment) would potentially breach international human rights standards. Due to the difficult and complex issues involved some people may consider that it is preferable to do nothing. Any accommodation of physical punishment may be seen to encourage violence. But to ignore this issue fails to address the inconsistencies between the offences of assault occasioning bodily harm and unlawful wounding. These inconsistencies not only affect Aboriginal people but all Western Australians.

In the Commission's view the three possible options for legislative reform are:

- To amend the

Ignorance of the law

The Commission discusses the application of Aboriginal customary law to this defence. [pp 176–178] In summary, the defence may apply where an accused believes that they are entitled to do something with respect to property under Aboriginal customary law and also believes that Australian law recognises that right.

The defence of honest claim of right is particularly relevant to offences relating to customary harvesting. An Aboriginal person may engage in customary harvesting believing that Australian law allows them to do so. In cases where the relevant Australian law prohibits a particular activity for all people, then it will be extremely difficult for Aboriginal people to rely on the defence. However, in other cases, where the law allows an exemption for Aboriginal people, the legal position is not so clear. For example, s 16 of the *Wildlife Conservation Act 1950* (WA) states that it is an offence to take protected fauna (from any land) without a licence. Aboriginal people are exempted from this provision in certain circumstances. From time-to-time this exemption is subject to change. The governor may declare that particular fauna is restricted, even to Aboriginal people. For an Aboriginal person who is unaware of this restriction, it is arguable that he or she may have a defence to a charge of taking fauna without a licence. The Commission explains how this defence might apply [p 178] but notes that successful reliance upon this defence could undermine the conservation objectives that underlie the restrictions imposed by the governor.

[See also Proposal 73, p 376]

Native title defence

While the defence of honest claim of right is based upon a mistaken belief that Australian law recognises customary harvesting rights, a native title defence claims that Australian law does recognise those rights. In practice, the strict evidential requirements to establish native title have proved difficult to meet. Further, proof of native title does not necessarily mean that a native title holder is immune from all legislative provisions that regulate fishing and the taking of flora and fauna. [pp 178–179] The Commission discusses strengthening of the legislative recognition of customary harvesting rights in Part VIII of the Discussion

The defence of duress in Western Australia is more restrictive than most other Australian jurisdictions. [p 180]

The Commission recognises that some Aboriginal people may engage in conduct that is against Australian law (such as spearing) because they fear that if they do not they may be subject to traditional punishment themselves. However, in these circumstances there may not necessarily be an actual threat. Instead the fear may arise because the person simply knows that if they do not comply with their obligations under Aboriginal customary law then punishment will follow. The Commission does not consider that it is appropriate to remove the requirement of an actual threat. To do so would allow people to be excused from criminal conduct merely because they feared that they would be harmed, even if this fear was unfounded.

On the other hand, the Commission is of the view that the requirements of the defence—namely, that there must be a threat of immediate death or grievous bodily harm and that the threat must be to harm the accused—are unduly restrictive. It would be rare for punishment to follow immediately after a breach of Aboriginal customary law had taken place. And in some cases an Aboriginal person may respond to threats to harm a member of their family. [pp 181–182]

The Commission has proposed that the defence of duress in Western Australia be amended in similar terms to the defence in the Australian Capital Territory

rights in relation to the discipline of children under Australian law. [Proposal 22, p 189] Recognising the negative history between the Department of Community Development and many Aboriginal people, the Commission has invited submissions in relation to the most appropriate agency to coordinate this education proposal. [Invitation to Submit 7, p 189]

Bail

When a person is charged with a criminal offence under Australian law a decision

The requirement for a responsible person for juveniles

In all cases, regardless of the nature of the alleged offence, a child under the age of 17 years who is required to attend court on bail can only be released if a responsible person also signs an undertaking. This requirement causes problems for many Aboriginal children who may not be able to find a responsible person because of socio-economic disadvantage such as lack of transport. Aboriginal children from regional and remote locations who are not released on bail are further disadvantaged because they must be detained in Perth. Of course, many adults are also disadvantaged when bail is not granted in regional areas. The Commission has proposed that all accused (both children and adults) should be entitled to apply for bail by telephone to a magistrate if they are dissatisfied with a bail decision made by a police officer, justice of the peace or authorised community services officer. This application can only be made if the accused would not otherwise be taken before a court by 4.00 pm the following day. [Proposal 25, p 194]

The Department of Justice operates a supervised bail program for those juveniles who are unable to locate a responsible person. At the beginning of 2005 there was only one supervised bail program in operation in regional areas (Yandeyarra). The Commission has proposed that the Department of Justice continue to develop, in partnership with Aboriginal communities non-custodial bail facilities. [Proposal 26, p 195]

Personal circumstances of the accused

The *Bail Act* provides that when determining if an accused should be released on bail the 'character, previous convictions, antecedents, associations, home environment, background, place of residence, and financial position' must be considered. These criteria (many of which focus on western concepts) have the potential to disadvantage Aboriginal people applying for bail. Many Aboriginal people experience high rates of homelessness and overcrowding in public housing. They also have a higher incidence of unemployment than non-Aboriginal people. For Aboriginal people assessment of their family, kin and community ties would be more appropriate. The Commission notes that in some other Australian jurisdictions bail legislation refers to aspects of Aboriginal culture.

In Western Australia the *Bail Act* provides that an authorised officer or judicial officer who is deciding whether an accused will be granted bail is to consider any relevant matter. Therefore, Aboriginal customary law or other cultural issues can properly be taken into account. Nevertheless, in order to promote consistency and ensure that authorised officers and judicial officers are directed to consider Aboriginal customary law and cultural matters, the Commission has proposed that the *Bail Act* be amended. In the case of an accused who is an Aboriginal person, an authorised officer or judicial officer will be required to consider any cultural or Aboriginal customary law issues that are relevant to bail. The Commission has not limited this proposal to the personal circumstances of the accused because Aboriginal customary law may be relevant in other ways. It may provide a reason why an accused previously failed to attend court. Aboriginal customary law processes may impact upon the choice of appropriate bail

conditions. The Commission has also proposed that an authorised officer or judicial officer must take into account any submissions made by a member of a community justice group from the accused's community.

Aboriginality are not overlooked, the Commission has proposed that the *Sentencing Act* be amended to include as a relevant sentencing factor the cultural background of the offender. [Proposal 29, p 208]

Imprisonment as a sentence of last resort

Despite the practice of sentencing courts taking into account relevant factors associated with Aboriginality and the numerous reports and inquiries that have recommended changes to the criminal justice system, the rate of imprisonment of Aboriginal people continues to rise and remains disproportionate to the rate of imprisonment of non-Aboriginal people. In this regard Western Australia has the worst record in Australia. As discussed above, it is widely acknowledged that part of reason for the high levels of over-representation of Aboriginal people in custody is the cumulative effect of discriminatory practices within the criminal justice system.

Legislative provisions in Western Australia which require that imprisonment should only be used as a sanction of last resort have not yet achieved any significant reduction in the rate of Aboriginal imprisonment. While there are specific proposals throughout the Discussion Paper aimed at reducing the level of over-representation of Aboriginal people in the criminal justice system, the Commission acknowledges that these reforms will take time to implement and even longer to have any significant impact on imprisonment rates. In the meantime, it is unacceptable for Aboriginal people to continue to be imprisoned at such excessive rates.

The Commission has considered the situation in Canada where indigenous peoples are also subject to high imprisonment rates. In 1996 the Canadian Criminal Code was amended to provide that all available sanctions other than imprisonment should be considered for all offenders, with particular reference to the circumstances of indigenous offenders. This provision was designed to reduce the level of indigenous imprisonment in Canada and recognise that the circumstances of indigenous offenders are different from those of non-indigenous offenders.

The Commission considered arguments in favour of and against the introduction of a similar provision in Western Australia. [pp 210–212] It concluded that the lack of acknowledgement of the discriminatory effect of practices within the criminal justice system upon Aboriginal people justifies the introduction of such a provision in Western Australia. It is proposed that the *Sentencing Act* and the *Young Offenders Act* provide that when a court is considering whether a term of imprisonment is appropriate it is to have regard to the particular circumstances of Aboriginal people. [Proposal 30, p 212] The Commission emphasised that this proposal does not mean that every Aboriginal offender will automatically receive a reduced sentence. General sentencing principles will still apply and where an offence is particularly serious imprisonment would be required. It would also be necessary in any particular case for the sentencing court to consider the personal circumstances of the offender and whether that offender's history indicates that he or she may have suffered the negative effects of a system that generally discriminates against Aboriginal people.

Aboriginal customary law and sentencing

There are two main ways in which courts have taken Aboriginal customary law into account during sentencing proceedings. The first and most common way is in relation to traditional punishment. The second is where Aboriginal customary law provides a reason or explanation for the offence.

Traditional punishment as mitigation

From an examination of how Australian courts have taken traditional punishment into account as mitigation, the Commission has identified what it considers to be the most important principles and issues in order to determine whether reform is required.

- Courts cannot condone or sanction the infliction of traditional punishment that may be unlawful under Australian law.
- Cases where traditional punishment has not yet taken place are difficult

argued that sexual offences against children are justified to a degree because of the practice of promised brides. The Commission concluded that it is unlikely any such arguments would succeed in Western Australia because, unlike the Northern Territory Criminal Code, the *Criminal Code* (WA) has never recognised traditional marriage as a defence to having sexual relations with a child under the age of 16 years. Further, the Commission has no evidence that the practice of promised brides is common in this state.

The Commission strongly condemns any suggestion that family violence or sexual abuse against Aboriginal women and children is justified under Aboriginal customary law. However, there may be situations where Aboriginal women are liable to traditional physical punishments under customary law. The Commission recognises the potential for offenders to argue that violent behaviour against women is acceptable under customary law. However, this does not justify a ban on courts considering Aboriginal customary law issues. Due to the discretionary nature of sentencing, courts are able to balance Aboriginal customary law and international human rights that require the protection of women and children.

[pp 218–219]

The Commission's view

Although there is an abundance of judicial authority to support the consideration of Aboriginal customary law during sentencing proceedings, the Commission has found that in Western Australia there is no consistent approach. Further, reform is necessary to ensure that Aboriginal customary law is viewed more broadly rather than judicial recognition being primarily limited to traditional physical punishments. The Commission also suggested that the recognition of Aboriginal customary law in sentencing should come from Parliament as well as the judiciary. It is proposed that the *Sentencing Act* and the *Young Offenders Act* provide that when sentencing an Aboriginal offender the court must consider:

- any aspect of Aboriginal customary law that is relevant to the offence;

References to false claims being made by Aboriginal people or their lawyers that an offender had been or would be subject to traditional punishment or that behaviour was permitted under Aboriginal customary law was a recurrent theme of the Commission's consultations. Therefore, the Commission understands the importance of ensuring that false claims about Aboriginal customary law are discouraged.

In practice, information presented to sentencing courts about Aboriginal customary law has been varied. Courts have heard expert evidence from Elders; oral evidence from Aboriginal people; written statements from Aboriginal people; and submissions by defence counsel which have sometimes been accepted or verified by the prosecution. Courts throughout Australia have stressed the importance of ensuring reliable evidence about Aboriginal customary law and have established important principles in this area. Nevertheless, in a number of cases in Western Australia information about customary law has only been given through the submissions of defence counsel without any evidence (including evidence of Aboriginal people) being presented.

The Commission is of the view that it is inappropriate for a court sentencing an Aboriginal offender to be informed about relevant customary law issues solely from the submissions of defence lawyers. This is not a criticism of defence lawyers. Defence lawyers have a professional obligation to their clients and there may be a conflict between the interests of the offender and the views of the relevant Aboriginal community in relation to the customary law issues. Defence lawyers may also be limited by lack of resources to properly fund an investigation into customary law issues.

The legislative provisions in the Northern Territory and Queensland that deal with the reception of information about Aboriginal customary law for sentencing purposes have been examined. The Commission has proposed that there should be a legislative provision in Western Australia to promote more reliable and balanced methods of presenting evidence about customary law to a sentencing court. It is proposed that a sentencing court must have regard to any submissions made by a representative of a community justice group or by an Elder or respected member of the Aboriginal community of the offender or the victim. Submissions may be made orally or in writing on the application of the accused, the prosecution or a community justice group. The sentencing court is to allow the other party a reasonable opportunity to respond to the submissions if requested. [Proposal 32, pp 221–224]

Sentencing options

Diversionary schemes

In the criminal justice system there are two types of diversionary options: those that divert offenders away from the criminal justice system and those that divert offenders away from custody. The Commission examined the existing diversionary options available to courts in Western Australia for Aboriginal offenders (both adults and juveniles). [pp 224–225] Although the diversionary option of a referral to a juvenile justice team has been recently improved (by the provision

for Aboriginal Elders and others to become more directly involved in the team process), the Commission concluded that diversionary options managed or controlled by Aboriginal communities should be encouraged. This will allow customary law processes, as well as other programs or services established within Aboriginal communities, to be used in the rehabilitation of young offenders.

The legislative provisions for juveniles in Western Australia are currently broad enough to allow a sentencing court to refer the young person to an Aboriginal diversionary scheme (such as one that might be established by a community justice group). The Commission suggests that pilot diversionary programs for Aboriginal offenders should be monitored and evaluated to determine whether any legislative changes are required in the long-term.

of the community (or community justice group). There may be some instances where an Aboriginal offender may not be welcome back to their community for a period of time and there may be some communities who are not willing to supervise some offenders.

It is also important that courts are flexible and do not impose unnecessary restrictions upon the manner in which an Aboriginal community or community justice group may decide to supervise or support an offender. In other words, a court should not impose, as part of its order, that a particular community process or punishment should take place. That decision should be left to the Aboriginal community. Of course, the court can retain an overall monitoring role by requiring that the offender re-appear in court to determine the final outcome.

Under the Commission's proposals for sentencing, all courts will be required to consider the cultural background of an Aboriginal offender; any relevant customary law issues; and the submissions from a representative of a community justice group or other representative from the offender's community. The previously discussed proposal for pilot Aboriginal courts will facilitate the practical implementation of these proposals because all parties involved in Aboriginal courts are generally more aware of the relevant issues. [p 230]

Practice and procedure

As mentioned above, the Commission is of the view that for the protection of all Australians, including Aboriginal Australians, Aboriginal people must be bound by the criminal law. Nonetheless, practices and procedures within the criminal justice system can be improved and altered to accommodate Aboriginal customary law and recognise that many Aboriginal people have difficulties understanding the criminal justice process.

Juries

The fundamental principle underlying a jury trial is the right of an accused to be judged by his or her peers. Aboriginal people are under-represented as jurors. The Commission has considered some of the reasons why Aboriginal people do not often sit as jurors. [p 231] To prevent an Aboriginal accused from having a trial by jury because the jury may not include any Aboriginal people would be discriminatory. An Aboriginal person must be allowed to exercise his or her right to a trial by jury. In circumstances where there may be prejudice an Aboriginal person could apply for a trial by a judge alone or a change in the venue of the trial. [p 232]

One important issue concerning the composition of a jury and Aboriginal customary law is gender-restricted evidence. Under Aboriginal customary law some matters can only be heard by women and some can only be heard by men. The current procedures that allow a party to object to a certain number of jurors are not sufficient to obtain a jury of one gender. The Commission has therefore proposed that where gender-restricted evidence is relevant to the case, the court may allow a jury to be comprised of one gender. [Proposal 34, p 232]

Fitness to plead

An accused may be unfit to stand trial or enter a plea to the charge because of mental incapacity, physical incapacity or language difficulties. Aboriginal people who face cultural, language and communication barriers may be unable to understand the nature of the proceedings and the consequences of a plea. The Commission examines the law in relation to fitness to plead and notes its concern about the repeal of s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). This provision operated as a protective measure for those Aboriginal people who may have had difficulties understanding criminal proceedings.

The relevant law is now contained in the *Criminal Procedure Act 2004* (WA). The Commission has found that this legislation is deficient because it hinges upon whether the accused is represented by a lawyer. In other words if the accused is legally represented the court will assume that there are no language or communication issues that may affect the accused's understanding. It is proposed that s 129 of the *Criminal Procedure Act* be amended to provide that a court must not accept a plea of guilty unless, having considered whether there are any language, cultural or communication difficulties, the court is satisfied that the accused understands the nature of the plea and its consequences. The benefit of this proposal is that it applies to all people. The previous provision under the *Aboriginal Affairs Planning Authority Act* was potentially offensive as it implied that only Aboriginal people lacked understanding of the criminal justice system. Anyone who does not fully understand English may have difficulties in

does not consider that it is appropriate to recommend that police officers should in any way facilitate the infliction of unlawful violent traditional punishment. [pp 236–238]

The decision to charge or prosecute an Aboriginal person for a criminal offence that occurred because the conduct giving rise to the offence was required

whether it would be more appropriate for the caution to be administered by a respected member of the young person's community or a member of a community justice group. [Proposal 37, p 241]

Because a caution does not require an admission of guilt or the consent of the young person, the Commission has expressed its concerns about the practice of police referring in court to previous cautions as part of the young person's history of offending. It is proposed that the *Young Offenders Act* be amended to provide that any previous cautions issued cannot be used in court against the young person. [Proposal 38, p 241]

Juvenile justice teams

Under the *Young Offenders Act* police may refer a young person to a juvenile justice team provided that the offence is not listed in either Schedules 1 or 2 of the Act. The young person must accept responsibility for the offence and consent to the referral. Although the Act suggests that first offenders should generally be referred to a juvenile justice team, the Commission proposes that the *Young Offenders Act* be amended to provide that a police officer must, unless there are exceptional circumstances, refer a young person to a juvenile justice team for a non-scheduled offence if the young person has not previously offended against the law. Exceptional circumstances in this context may include that the young person has committed a large number of offences at one time or that the circumstances of the offence are very serious. In determining whether a young person has previously offended against the law prior cautions cannot be taken into account. [Proposal 39, p 242] The Commission is also of the view that the categories of offences listed in Schedules 1 and 2 should be reviewed in order to enhance the availability of diversion to juvenile justice teams. In some cases the circumstances of the offence may be less serious than others and a referral to a juvenile justice team would be appropriate. [Proposal 40, p 242]

Even though the young person has to accept responsibility for the offence and consent before being referred to a juvenile justice team, the Commission does not believe that it is appropriate that such referrals can later be used in court against the young person. Acceptance of responsibility is not the same as proof of guilt. A young Aboriginal person may accept responsibility for an offence because they did not appreciate that there was a defence to the charge. Bearing in mind Aboriginal customary law notions of collective responsibility, a young Aboriginal person may accept responsibility merely because they were present when others committed the offence. Therefore, the Commission has proposed that previous referrals to a juvenile justice team cannot later be used in court against the young person unless it is for the purpose of deciding whether the young person should again be referred to a juvenile justice team. [Proposal 41, p 242]

Attending court without arrest

Instead of arresting a young person and taking the young person into custody police officers can choose to issue a notice to attend court. The Western Australia Police Service *COPs Manual* provides that a police officer may arrest a

young person for a scheduled offence if the offence is serious; if destruction of evidence is likely if the young person is not arrested; if it will prevent further offending; or if there is no other appropriate course of action. The Commission has proposed that the relevant criteria for arrest should be set out in legislation. [Proposal 42, p 243]

Diversion to a community justice group

The Commission strongly supports the development of Aboriginal-controlled diversionary programs and, in particular, programs or processes determined by a community justice group. It has proposed the establishment of a pilot diversionary scheme for young Aboriginal offenders that involves referral by the police to community justice groups. [Proposal 43, pp 243–244]

When an Aboriginal person engages in conduct that is unlawful under Australian law and the police are unaware of such conduct, then members of a community justice group as well as the parties involved can determine how to deal with the matter. If necessary, a community justice group can refer the matter to police. When a criminal matter does come to the attention of the police, the relevant police officer should have the option of referring it to the community justice group. The Commission does not wish to impose unnecessary restrictions upon diversionary processes developed by a community justice group. The only safeguard considered necessary is that an offender must first consent to being dealt with by the community justice group. A community justice group could also refuse to deal with a particular matter. Also, if the group was not satisfied with the outcome the young person could be referred back to police to be charged in the usual manner.

Just as the Commission has proposed that previous cautions and referrals to juvenile justice teams should not be later used against the young person, it is also proposed that a referral by police to a community justice group should only be mentioned in court if it is for the purpose of deciding whether the young person should again be referred to the community justice group.

Police interrogations

When Aboriginal people are being questioned about suspected involvement in an offence, they may be particularly vulnerable because of language, communication and cultural barriers, and the long-standing fear and mistrust of police. Miscommunication may result in an unreliable admission or confession by the person being questioned. The Commission emphasised it is vital that police ensure interviews are conducted fairly otherwise an innocent person may be convicted or a guilty person could be acquitted because the admission or confession cannot be used in court.

The Commission examined in detail the law throughout Australia in relation to the questioning of suspects by police. [pp 245–248] In particular, it considered the Criminal Investigation Bill 2005 which is currently before the Western Australian Parliament. The Commission concluded that Aboriginal people are disadvantaged in police interrogations and proposed that there should be legislative provisions setting out the minimum requirements for police questioning. The Criminal

Investigation Bill 2005, although covering some of the important issues does not, in the Commission's opinion, go far enough.

The Commission proposed that the following four matters be provided in legislation:

- The requirement that a caution must be issued (that is, suspects do not have to answer any questions but, if they do the answers may be used as evidence in court against them). Further, that questioning cannot commence until the interviewing police officer is satisfied that the suspect understands the meaning of the caution. In order to be satisfied the interviewing police officer must ask the suspect to explain the caution in their own words.
- Where the suspect does not speak English with reasonable fluency, the interviewing police officer must ensure that the caution is given or translated in a language that the suspect does speak with reasonable fluency and that an interpreter is available before the interview commences. The Commission has also proposed that the Western Australia Police Service and relevant Aboriginal interpreter services develop a set of protocols for the purpose of determing whether an Aboriginal person requires the services of an interpreter. [Proposal 44, p 249]
- That all suspects are to be informed that they may speak to a lawyer prior to the interview commencing and must be provided with a reasonable opportunity to speak to a lawyer in private. In the case of an Aboriginal suspect (unless the suspect expressly denies a legal representative from the Aboriginal Legal Service or has another lawyer) the interviewing police officer is to notify the Aboriginal Legal Service and provide an opportunity for a representative of the Aboriginal Legal Service to speak with the suspect prior to the commencement of the interview.
- That where a suspect who does not wish for a representative of the Aboriginal Legal Service to attend or where there is no representative available, the interviewing police officer must allow a reasonable opportunity for an interview friend to attend prior to the commencement of the interview (unless this requirement is waived by the suspect).

It is proposed that, unless there are exceptional circumstances, failure to comply with these provisions will cause the interview to be inadmissible in court. It is suggested that there should be appropriate exceptions. For example, the interviewing officer would not be required to delay questioning if to do so would potentially jeopardise the safety of any person. [Proposal 45, pp 248–250]

Policing Aboriginal communities and Aboriginal involvement in policing

response to the Gordon Inquiry to establish a permanent police presence in nine remote locations. [pp 250–251]

The role of APLOs was the subject of mixed views during the consultations. Aboriginal people were concerned that their role had changed over time and it was now more about enforcement with less emphasis on community liaison. Some people mentioned that APLOs were not always from the local community and therefore they did not understand local cultural issues. The Commission also noted that some APLOs may be placed in a conflict of interest between their duty as police officers and their kinship obligations. The Western Australia Police Service has implemented a voluntary transition program for APLOs. Under this program APLOs can make the transition to mainstream police officers. The Commission supports this approach provided that there is a strategy in place to ensure that the original community liaison role is addressed. It is suggested that members of a community justice group, wardens or patrol members could potentially take on this role. Therefore, Aboriginal police officers will be responsible to the Police Service and Aboriginal community members can undertake a liaison role while still maintaining accountability to their community.

Cultural awareness training

The Commission considered the current arrangements for cultural awareness training for police officers. While acknowledging that the Western Australia Police Service does provide cultural awareness training programs for its officers, many Aboriginal people expressed the view that better cultural awareness training for police is required. It is proposed that the government provide adequate resources to ensure that every police officer who is stationed at a police station that services an Aboriginal community participates in relevant cultural awareness training. [Proposal 46, p 253]

The future of police and Aboriginal relations

The Commission noted that the Aboriginal and Policy Services Unit was amalgamated with the Strategic Policy and Development Unit in November 2005. While the Commission understands that this amalgamation is designed to improve the effectiveness of policy and services concerning Aboriginal people, it is noted that the failure to maintain a separate Aboriginal unit within the police service is contrary to the recommendations of the RCIADIC. The incorporation of Aboriginal policy into a mainstream policy unit runs the risk that the momentum to improve Aboriginal police relations will be lost. The Aboriginal policy unit could have otherwise been improved by increasing its resources. Bearing in mind that the amalgamated unit is relatively new, it is difficult to understand its capacity to take a more active role in improving Aboriginal and police relations. The Commission has noted, in particular, that its proposal for community justice groups will be far more effective if there is a good working relationship between community justice group members and police. Therefore, the Commission has invited submissions as to whether the Western Australia Police Service's former Aboriginal Policy and Services Unit should be reinstated and provided with additional resources. [Invitation to Submit 8, pp 253–254]

Prisons

Aboriginal people in Western Australia are disproportionately over-represented in prison and detention centres. Underlying many of the Commission's proposals is the objective of reducing the number of Aboriginal people in custody. Therefore, the management of custodial facilities must acknowledge the detrimental impact of custody upon Aboriginal people and provide culturally appropriate programs, activities and services.

Since June 2000 the Western Australian Office of the Inspector of Custodial

their application. The Commission supports this initiative and has proposed that the Department of Justice, in conjunction with Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to assist prison officers and prisoners with application for attendance at funerals. The Commission further proposes that consideration be given to the potential role for community justice groups to assist prisoners in the process and to provide advice to prison authorities about the cultural significance of a prisoner's relationship with a deceased. [Proposal 47, p 258]

Use of restraints on prisoners and detainees during funerals

Prisoners and juvenile detainees attending funerals may be subject to the use of restraints including handcuffs and shackles. Aboriginal people consider that the use of physical restraints at funerals is disrespectful and causes immense shame to the prisoner and their family. While acknowledging that community safety and the prevention of escapes is of paramount importance, the Commission considers that the current policy and practice regarding the use of physical restraints during funeral attendances should be reviewed. Certain prisoners, in

to grant or deny parole or release on a supervised release order; and currently reports prepared for the Parole Board by community corrections officers do not contain sufficient information about cultural issues. In order to encourage more information about Aboriginal customary law and cultural issues the Commission is of the view that the Parole Board and the Supervised Release Board should be able to receive information from Elders or members of a community justice group. [Proposal 51, p 261]

Lack of programs and services

The extent to which a prisoner has engaged in programs while in prison is a consideration for the Parole Board in its determinations. The lack of Aboriginal-specific programs and services in prisons may therefore cause delays in being released on parole. The Parole Board has suggested that Aboriginal Elders could become more involved in supervising offenders while subject to parole. Many Aboriginal people consulted by the Commission supported the involvement of Aboriginal people in the provision of programs for offenders with a focus on Aboriginal culture and community responsibility. The Commission is of the view that its proposal for community justice groups will provide one method whereby Aboriginal communities can become more directly involved in the provision of programs and services to Aboriginal prisoners and detainees. [pp 261–262]

Aboriginal community-based alternatives to prison

A large number of Aboriginal prisoners are sent to prisons which are not the closest available prison to their home and community. Many Aboriginal people consulted by the Commission suggested the need for community-based alternatives to prison. Underlying these suggestions was the need to keep Aboriginal offenders near their communities, families and country, and utilise Aboriginal customary law processes in rehabilitating offenders. Aboriginal people consulted by the Kimberley Aboriginal Reference Group have also indicated strong support for alternatives such as work camps, ‘healing places’ and specific pre-release facilities for female prisoners.

The establishment of additional and improved custodial facilities (whether community-based or government-controlled) will assist in reducing the numbers of Aboriginal prisoners that are accommodated long distances from their families and communities. It may also assist with other problems experienced by Aboriginal prisoners. The Commission supports initiatives to develop Aboriginal community-based custodial facilities in regional areas. This approach is consistent with the Commission’s overall aim to increase the involvement of Aboriginal people in criminal justice issues as well as providing opportunities for Aboriginal customary law processes to rehabilitate Aboriginal offenders. Community justice groups proposed by the Commission could undertake a direct role in the design and implementation of alternative community-based custodial facilities. [p 262]

Aboriginal Customary Law and the Civil Law System

The role of kinship in Aboriginal society

Before exploring how Aboriginal customary law interacts with the civil law system it is necessary to understand something of the role of kinship in Aboriginal society. Kinship is at the heart of Aboriginal society: it underpins customary law rules and norms; it governs all aspects of a person's social behaviour; and it prescribes the obligations or duties a person has toward others as well as the activities or individuals that a person must avoid.

In *Mardujarra Kinship,* Robert Tonkinson explains that in Australian Aboriginal society kinship follows a 'classificatory' system where terms used among blood relatives (such as 'mother', 'brother', 'daughter' and 'cousin') are also used to describe more distantly related (and even unrelated) people. The notion of kinship in Aboriginal society is therefore quite different to the linear norm that features in non-Aboriginal society. As a result of the classificatory kinship system, individuals in Aboriginal society will have significant obligations to people who are classified as their son or sister but who would not necessarily register as someone to whom that person owed a duty in non-Aboriginal society. The Commission found that the notion of kinship and the obligations it imposes remain strong in contemporary Aboriginal society, including among urban Aboriginals. [pp 267–268]

Tortious acts and omissions

Australian tort law

In Australian law the legal branch of torts has developed to provide redress for wrongful acts or omissions that have caused injury (physical or economic) to another person. The principal objects of tort law are to deter wrongdoing and to compensate losses arising from conduct contravening socially accepted values. Legal liability in tort generally arises where an act done or omission made has caused a party identifiable damage in circumstances where a duty of care exists between the tortfeasor (the wrongdoer) and the party that is wronged, and that duty is breached. Whether a duty of care exists under Australian law

Contractual arrangements

The existence of a customary law of contract

Anthropological research has revealed evidence of extensive trade routes and regulated trade or supply agreements between individuals and groups in traditional Aboriginal society. The enforceability of obligations under these agreements and sanctions consequent upon breach together with the elements of promise exchange, bargain and the sophisticated nature of rules governing transactions indicate that, in a very broad sense, a customary law of contract did exist in traditional Aboriginal society. However, a strong social dimension, not mirrored in Australian law, can also be discerned in the various types of contractual arrangements in traditional Aboriginal society. For example, kinship obligation, reciprocity and social status appear to have played a central role in Aboriginal contractual arrangements and sometimes the social relationship between trading partners may be as important as the trade itself. The question for the Commission was whether there is a need for Australian law to functionally recognise Aboriginal customary laws in this area. [pp 274–276]

A need for recognition?

The Commission's research (and that of the ALRC before it) revealed no evidence of conflict between Aboriginal customary law and Australian law in relation to contract. The common law has developed various rules to regulate verbal agreements and unconscionability – two areas that have the potential to induce conflict or cause problems for Aboriginal people. The Commission is of the opinion that, in the absence of any evidence of current conflict between Aboriginal customary law and Australian law in this area, the potential for development of the common law to recognise customary rules of contract should remain a matter for the judiciary. The Commission does not believe that any statutory intervention is required to direct courts to have regard to customary law in this area. [pp 276–277]

Protecting Indigenous consumers

In arriving at this conclusion the Commission was influenced by the fact that the majority of contracts entered into by Indigenous Australians (and indeed all Australians) are consumer and credit contracts. These contracts are generally governed by legislation aimed at protecting the consumer and disputes surrounding such contracts are often settled without judicial intervention. Western Australia's consumer protection regime would therefore appear to provide a more practical focus in efforts to reduce any disadvantage that Aboriginal people may experience as a result of the different expectations traditionally placed upon Aboriginal contractual relations.

The Commission has examined relevant consumer legislation and has looked at some of the specific issues facing Aboriginal consumers in Western Australia. The Commission found that there is a clear case for more accessible consumer protection services and an urgent need for consumer education that is specifically targeted at Aboriginal people to increase knowledge of their rights and

responsibilities as consumers. The Department of Consumer and Employment Protection has sought to address the special needs of Indigenous consumers in Western Australia by the employment of Indigenous educators, who are currently working closely with regional offices and Indigenous advocates and Elders to create a framework for the appropriate delivery of consumer protection advice and services to Aboriginal communities. The Commission is hopeful that this measure, along with the implementation of a comprehensive national Indigenous consumer strategy, will make significant inroads into the consumer issues identified in its Discussion Paper. Given the attention that these issues are currently receiving from government, the Commission has not felt it necessary to make any proposal in this regard. [pp 277–280]

Succession: Distribution of property upon death

Succession laws govern the distribution of property upon death and include laws

children of a traditional marriage or a parent 'by reason of tribal marriage'. The AAPA Regulations further provide that a moral claim may be made against an Aboriginal deceased estate within two years of the date of death if no other valid claim is made on the estate. [pp 284–285]

Although the AAPA scheme purports to recognise Aboriginal customary laws, it has been subject to substantial criticism. In particular, the emphasis remains on lineal relationships (reflecting a non-Aboriginal notion of kinship) rather than collateral or classificatory relationships. Another important criticism is that by automatic vesting of the intestate estate in the Public Trustee, the deceased's family are discriminated against in that they have no right to administer the estate themselves. The Public Trustee has also reported some special difficulties faced by Aboriginal people in proving their entitlements under the *Administration Act* (the first step of distribution under the AAPA scheme) and under the AAPA Regulations. [pp 285–288]

Reform of Aboriginal intestacy laws

In considering reform of the law in this area, the Commission has investigated statutory schemes for the administration of Aboriginal intestate estates in Queensland and the Northern Territory. A full discussion of the advantages and disadvantages of these schemes may be found in the Discussion Paper. [pp 288–291] The Commission has proposed changes to the current scheme to rectify the problems observed in the Discussion Paper and to import positive aspects of schemes operating in other jurisdictions. Among other things the Commission has proposed that:

- Aboriginal deceased estates no longer be automatically vested in the Public Trustee;
- amendments be made to the *Administration Act* to simplify the procedure for grant of letters of administration in relation to Aboriginal intestate estates;
- persons who enjoy a classificatory relationship under the deceased's customary law may apply to succeed to the estate if no person of entitlement can be found under the *Administration Act;*
- the existing bias toward male relatives be removed from the AAPA Regulations; and
- the offensive definition of 'Aboriginal person' in the AAPA Act be replaced.

[Proposal 52, p 291–292]

In recognition of the fact that, prior to 1970, the births of many Aboriginal people were unregistered, the Commission has also invited submissions on whether a relaxed standard of proof should apply to the determination of the entitlement of a person of unregistered birth. [Invitation to Submit 9, p 293]

In making its proposals for reform, the Commission was mindful of the fact that the application of the Western Australian Aboriginal intestacy scheme is limited in practice by the need for intestate Aboriginal estates to be brought to the notice of authorities. In most cases there is capacity for kin to apply customary law to

Anthropological studies have shown that various forms of inquiries into the cause of a death were performed in traditional Aboriginal societies. Aboriginal

Funerary practices

Aboriginal funerary rites and the laws of Western Australia

Death is a regrettably frequent event in contemporary Aboriginal society and the funerary rites that are customarily performed upon death remain important to Aboriginal culture. In its Discussion Paper the Commission has examined Aboriginal funerary practices and has found that the current Western Australian laws are sufficiently flexible to accommodate the performance of certain customary rites upon death, including preparation of the deceased's bodily remains for final disposal. The Commission has also found that the by-laws and rules relating to the performance of graveside ceremonies would not unduly interfere with customary law in the burial process. [pp 310–313]

Aboriginal burial rights and the laws of Western Australia

Burial was (and remains) the most common traditional Aboriginal mortuary practice in Western Australia. Under Aboriginal customary law, the right to dispose of a deceased's body usually rests with the family or blood relatives of a deceased. The family's wishes will therefore prevail over those of the deceased's spouse. [pp 311–314]

The position under Aboriginal customary law is at odds with Australian law which holds that the right to bury the deceased will lie with the person who has the highest entitlement to the deceased's estate. In Western Australia, the highest entitlement lies with the surviving spouse (or de facto partner) followed by the children of the deceased, the deceased's parents, the deceased's siblings, then other specified family members. Courts have routinely rejected cultural arguments as irrelevant when deciding who has the right to bury a deceased. [pp 314–315]

Because of the marked difference between the position at customary law and under Australian law, disputes over rights to dispose of an Aboriginal deceased arise regularly. Often conflicts result from the wishes of family to bury a deceased family member in their traditional homelands pursuant to the relevant customary laws and the competing wishes of the deceased's spouse to have his or her loved one buried elsewhere. In some cases there have been competing cultural beliefs about who has the right to bury an Aboriginal deceased. In its Discussion Paper the Commission has discussed in some detail the various problems arising in this area and has examined the laws of other jurisdictions. The Commission has concluded that without further submissions on this matter it is not in a position to offer a firm proposal. The Commission therefore invites submissions on the following:

- whether Aboriginal cultural and spiritual beliefs should be considered relevant to a court's decision in resolving a dispute over the right to burial of an Aboriginal deceased;
- what would be the appropriate protocol to apply in cases where there are genuinely held but competing cultural beliefs;

- whether significance should be placed on the deceased's wishes regarding burial if embodied in a signed document (not necessarily a will); and
- what is the appropriate forum for the determination of burial disputes.

[Invitation to Submit 12, p 317]

Indigenous cultural and intellectual property rights

Intellectual property is a generic term for the various rights or bundles of rights which the law accords for the protection of creative effort or, more especially, for the protection of economic investment in creative effort. Australian intellectual property regimes are established and governed primarily through Commonwealth legislation. The ability of the Western Australian government to recognise Aboriginal customary laws in relation to Indigenous cultural and intellectual property rights is therefore limited to the development of protocols and to the support of relevant amendment to Commonwealth legislation. [Proposal 62, p 328]

In its Discussion Paper the Commission has examined the potential of conflict between Aboriginal customary law and Australian intellectual property laws in the areas of copyright in artistic works and Indigenous intellectual property in the regulation of resources. [pp 320–327] The Commission acknowledges the significance of culture to Aboriginal communities and the communal nature of the ownership of Indigenous cultural and intellectual property. The Commission has proposed that protocols relating to the use, sale and protection of Indigenous cultural and intellectual property be developed and promoted in Western Australia to inform government agencies, educational and cultural institutions, and private industries in their dealings with Aboriginal artists. [Proposal 60, p 325] The Commission has further proposed that the Western Australian government develop protocols aimed at those issues arising from the 'bioprospecting' of Aboriginal medical knowledge in the exploration of biodiversity for commercially valuable genetic and biochemical resources. [Proposal 61, p 327]

matches other than the promised marriage will generally only be accepted if they adhere strictly to kinship rules. [p 333]

In relation to the recognition of promised marriage contracts in Western Australia the Commission has concluded that Australia's international obligations preclude recognition of non-consensual or underage customary law marriage. However, the Commission notes that the mere denial of recognition does little to practically enhance the rights of young Aboriginal girls, who may be the subject of a customary law promise to marry. The Commission has therefore proposed that the government include, in educative initiatives planned in response to the Gordon Inquiry, information about the freedom of choice in marriage partners under Australian and international law. These initiatives should also include education about the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law. [Proposal 63, p 334]

Recognition of traditional Aboriginal marriage

The decline of promised marriages in Aboriginal society (in particular, child betrothals) has undoubtedly resulted in more freedom for Aboriginal people to choose their marriage partner. While this freedom can have negative implications for the maintenance of Aboriginal culture (because marriages more often occur without regard for traditional skin groupings or other marriage rules of relevant clans), there are still a number of Aboriginal adults who marry traditionally and with regard for customary marriage rules. [pp 334–335]

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

- equating a traditional marriage to a de facto relationship under Western Australian law; and
- functional recognition of traditional marriage for particular purposes.

Although in Western Australia the legal benefits of marriage are almost mirrored under laws dealing with de facto relationships, the Commission has discounted this method of recognition of traditional Aboriginal marriages. Where such an approach has been investigated in the past, Aboriginal people have expressed the fundamental objection that to treat a traditional marriage as a de facto relationship would significantly degrade the traditional status and dignity of the union. The Commission has therefore pursued the course of 'functional recognition' recommended by the ALRC.

Functional recognition of traditional Aboriginal marriage

Functional recognition involves an examination of the specific legal and social problems that can arise from the failure to recognise traditional Aboriginal marriage

as a lawful marriage to ensure that, wherever possible, the benefits, obligations or protections that lawful marriage attracts under Western Australian law are also extended to traditional Aboriginal marriage. The concept of functional recognition has the advantage that it can avoid the recognition or enforcement of aspects of traditional marriage (such as underage marriage) that may infringe basic human rights or international obligations. Another benefit is that functional recognition can recognise traditional marriages that are actually or potentially polygamous, providing protection for all partners of a traditional marriage. [p 336]

It is not known to what extent polygamy is practised in Western Australian Aboriginal communities today and the Commission did not receive any submissions on this issue during its community consultations. However, it is noted that in its recent report on Aboriginal customary law the NTLRC saw fit to suggest the review of legislation and administrative policy and procedure to take account of traditional Aboriginal polygamous marriages. The Commission therefore invites submissions on this matter. [Invitation to Submit 13, p 337]

Defining traditional Aboriginal marriage for the purposes of legislative recognition in Western Australia

The Commission has considered the potential of legal and social problems that may arise from the failure to recognise traditional Aboriginal marriage for the purpose of Western Australian laws. It has concluded that explicit recognition of Aboriginal traditional marriage would be desirable for the purposes of all written its, obligation0
522(15 Tc.2(ian lWge 253612.8[W)2w)43D of

The Commission is mindful that because traditional Aboriginal marriage is not explicitly recognised in s 13A of the *Interpretation Act*

The Aboriginal Child Placement Principle was first adopted as Commonwealth government policy in 1980 and has drawn broad support from Aboriginal communities. In its 1986 report on Aboriginal customary laws the ALRC recommended that state and territory legislation dealing with the placement of children should expressly reflect the Principle. Western Australia was the last state to legislatively implement the Principle in its child custody legislation in 2002–2004. [p 341]

The 'best interests of the child' principle

The 'best interests of the child' principle is the guiding principle of the United Nations *Convention on the Rights of the Child*. It requires that in all actions concerning children (and in all child welfare and custody legislation) the child's best interests are the primary consideration. However, the best interests of an Aboriginal child may be quite different to those of a non-Aboriginal child and the application of the principle must be informed by relevant cultural considerations.

Because the best interests principle is subjectively applied by administrative decision-makers (and, in relation to court custody proceedings, judges) attention must be paid to the process of application to avoid ethnocentrism. The Commission believes that the involvement of Aboriginal people and Aboriginal organisations in cases involving the placement of an Aboriginal child is imperative to avoid ethnocentric assumptions unnecessarily colouring the decision-making process. [p 342]

Adoption

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

The legislative form of the Principle in schedule 2A of the *Adoption Act* provides that the first preference for placement of an Aboriginal child is with an Aboriginal person in the child's community 'in accordance with local customary practice'. The *Adoption Act* also provides in s 16A that the Director-General must consult with an Aboriginal child welfare agency regarding the prospective adoption of an Aboriginal child and for an Aboriginal officer of the Department to be 'involved at all relevant times in the adoption process' of an Aboriginal child.

The importance of such consultation in regard to the placement of an Aboriginal child, particularly in determining the best interests of such a child, is emphasised in the Commission's Discussion Paper. However, the Commission considers it equally important that consultation be had with the child's extended family or community, especially in light of the need to establish 'local customary practice' in application of the Aboriginal Child Placement Principle under the *Adoption Act*. The Commission therefore proposes that schedule 2A of the *Adoption Act* be amended to ensure that all reasonable efforts are made to establish the

of an Indigenous family law database and facilitation of research into Aboriginal customary law and family issues; and the development—in partnership with Indigenous communities—of narrative therapy and Indigenous family law conferencing to enhance family dispute resolution. The focus on alternative dispute resolution is particularly crucial in Western Australia where the new *Family Law Rules 2004* (WA) compel families to participate in primary dispute resolution. In these circumstances, the lack of culturally appropriate dispute resolution services for Aboriginal clients represents a significant problem.

The Commission considers that the government can do more to meet the needs of Aboriginal clients in the Family Court of Western Australia. In this regard the Commission supports the recommendation of the Family Law Pathways Advisory Group and proposes that the Western Australian government seek federal funding in whole or in part for its immediate implementation in the Family Court of Western Australia. [Proposal 69, p 346]

Parenting disputes

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

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

The Commission strongly supports this recommendation; however, in the interests of maintaining equality in relation to ex-nuptial and nuptial children in Western Australia, the Commission is unwilling to propose that Western Australia unilaterally amend the *Family Court Act 1997* (WA) to establish this procedure unless and until similar amendments are made to its Commonwealth counterpart. Nevertheless, the Commission notes that the state's implementation of Proposal 69 (discussed above) will go some way to reducing the disadvantage faced by Aboriginal people in securing court orders for the legal transfer of parental responsibilities to members of a child's extended family or kinship group. [pp 347–348]

Family violence and the protection of women and children

Family violence in Western Australian Aboriginal communities

During consultations for this reference, the Commission received a great number of submissions suggesting that family violence was of considerable concern to Aboriginal communities, and particularly to Aboriginal women. Over the past two decades the escalating problem of interpersonal or family violence in Aboriginal communities has become increasingly apparent. In 2002 the Gordon Inquiry in

rather than policy outcomes. The Commission has proposed that evaluation of government initiatives to address family violence and child abuse in Aboriginal communities be ongoing with an emphasis on positive practical outcomes. The Commission considers it imperative that the government regularly consult with those responsible for frontline service delivery and with those receiving the benefits of such service to genuinely assess the effectiveness of programs and monitor the changing needs of communities. In addition, programs and government service delivery must be flexible and dynamic on a local level to accommodate cultural differences, to involve established local Aboriginal-run services, and to ensure that the best result is achieved for each community. [Proposal 71, p 355]

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

Many women experiencing family violence avoid seeking assistance from authorities for fear that their children might be removed from them. This is particularly a concern amongst Aboriginal women who may view this issue in the context of past government policies supporting the removal of Aboriginal children from their families. Other factors such as fear of community reprisal or shame, the relationship and kinship obligations between the victim and the perpetrator of family violence and the complex (and sometimes alien) nature of Western legal processes to deal with family violence can also impact upon an Aboriginal woman's decision not to report family violence. These factors indicate the need for more culturally appropriate processes for responding to, intervening in and preventing family violence in Aboriginal communities. [p 352]

The Commission's research found that the success of family violence intervention programs will often depend upon whether there is significant local Aboriginal involvement in delivery of the program. The Commission has therefore proposed that the Western Australian government actively encourage and resource the development of community-based and community-owned Aboriginal family violence intervention programs that are designed to respond to the particular conditions and cultural dynamics of the host community. [Proposal 70, p 353]

The Commission has also commented on the cultural appropriateness of women's refuges in Western Australia and the need for the development of men's shelters so that women and children are not always forced to leave the family home to escape violence or abuse. [p 357]

Restraining orders

During consultations for this reference the appropriateness of the restraining order regime in Western Australia was criticised in relation to its application to Aboriginal people. It was said that many Aboriginal women do not support the removal of men from the family home pursuant to a restraining order because of strong cultural and social obligations to maintain family relationships. A preference was indicated for temporary measures that would deal immediately with family violence by removal of the perpetrator from the home accompanied by ongoing programs that emphasise family healing and behavioural reform. [p 355]

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

> such restraints on the lawful activities and behaviour of a person as the officer considers appropriate to prevent a person —
>
> (a) committing an act of family and domestic violence; or
>
> (b) behaving in a manner that could reasonably be expected to cause a person to fear that such an act could be committed.

It is hoped that the powers extended to police by these amendments will assist authorities to take a more positive role in combating family violence by initiating immediate action to separate perpetrators of family violence from their victims in situations where there is evidence of family violence or a reasonably perceived threat of such violence. Because the police order regime is in its infancy the Commission has invited submissions on its effectiveness in relation to controlling family violence in Aboriginal communities. The Commission intends to review these submissions before making any proposals for reform in this area. [Invitation to Submit 14, p 357]

Customary law is no excuse for family violence or child sexual abuse

It has been noted that Aboriginal men sometimes excuse violent domestic behaviour by reference to their role of authority under Aboriginal customary law or in their traditional culture. Recent events in the Northern Territory have also

The need for the protection of Australian law

Despite criticism of the effectiveness and cultural appropriateness of available measures for protection against family violence, it is widely recognised by Australian governments and Aboriginal communities that Aboriginal women and children need to be able to rely upon the protection of Australian law. However, the Commission acknowledges that there may be some role for culturally sanctioned, non-violent Aboriginal customary law strategies for dealing with perpetrators of family violence and that such customary law responses could, in certain circumstances, work in tandem with prevention and protection strategies provided for under Australian law. Such customary law responses might include community 'shaming' of perpetrators of family violence or, in respect of repeat or serious offenders, banishment from the community.

It is important that any customary law responses to family violence do not deprive Aboriginal women of their ability to seek protection or initiate criminal proceedings under Australian law. However, many Aboriginal women consulted by the Commission sought alternative responses to family violence that would not see their men imprisoned (the rehabilitative value of which is, at best, tenuous). An Aboriginal customary law response at first instance, and in less serious cases of family violence, might assist in diverting Aboriginal men from the criminal justice system while allowing for increased opportunities for family and community healing. In some cases, as argued by respondents to the Commission's community consultations, it may also be more effective in addressing violent behaviour and rehabilitating offenders than measures under the criminal law. The Commission has invited submissions on this subject.

[Invitation to Submit 15, p 361]

Customary Hunting, Fishing and Gathering Rights

Under customary law, a person's entitlement to fish, hunt animals, gather vegetable foods or exploit natural resources (such as water, firewood or minerals) is consequent upon their degree of connection to 'country'. Those who possess the right to harvest resources are also vested with obligations to conserve resources and respect the land. For this reason (and others), restrictions will sometimes be placed on entitlements to harvest natural resources. These restrictions define:

- whether permission must be obtained in order to hunt or gather on certain land;
- who may harvest certain resources, in particular plants with medicinal properties or those used for making ceremonial items;
- how much of a resource (especially a non-renewable resource) may be taken;
- whether a resource may only be taken at a certain time or day or a certain time of year;
- whether hunting or gathering on certain land is forbidden;
- whether rituals are required to be performed prior to harvesting certain resources; and
- whether a person may consume certain harvested foods. [pp 365–367]

Although few Aboriginal people today would depend exclusively on hunting and gathering of natural food resources for subsistence, these activities continue to define Aboriginal peoples' fundamental connection to the land. Harvesting can also be seen as a manifestation of self-determination and importantly, in relation to the current reference, harvesting has a strong connection with the maintenance of Aboriginal customary law in contemporary society.

Recognising Aboriginal customary laws in relation to harvesting natural food resources

The call for recognition of Aboriginal customary law rights to hunt, fish and gather is clearly grounded in the status of Aboriginal people as 'first Australians'.

Acts that deal with wildlife conservation (including hunting of animals and taking of bush flora) and the management of fish resources currently provide exemptions to Aboriginal people in regard to customary harvesting activities that might otherwise constitute an offence. The Commission has examined the nature and operation of these exemptions in considering whether there is a need for further recognition of Aboriginal customary rights in these areas.

The Commission has also considered a number of issues typically raised in relation to the legislative recognition of Aboriginal customary harvesting rights including whether foods harvested by Aboriginal people under a legislative exemption are used for subsistence or for commercial purposes and whether recognition of customary harvesting should be restricted to traditional methods. [pp 369–371] The Commission's examination of these issues has informed its conclusions in relation to improving recognition of Aboriginal customary harvesting rights in Western Australia.

Improving recognition of Aboriginal customary harvesting rights in Western Australia

Priorities of recognition

There is no doubt that customary harvesting activities remain important to Aboriginal people and in many cases would be considered vital to the maintenance of Aboriginal culture. Further, as discussed in Part IV, there are international conventions that support the recognition of the rights of indigenous peoples to be free to enjoy their culture and practise their customs, including customary use of land and resources. Nonetheless, with encroaching threats to Australia's biodiverse regions, the conservation of native species and habitats must now be regarded as having priority over all other interests in land, including the interests of indigenous peoples. In its 1986 report *The Recognition of Aboriginal Customary Laws,* the ALRC considered the following hierarchy of priorities as justified:

- conservation and other identifiable overriding interests (such as safety, rights of innocent passage, shelter and safety at sea);
- traditional hunting and fishing; and
- commercial and recreational hunting and fishing.

The Commission supports this hierarchy of priorities and has proposed that the recognition of Aboriginal customary laws relating to hunting, fishing and gathering be subject to the genuine interests of conservation of Western Australia's diverse biological resources, but that they take a higher priority than commercial and recreational interests in the same resources. [Proposal 72, p 374]

The Commission considers it unlikely that Aboriginal people would object to the prioritisation of conservation in regard to land and natural resources – Aboriginal people employed (and in some cases continue to employ) traditional methods to conserve species and resources, thereby managing the continent in a sustainable way. The Commission considers that Western Australia can learn from its Aboriginal people in this regard. To that end, the Commission has also

proposed that in the application of conservation programs and decision-making in respect of conservation of land and resources in Western Australia, the government and its conservation bodies actively consult, engage with and involve Aboriginal people. [Proposal 72, p 374]

The need for clarity in the legislative recognition of customary harvesting

As mentioned earlier, Aboriginal people can rely on customary harvesting exemptions under the Acts controlling hunting, gathering and fishing in Western Australia. These exemptions (described in more detail below) are limited and

Barter and exchange

Currently s 23 of the *Wildlife Conservation Act* permits harvesting for the purpose of providing sufficient food for family, but not for sale. 'Family' is not defined in the Act but, in the context of Aboriginal persons, should be more broadly defined than a person's immediate 'nuclear' family. It is the Commission's tentative view that the taking of fauna and flora for non-commercial purposes under the customary harvesting exemption should include taking sufficient for the purpose of satisfying kin obligations

Improving recognition – access to land for customary harvesting purposes

Procedure

The best witnesses to provide evidence to the courts about Aboriginal customary law are Aboriginal people themselves. However, for many Aboriginal people, appearing in court as witnesses and telling the court about their customary law is an extremely difficult thing to do. During the Commission's consultations, Aboriginal people reported a number of problems that they faced when appearing in court and when dealing with the court system generally. The comments

made a number of suggestions to address this problem. The key change needed is for both the courts and interpreters to be aware of, and be able to deal with, problems related to customary law. To this end, the Commission has proposed that guidelines be developed for the use by the Department of Justice in dealing with Aboriginal language interpreters. [Proposal 82, p 405] The proposed guidelines would require that only trained interpreters be used and that sufficient information is provided to interpreters to enable them to determine whether they might have a conflict under customary law in a particular matter. [pp 401–405] The Commission also has invited submissions about methods of use of interpreters in court proceedings to aid in the development of protocols to assist courts, lawyers and witnesses when using the services of an interpreter. [Invitation to Submit 17, p 405]

Problems caused by advocacy techniques

The way in which witnesses are asked questions can be problematic for some Aboriginal people. The Discussion Paper examines the difficulties experienced by Aboriginal people caused by techniques used by lawyers; in particular, leading questions, questions demanding quantitative speculation and repetitious questions. [pp 398–400] Overcoming these problems is not simple: it is important that the court hears all relevant evidence, but it is undesirable to place undue restrictions on the manner in which questions are asked in court. One effective way of dealing with this issue is to depart entirely from the question-and-answer format and for the witness to tell his or her story uninterrupted by questioning: this is known as 'evidence in narrative form'. The Commission is of the preliminary view that no reform to the law is needed to enable Aboriginal witnesses to give evidence in this way. However, as the Commission is unaware of the extent to which the courts presently allow Aboriginal witnesses to present their evidence in narrative form, it seeks submissions as to whether it is desirable for amendments to be made to the *Evidence Act* to set out guidelines for narrative evidence. [Invitation to Submit 18, p 406]

The Commission has made other suggestions designed to assist with these issues including: the development of protocols for lawyers dealing with Aboriginal witnesses [p 414], the employment of facilitators to assist Aboriginal witnesses [Proposal 89, p 415], and cultural awareness training to help judges to understand the problems faced by Aboriginal witnesses. [Proposal 90, p 416]

The impact of customary law upon witnesses' evidence

The Commission gave consideration to the fact that for some Aboriginal witnesses their obligations under customary law have at times clashed with the requirements of the court. For example, Aboriginal customary law can affect the ability of witnesses to give evidence where:

- witnesses do not have authority to speak on the subject they are being asked about (either because they are not entitled to the knowledge, or because they cannot speak about it in the circumstances of the hearing);
- there is a speech ban or taboo in place;

Aboriginal Community Governance in Western Australia

It is recognised that the effects of colonisation have largely undermined the traditional Aboriginal power structures and relationships that give customary law its vitality, legitimacy and authority. The Commission's consultations revealed that many Aboriginal people see reclaiming traditional values through recognition of customary law as an important way to address these deficits. However, it is arguable that the Commission's proposals for the recognition of Aboriginal customary law and the accommodation of cultural beliefs (set out earlier) will be meaningless if more is not done to advance the broader objective of empowering Aboriginal communities to reclaim control over their own destinies. The Commission has therefore examined the existing status of Aboriginal community governance in Western Australia and looked at what is being done (and what more can be done) to maximise opportunities for greater Aboriginal participation in decision-making, and to encourage more effective and appropriate community governance processes.

Indigenous self-determination in the Western Australian context

Self-determination is considered a fundamental human right at international law and is recognised in a number of international instruments. Although these instruments do not identify the forms that self-determination may take, there is

Aboriginal governance in Western Australia

Community governance

The *Aboriginal Communities Act 1979* (WA) defines the current system of Aboriginal community governance in Western Australia. Although the preamble to the Act is expressed in broad terms that might support the Act's extension to wider governance matters, in practice the Act has only ever been used as a tool for addressing criminal justice issues. Problems with the current community by-laws scheme under the Act are canvassed in detail in Part V of the Discussion Paper, but in summary there have been significant issues with:

- the enforcement of by-laws by police and wardens;
- the capacity for breach of by-laws to contribute to the over-representation of Aboriginal people in the mainstream criminal justice system;
- the fact that by-laws have been established by communities (and approved by the Governor) that go beyond the delegated law-making powers contained in the enabling Act;
- that the by-law scheme creates an additional layer of law applicable only to Aboriginal communities;
- that community councils empowered under the Act are not always representative and are in some instances dysfunctional; and
- that by-laws are not always, as the Act envisaged, established in consultation with the community and are not necessarily reflective of traditional authority structures or customary law. [pp 430–431]

The Commission has proposed that the *Aboriginal Communities Act* be repealed and replaced with a new Act – the 'Aboriginal Communities and Community Justice Groups Act'. [Proposal 11, p 120] The Commission considers that this new Act may be a suitable vehicle for reform of Aboriginal community governance.

Regional governance

The abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) in March 2005 has created a new imperative for Aboriginal governance at all levels. Under the new Commonwealth arrangements for Aboriginal affairs the Australian government has introduced a new 'whole-of-government' approach to delivering services to Aboriginal people. Part of this new approach involves the establishment of multi-agency Indigenous Coordinating Centres in former ATSIC regions to oversee partnership agreements between communities and the Commonwealth government and to integrate services provided by all levels of government to Aboriginal communities. Key to the ultimate success of the new arrangements is the establishment of a network of regional representative organisations 'to ensure that local needs and priorities are understood'. [p 433]

In Western Australia the west Kimberley's Kullarri Regional Indigenous Body (KRIB) is one of the first regional representative structures established since ATSIC's demise. The Commission has examined the KRIB model and considers

it an exemplar because it is a 'self-identifying' and 'self-organising' structure that has emerged from within the community itself. The Commission believes that regional governance models of this nature will have a significant role to play in ensuring the accountability of government for service provision to Aboriginal communities.

Reform of Aboriginal community governance in Western Australia

There is no doubt that a pressing need exists for Aboriginal community governance reform in Western Australia. The impetus for such reform primarily arises from the state of entrenched Indigenous disadvantage discussed in Part II of the Discussion Paper and the law and order issues discussed at length in Part V. In considering the possibilities for reform of Aboriginal community governance in Western Australia, the Commission was mindful of the need to address the problems identified (and examined in some detail) in its Discussion Paper; in particular:

- inequality of government service provision to Aboriginal communities (as compared to non-Aboriginal communities in similar geographic regions);
- lack of Aboriginal participation in community governance and the need to build the governing capacity of Aboriginal communities;
- lack of community economic base and consequent lack of employment;
- over-reliance on non-Aboriginal staff in community governing organisations and problems with recruitment and retention of these staff;
- intra-community (family) feuding;
- community dysfunction and law and order issues;
- breakdown of cultural authority of Elders caused by, amongst other things, the emergence of alternative authority structures imposed by the current scheme of community governance in Western Australia; and
- inappropriate or externally imposed governing structures.

The Commission has acknowledged the potential of newly emerging regional Aboriginal governing structures to address many of these issues; however, there is still a need for effective governance at the community level. Indeed, the effectiveness of regional bodies will ultimately rely upon the 'health' and capacity of their constituent communities and their ability to interact with the relevant regional body. [pp 422–435]

Funding for autonomy

The Commission has considered the funding options available to Aboriginal local governing bodies under the *Local Government Assistance Act 1995* (Cth). Broadly these include establishment as a separate local governing body under state law (the Ngaanyatjarraku Shire Council in the Gibson Desert (Warburton) region is an example), and bodies 'declared' by the state to be local governing bodies.

[pp 431–432] The latter option has been used by other jurisdictions, notably the Northern Territory, to secure discrete federal funding for Aboriginal communities without the stringent reporting and service provision responsibilities required of local governments under state law.

The Commission has noted that to date there has been no attempt in Western Australia to exploit federal funding options for discrete Aboriginal communities as 'declared' local governing bodies. The Commission believes that this option may offer Aboriginal communities (in particular communities that are not being adequately provided for by current local governments) the opportunity to fund or negotiate their own service provision in a broadly autonomous environment. In some cases, such funding may offer Aboriginal communities the prospect of enhancing their economic base by bringing employment to the community and its members. Of course, it must be acknowledged that such an option could only work in the most functional communities and will require significant initial support by government and preparatory programs to build local governing capacity. Nonetheless, it is an option that the Commission considers should be further explored in Western Australia. [Proposal 92, p 436]

Currently local governments receive state and federal funding according to a formula that specifically recognises Aboriginal population, remoteness and disadvantage factors. However, because this funding is 'untied' (that is, the funding authority cannot dictate the way in which the money is spent), there is no direct accountability of local governments to ensure that Aboriginal-specific funding reaches Aboriginal communities. The Commission has therefore proposed that, where local governments continue to be responsible for service provision in Western Australian Aboriginal communities, the Western Australian government should investigate ways of improving the accountability of local governments for funding provided for the benefit of Aboriginal people in the local government area. [Proposal 91, p 423]

Some guiding principles for Aboriginal community governance reform

[Proposal 91, p 429 iss0ginc0u77stermhat00sstTatTltaope in the local go18a5m

part of the capacity building process before true community governance can succeed. Both the government and Aboriginal people must therefore recognise that the process of delivering greater governing autonomy to Aboriginal communities will, in some cases, take a significant amount of time. [pp 436–437]

A basic framework for reform

The Commission is impressed by the self-identifying and self-organising governance structures emerging at the regional level and considers that the starting point for reform of community governance in Western Australia should be limited to a basic framework that can facilitate this approach at a community level. Although the guiding principles set out above should inform the process of reform, it is the Commission's opinion that the most important rule to observe in community governance reform is that the model of governance be developed *by* the community, rather than be imposed *on* the community.

As noted earlier, the Commission has proposed in Part V of the Discussion Paper that the *Aboriginal Communities Act 1979* (WA), which provides the current community governance structure, be abolished and that a new statute (the 'Aboriginal Communities and Community Justice Groups Act') be enacted to enable the establishment of Aboriginal community justice groups. The Commission believes that these representative, gender-balanced groups will answer many of the law and order issues in communities and assist in healing community dysfunction, and enhancing cultural authority and governing capacity. Importantly, the groups allow discrete communities to establish their own community rules and sanctions and enhance the opportunity for recognition of Aboriginal customary law. The groups will also have a broader role to play in informing courts and justice bodies and in diverting Aboriginal people away from the criminal justice system. [pp 437–438]

The Commission believes that the proposed 'Aboriginal Communities and Community Justice Groups Act' may also be a suitable vehicle for establishing the basic framework for reform and recognition of community governance in Western Australia. However, after considering the available research, governance studies and legislative review presently underway the Commission has decided that it should not prescribe a governance structure but should confine itself to proposing a basic framework for reform based on the facilitation of self-identifying and self-organising governance structures informed by the guiding principles set out above. [Proposal 93, p 438]

Summary of Proposals

Aboriginal peoples in Western Australia

Proposal 1 [p 43]

That the Western Australian government adopt a genuine whole-of-government approach to the delivery of services to Aboriginal people in Western Australia requiring the constructive communication between agencies at the state, regional and local levels and the consideration of cooperative multi-agency joint-funded programs to achieve real outcomes that effectively address the current state of Indigenous disadvantage in Western Australia.

Proposal 2 [p 44]

That employees of Western Australian government agencies who work directly, or have regular dealings, with Aboriginal people be required to undertake cultural awareness training. Such training should include presentations by Aboriginal people and be delivered at the regional level to allow programs to be appropriately adapted to take account of regional cultural differences and customs and concerns of local Aboriginal communities.

That consideration be given to agency-arranged cultural awareness training being a condition of the contract where contractors or sub-contractors to any Western Australian government agency are required to work directly, or have regular dealings, with Aboriginal people.

Recognition of Aboriginal customary law

Proposal 3 [p 49]

That s 5 of the *Interpretation Act 1984* ian g0 81in5ca(Reci6‘)T 28e /law**rem006lonce00s5tiat sBT1**

In determining whether a person is a Torres Strait Islander person the following factors are of probative value:

(a) genealogical evidence;
(b) evidence of genetic descent from a person who is a Torres Strait Islander person;
(c) evidence that the person self-identifies as a Torres Strait Islander person; or
(d) evidence that the person is accepted as a Torres Strait Islander person in the community in which he or she lives.

For the purposes of Western Australian written laws the term 'Aboriginal person' is taken to include a Torres Strait Islander person.

Proposal 4 [p 60]

That cultural awareness training be made available to volunteer workers.

That cultural awareness training be specific to local Aboriginal communities and include programs presented by Aboriginal people.

Proposal 9 [p 106]

That the relevant criteria for an application for an extraordinary drivers licence as set out in s 76 of the *Road Traffic Act 1976* (WA) be amended to include:

- That where there are no other feasible transport options, Aboriginal customary law obligations be taken into account when determining the degree of hardship and inconvenience which would otherwise result to the applicant, the applicant's family or a member of the applicant's community.
- In making its decision whether to grant an extraordinary drivers licence the court should be required to consider the cultural obligations under Aboriginal customary law to attend funerals and the need to assist others to travel to and from a court as required by a bail undertaking or other order of the court.

Proposal 10 [p 106]

That the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) be amended to provide that an Aboriginal person may apply to the registrar of the Fines Enforcement Registry for the cancellation of a licence suspension order on the additional grounds that it would deprive the person or a member of his or her Aboriginal community of the means of obtaining urgent medical attention, travelling to a funeral or travelling to court.

Proposal 11 [p 120]

That the *Aboriginal Communities Act 1979* (WA) be repealed. As an alternative, Aboriginal communities should be empowered to establish community justice groups and decide their own community rules and sanctions. For this purpose the Commission has proposed the 'Aboriginal Communities and Community Justice Groups Act' – see Proposal 18.

Proposal 12 [p 121]

That the definition of public place in s 1 of the *Criminal Code* (WA) be amended to include a discrete Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' other than an area of that community which is used for private residential purposes.

Proposal 13 [p 122]

That s 73 of the *Road Traffic Act 1974* (WA) be amended to bring lands of an Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' within the definition of 'driving'.

Proposal 14 [p 123]

That the proposed 'Aboriginal Communities and Community Justice Groups Act' include a provision relating to the prohibition and restriction of people on community

lands. This provision should state that the community council of a discrete community which has been declared under the Act has the right, subject to the laws of Australia, to refuse the entry of any person into their community and, if permission for entry is granted, to determine on what conditions the person may remain on the community. It is an offence, without lawful excuse, to fail to comply with the conditions or enter without permission. This offence has the same penalty as the offence of trespass under the *Criminal Code* (WA).

Further, that a specific provision in relation to community members provide that the community council can, by giving reasonable notice, ask a member of the community to leave the community or part of the community for a specified period of time. Failure to leave the community, or returning to the community during the specified period, without lawful excuse constitutes an offence of trespass. Where a community has established a community justice group the community council can only ask a member of the community to leave if it has been recommended by the community justice group.

That these provisions expressly state that a member of the police force can remove a person who has not complied, within a reasonable time, with the request of the community council to leave the community.

Proposal 15 [p 124]

That the definition of 'public place' in the *Protective Custody Act 2000* (WA) be amended to include discrete Aboriginal communities which have been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'.

That the Commissioner of Police seeks nominations from Aboriginal community councils for the appointment of persons as community officers under s 27 of the *Protective Custody Act 2000* (WA).

Proposal 16 [p 126]

That the Director-General of the Department of Indigenous Affairs be given the power to apply to the liquor licensing authority for regulations in relation to the restriction or prohibition of alcohol on behalf of a discrete Aboriginal community which has been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. An application should only be made after it has been established that the majority of the community members support the application. The regulations should provide that breaching the restrictions or prohibition imposed is an offence.

Proposal 17 [p 127]

That the *Liquor Licensing Act 1988* (WA) be amended to provide that it is an offence to sell or supply liquor to a person in circumstances where the person selling or supplying the liquor knows, or where it is reasonable to suspect, that the liquor will be taken into an Aboriginal community which has prohibited the consumption of liquor under the *Liquor Licensing Regulations 1989* (WA).

Proposal 18 [p 140]

That legislation, the 'Aboriginal Communities and Community Justice Groups Act' be enacted to provide for the establishment of Aboriginal community justice groups upon the application, approved by the Minister for Indigenous Affairs, of an Aboriginal community.

That the Minister must approve a community justice group if satisfied that the membership of the community justice group is representative of all relevant family, social or skin groups in the community (to be defined in the Act); that there is provision for the equal representation of men and women; and that a majority of the members of the community support the establishment of a community justice group.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' distinguish between the two types of Aboriginal communities which are covered by the legislation:

- Discrete Aboriginal communities which have been declared by the Minister for Indigenous Affairs to be a community to which the legislation applies.
- All other Aboriginal (non-discrete) communities.

That the Minister for Indigenous Affairs is to declare that an Aboriginal community is a discrete Aboriginal community to which the Act applies, if satisfied, that there are structures or provisions which require that the proposed community justice group consult with the members of the community in relation to the nature of the community rules and community sanctions.

That those communities that are currently declared to be a community to which the *Aboriginal Communities Act 1979* (WA) applies be deemed to be an Aboriginal community to which the proposed 'Aboriginal Communities and Community Justice Groups Act' applies.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' include a definition of what constitutes community lands. For communities with a crown reserve lease or pastoral lease the definition should state that the community lands are the entire area covered by the reserve or pastoral lease. For other communities the Minister is to declare the boundaries of the community lands in consultation with the community.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' provide that the functions of a community justice group in a discrete Aboriginal community include setting community rules and community sanctions subject to the laws of Australia. For all community justice groups the functions would include the establishment of local justice strategies and crime prevention programs;

That an Aboriginal Justice Advisory Council be established to oversee the consultation process with Aboriginal communities and to provide advice and support to communities who wish to establish a community justice group. The membership of the Aboriginal Justice Advisory Council should be predominantly Aboriginal people from both regional and metropolitan areas as well as representatives from relevant government departments including the Department of Indigenous Affairs, the Department of Justice and the Department for Community Development. This council is to be established within a framework that provides that its role is to advise and support Aboriginal communities and that government representatives are involved to provide support based upon their particular expertise.

Proposal 19 [p 157]

That the Western Australian government establish as a matter of priority pilot Aboriginal Courts for adults and children in the metropolitan area and, subject to the views of the relevant Aboriginal communities, in other locations across the state. This pilot project must ensure adequate consultation with Aboriginal communities and other stakeholders and be sufficiently resourced and supported by government departments.

Proposal 20 [p 175]

That relevant Western Australian government departments provide culturally appropriate information about changes to the criminal law that may significantly affect Aboriginal people. For the purposes of improving the communication of specific laws to Aboriginal people, government departments should consider engaging Aboriginal organisations and groups to assist with the design and delivery of any legal education program.

Proposal 21 [p 183]

That s 31(4) of the *Criminal Code* (WA) be amended to remove the requirement that there must be a threat *of immediate death or grievous bodily harm.*

That s 31(4) be amended to provide that the threat may be directed towards the accused or to some other person.

That the defence be based on the defence in Australian Capital Territory and the Commonwealth.

Proposal 22 [p 189]

That the Western Australian government continue to introduce strategies to educate Aboriginal communities about effective methods of discipline and inform Aboriginal communities of their right under Australian law to use physical correction

Proposal 23 [p 193]

That Clause 1 of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to include, as a possible condition of bail,

(f) that before the release of the accused on bail a responsible person undertakes in writing in the prescribed form to ensure that the accused complies with any requirement of his bail undertaking. The authorised officer or judicial officer must be satisfied that the proposed responsible person is suitable.

Proposal 24 [p 193]

That the *Bail Act 1982* (WA) be amended to provide that when setting the amount of a surety undertaking the financial means of any proposed surety should be taken into account.

Proposal 25 [p 194]

That the *Bail Act 1982* (WA) be amended to provide that where an adult or juvenile accused has been refused bail or is unable to meet the conditions of bail that have been set by an authorised police officer, justice of the peace or authorised community services officer, the accused is entitled to apply to a magistrate for bail by telephone application if he or she could not otherwise be brought before a court by 4.00 pm the following day.

Proposal 26 [p 195]

That the Department of Justice continue to develop, in partnership with Aboriginal communities, non-custodial bail facilities for Aboriginal children in remote and rural locations. In developing these facilities the Department of Justice should work in conjunction with any local community justice group.

Proposal 27 [p 197]

That Clause 3 of Part C in Schedule 1 of the *Bail Act 1982* (WA) be amended to provide that the judicial officer or authorised officer shall have regard to:

(e) Where the accused is an Aboriginal person, any cultural or Aboriginal customary law issues that are relevant to bail.

Without limiting the manner by which information about cultural or Aboriginal customary law issues can be received by an authorised officer or judicial officer, the authorised officer or judicial officer shall take into account any submissions received from a representative of a community justice group from the accused's community.

Proposal 28 [p 198]

That bail forms and notices (including the bail renewal notice handed to an accused after each court appearance) be amended to include culturally appropriate educational material in relation to the obligations of bail including what an accused person can do if he or she is unable to attend court for a legitimate reason.

Proposal 29 [p 208]

That the *Sentencing Act 1995* (WA) include as a relevant sentencing factor the cultural background of the offender.

Proposal 30 [p 212]

That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended by including a provision that:

When considering whether a term of imprisonment is appropriate the court is to have regard to the particular circumstances of Aboriginal people.

Proposal 31 [p 220]

The court must not accept a plea of guilty unless, having considered whether there are any language, cultural or communication difficulties, the court is satisfied that the accused understands the nature of the plea and its consequences.

Proposal 36 [p 239]

That the Western Australia Police Service *COPs Manual* OP-28 be amended to require relevant Aboriginal customary law issues to be taken into account in the decision to charge or prosecute an offender.

That the Director of Public Prosecutions consider amending the *Statement of Prosecution Policy and Guidelines 2005* to include that any relevant Aboriginal customary law issues should be taken into account in the decision to prosecute an offender.

Proposal 37 [p 241]

That Part 5, Division 1 of the *Young Offenders Act 1994* (WA) be amended to provide that police officers must consider, in relation to an Aboriginal young person, whether it would be more appropriate for the caution to be administered by a respected member of the young person's community or a member of a community justice group.

Proposal 38 [p 241]

That the *Young Offenders Act 1994* (WA) be amended to provide that any previous cautions issued under this Act cannot be used in court against the young person.

Proposal 39 [p 242]

That Part 5, Division 2 of the *Young Offenders Act 1994* (WA) be amended to provide that, subject to the young person's consent and acceptance of responsibility for the offence, a police officer must refer a young person to a juvenile justice team for a non-scheduled offence if the young person has not previously offended against the law, unless there are exceptional circumstances that justify not doing so.

In determining whether a young person has previously offended against the law, previous cautions cannot be taken into account.

Proposal 40 [p 242]

That the categories of offences listed in Schedule 1 and Schedule 2 of the *Young Offenders Act 1994* (WA) be immediately reviewed to enhance the availability of diversion to the juvenile justice teams for offences committed in circumstances considered less serious.

Proposal 41 [p 242]

Proposal 42 [p 243]

That the *Young Offenders Act 1994* (WA) include the relevant criteria (as set out in the *COPs Manual*) for the decision whether to arrest a young person or alternatively to issue a notice to attend court.

Proposal 43 [p 244]

That a diversionary scheme for young Aboriginal people be established to involve

- That before commencing an interview the interviewing police officer must advise the suspect that he or she has the right to contact a lawyer and provide a reasonable opportunity for the suspect to communicate (in private) with a lawyer.
- In the case of a suspect who is an Aboriginal person the police must notify the Aboriginal Legal Service prior to the interview commencing and advise that the suspect is about to be interviewed in relation to an offence and provide an opportunity for a representative of the Aboriginal Legal Service to communicate with the suspect. The interviewing officer does not have to comply with this requirement if the suspect has already indicated that he or she is legally represented by another lawyer or if the suspect states that he or she does not want the Aboriginal Legal Service to be notified.
- If the suspect does not wish for a representative of the Aboriginal Legal Service to attend or there is no representative available the interviewing officer must allow a reasonable opportunity for an interview friend to attend prior to commencing the interview. The interviewing officer does not have to comply with this requirement if it has been expressly waived by the suspect.
- That appropriate exceptions be included, such as an interviewing officer is not required to delay the questioning in order to comply with this provision if to do so would potentially jeopardise the safety of any person.

Proposal 46 [p 253]

That the Western Australian government provide adequate resources to ensure that every police officer who is stationed at a police station that services an Aboriginal community participates in relevant Aboriginal cultural awareness training.

This cultural awareness training should be presented by local Aboriginal people including, if appropriate, members of a community justice group.

Proposal 47 [p 258]

That the Department of Justice, in conjunction with Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to

Proposal 49 [p 260]

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

Proposal 50 [p 260]

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

Proposal 51 [p 261]

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

Aboriginal customary law and the civil law system

Proposal 52 [pp 291–92]

That the present definition of 'person of Aboriginal descent' contained in s 33 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be deleted.

That the requirement in s 35(1) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) that all property of an intestate Aboriginal deceased be automatically vested in the Public Trustee be removed so that the family or next of kin of such deceased may have the choice to administer the estate of the deceased by grant of formal letters of administration under the *Administration Act 1903* (WA).

That s 25 of the *Administration Act 1903* (WA) be amended to state that in the case of intestate Aboriginal estates, the Supreme Court need not know who is entitled in distribution to them, nor whether they wish to apply for a grant of letters of administration themselves.

That traditional Aboriginal marriage be recognised as a marriage and that children of a traditional Aboriginal marriage be recognised as issue of a marriage for the purposes of the *Administration Act 1903* (WA).

That s 35(2) of the

That a new s 35(2A) be inserted into the *Aboriginal Affairs Planning Authority Act 1972* (WA) directing that proof of entitlement to an intestate Aboriginal estate as classificatory kin under s 35(2) of that Act shall be determined upon application to the Supreme Court and that such application may be made after one year of the date of death of the deceased.

That s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) dealing with moral claims be retained in its current form and that the regulations associated with moral claims (sub-regs 9(5) and (6) of the *Aboriginal Affairs Planning Authority Act Regulations*) also be retained.

That sub-regs 9(1)–(4) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be repealed.

Proposal 53 [p 293]

That the prescribed amount declared by proclamation pursuant to s 139(1) of the *Administration Act 1903* (WA) be reviewed and updated to an amount appropriate at the date of proclamation.

Proposal 54 [p 294]

That the Department of Indigenous Affairs and the Public Trustee be jointly funded to establish a program aimed at educating Aboriginal people about the value of wills and also about their entitlements, rights and responsibilities under Western Australian laws of succession.

Proposal 55 [p 295]

That the list of persons entitled to claim against a testate or intestate estate of an Aboriginal person under s 7 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) be extended to include a person who is in a kinship WA9re5

are made aware of alternatives for the financial management of their inheritance before accepting the administration of the financial and/or legal affairs of those beneficiaries. And, that these alternatives are communicated in a culturally appropriate way with the assistance of an independent legal or financial advisor and, if required, an interpreter.

Proposal 58 [p 306]

That the *Coroners Regulations 1997* (WA) be amended to include a direction that in making a decision whether or not to order a post-mortem examination on an Aboriginal deceased person, a coroner must have regard to the desirability of minimising the causing of distress or offence to relatives and extended family (including classificatory kin) of the deceased who, because of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended by the making of that decision.

Proposal 59 [p 308]

That the Department of Justice establish, at the earliest opportunity, a dedicated internet site for the Coroner's Court of Western Australia to enable public access to coronial guidelines, procedures, protocols and findings.

Proposal 60 [p 325]

That protocols relating to the use, sale and protection of Indigenous cultural and intellectual property be developed and promoted in Western Australia. Such protocols should inform Western Australian government agencies and educational and cultural institutions in their dealings with Aboriginal artists and the observance of these protocols by all Western Australian industries, companies and individuals should be actively encouraged by government.

Proposal 61 [p 327]

That the Western Australian government develop protocols aimed at addressing those issues that arise from the 'bioprospecting' of Aboriginal medical knowledge; that is, the exploration of biodiversity for commercially valuable genetic and biochemical resources. These protocols should aim to safeguard Indigenous cultural and intellectual property by ensuring that those who seek to benefit from traditional cultural knowledge:

- undertake direct consultation with Aboriginal people as to their customary law and other requirements;
- ensure compliance with Aboriginal peoples' customary law and other requirements;
- seek prior informed consent for the use of any Aboriginal knowledge from the custodians of that traditional knowledge;
- seek prior informed consent for access to Aboriginal land for any purposes including collection;
- ensure ethical conduct in any consultation, collection or other processes;
- ensure the use of agreements on mutually agreed terms with Aboriginal people for all parts of the process; and
- devise equitable benefit-sharing arrangements for Aboriginal people.

Proposal 62 [p 328]

That the Western Australian government support and encourage the review of Commonwealth intellectual property laws and the institution of special measures to provide better protection for Indigenous cultural and intellectual property.

Aboriginal customary law and the family

Proposal 63 [p 334]

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

Proposal 64 [p 337]

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

5. 'Definitions applicable to written laws'

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

Proposal 65 [p 337]

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

13B. Definitions of certain domestic relationships

(1) A reference in a written law to 'spouse', 'husband', 'wife', 'widow' and 'widower' will be taken to include the corresponding partner of a traditional Aboriginal marriage.

(2) Section 13B(1) does not apply to the *Family Court Act 1997* (WA).

Proposal 66 [p 338]

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

205U. Application of Part generally

(1) This Part applies to de facto relationships and traditional Aboriginal marriages.

(2) However, this Part does not apply to a de facto relationship or traditional Aboriginal marriage that ended before the commencement of this Part.

(3) This Part does not authorise anything that would otherwise be unlawful.

Proposal 67 [p 343]

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

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

Proposal 68 [p 345]

Recognising the custom in Aboriginal communities of making private arrangements

Proposal 73 [p 376]

That relevant Western Australian government authorities take all reasonable steps to enhance communication of harvesting exemptions available to Aboriginal people and of any restrictions placed from time-to-time upon those exemptions.

Proposal 74 [p 377]

That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) be subsumed into future wildlife and biological resource conservation legislation and be expanded to include the taking of flora and fauna (subject to conservation restrictions placed on certain species from time-to-time) for non-commercial purposes including for food, artistic, cultural, therapeutic and ceremonial purposes according to Aboriginal customary law.

That the exemption described above also apply to land designated under the *Conservation and Land Management Act 1984* (WA) subject to the provisions of conservation management plans over such land.

Proposal 75 [p 377]

That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA)—and its successor in future conservation legislation—remain applicable to all fauna and flora (subject to conservation restrictions), including introduced species.

Proposal 76 [p 382]

That s 267 of the *Land Administration Act 1997* (WA) be amended to make clear the legislative intention in relation to the use of firearms for customary hunting on Crown land pursuant to exemptions contained in s 104 of the *Land Administration Act 1997* (WA) and s 23 of the *Wildlife Conservation Act 1950* (WA).

Aboriginal customary law in the courtroom: evidence and procedure

Proposal 77 [p 395]

That the *Evidence Act 1906* (WA) be amended to provide that:

- The hearsay rule be excluded in relation to out of court statements which go to prove the existence or non-existence, or the content, of Aboriginal customary law.
- If a person has specialised knowledge, whether based on experience or otherwise, of Aboriginal customary law, then that person may give opinion evidence in relation to that matter where the opinion is wholly or substantially based on that knowledge.

manner then the witness may be declared a special witness and be able to give evidence using the protective measures set out in ss 106A to 106T on the application of the witness, or on the initiative of the court.

Proposal 84 [p 411]

That the *Evidence Act 1906* (WA) be amended to provide that the court in the exercise of its discretion can allow evidence about customary law to be given by witnesses in groups.

Proposal 85 [p 411]

That the *Evidence Act 1906* (WA) be amended to provide that the court in the exercise of its discretion can allow evidence about customary law to be taken on country.

Proposal 86 [p 413]

That amendments be made to the rules governing procedure to allow an application to be made to the Chief Justice of the Supreme Court, the Chief Justice of Family Court, the Chief Judge of the District Court or the Chief Magistrate for a judge or magistrate of a particular gender to be assigned to a matter in which gender restricted evidence is likely to be heard.

Proposal 87 [p 413]

That the *Criminal Procedure Act 2004* (WA) be amended to provide that a court may order that certain information not be referred to in proceedings if the court is satisfied that reference to that information would be offensive to an Aboriginal person or community because of Aboriginal customary law, provided that to do so is not contrary to the administration of justice.

Proposal 88 [p 414]

That the following sub-sections be added to s 171(4) of the *Criminal Procedure Act 2004* (WA):

(d) On an application by a party or on its own initiative, a court may make an order that prohibits the publication of any evidence if the court is satisfied

Proposal 90 [p 416]

That all Western Australian courts (including the State Administrative Tribunal) implement Aboriginal cultural awareness training.

That the Western Australian government provide adequate resources to implement this proposal by ensuring that there are sufficient funds to develop programs, engage Aboriginal presenters without adversely affecting the work of the courts.

Where a judicial officer is required to regularly sit at a particular location, *local* cultural awareness should be encouraged.

The Commission encourages members of a community justice group to participate in cultural awareness training.

Aboriginal community governance in Western Australia

Proposal 91 [p 423]

That the Western Australian government investigate ways of improving accountability of local governments for funding provided for the benefit of Aboriginal people in each local government area.

Proposal 92 [p 436]

That the Western Australian government explore the possibility of accessing federal funding for discrete Aboriginal communities under s 4(1)(b) of the *Local Government (Financial Assistance) Act 1995* (Cth) with a view to offering this autonomous option to functional Aboriginal communities that are not currently well-served by their local governments.

Proposal 93 [p 438]

That the starting point for reform of Aboriginal community governance in Western Australia be limited to a basic framework that can facilitate self-identifying and self-organising governance structures to emerge at a community level.

That reform of Aboriginal community governance in Western Australia be informed by the guiding principles of voluntariness; community empowerment and devolved decision-making power; 'downwards accountability'; flexibility in funding and institutional structure; and balanced clan and gender representation.

That Aboriginal communities be free to develop or choose a model of governance that is appropriate for their needs rather than have such model imposed on them by government.

Summary of Invitations to Submit

Aboriginal peoples in Western Australia

Invitation to Submit 1 [p 31]

The Commission invites submissions on the problems faced by Aboriginal people in Western Australia in proving their Aboriginality, particularly for the purposes of accessing programs and benefits offered by Western Australian government agencies for the exclusive benefit of Aboriginal people.

Aboriginal customary law and the criminal justice system

Invitation to Submit 2 [p 116]

The Commission invites submissions on the extent to which the defence of acting under a custom of the community has been relied upon by Aboriginal people accused of breaching a by-law enacted under the *Aboriginal Communities Act 1979* (WA) and whether the defence was successful.

Invitation to Submit 3 [p 123]

The Commission invites submissions as to whether (and if so, on what terms) there should be a customary law defence to the offence of trespass in the proposed 'Aboriginal Communities and Community Justice Groups Act'.

Invitation to Submit 4 [p 161]

The Commission invites submissions as to whether there should be a partial defence of Aboriginal customary law that would have the effect, if proved, that a person charged with wilful murder or murder would instead be convicted of manslaughter.

In the alternative the Commission invites submissions as to whether the mandatory penalty of life imprisonment for the offences of wilful murder and murder should be abolished and replaced with a maximum sentence of life imprisonment so that issues concerning Aboriginal customary law can be taken into account in mitigation of sentence where appropriate.

Invitation to Submit 5 [p 172]

The Commission invites submissions as to whether the *Criminal Code* (WA) should be amended to remove the distinction between assault occasioning bodily harm and unlawful wounding and, if so, whether:

- the *Criminal Code* (WA) should provide that consent is an element of an offence of unlawful wounding; or
- the offence of unlawful wounding should be removed; or
- the various categories of violence should be redefined as harm or serious harm and to provide that a person can consent to harm but not to serious harm unless in pursuance of a socially acceptable function or activity.

Invitation to Submit 6 [p 187]

The Commission invites submissions as to whether the ordinary person should be defined as an ordinary person of the same cultural background as the accused for the purposes of assessing both the gravity of the provocation and determining whether an ordinary person could have lost self-control.

Invitation to Submit 7 [p 189]

The Commission invites submissions in relation to the most appropriate agency to coordinate education strategies for Aboriginal people about effective methods of parental discipline.

Invitation to Submit 8 [p 254]

The Commission invites submissions as to whether, in light of the Commission's proposals in relation to criminal justice (or for any other reason), the Western Australia Police Service's former Aboriginal Policy and Services Unit should be

Invitation to Submit 12 [p 317]

The Commission invites submissions on:

- Whether cultural and spiritual beliefs genuinely held under Aboriginal customary law should be considered by the court where there is a dispute in relation to the disposal of a body of an Aboriginal deceased. And if so, what significance should be attached to such cultural and spiritual beliefs?
- What would be the appropriate protocol to apply in cases where there are genuinely held but competing cultural and spiritual beliefs?
- What, if any, significance should be placed on the deceased's wishes regarding burial if embodied in a signed document (not necessarily a will)?
- Whether the Supreme Court of Western Australia is the appropriate forum for the determination of burial disputes and, if not, what would be the appropriate forum?

Aboriginal customary law and the family

Invitation to Submit 13 [p 337]

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

Invitation to Submit 14 [p 357]

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

Invitation to Submit 15 [p 361]

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

Customary hunting, fishing and gathering rights

Invitation to Submit 16 [p 378]

The Commission invites submissions as to whether the non-commercial barter or exchange of fauna or flora taken by Aboriginal persons pursuant to the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) be permitted and, if so, what, if any, restrictions should be placed upon such exchange.

Aboriginal customary law in the courtroom: evidence and procedure

Invitation to Submit 17 [p 405]

The Commission invites submissions to inform the development of protocols to assist witnesses, lawyers, parties and court officers when using the services of an interpreter.

Invitation to Submit 18 [p 406]

The Commission invites submissions as to whether it is necessary for amendments to be made to the *Evidence Act 1906* (WA) to allow for evidence to be given in narrative form, and to provide for regulation of that form of evidence.

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; ingT8fe(T8.000621.6Aboem;sher ertl3)48 the lacr0.001ropdomesti1osTc-0.08 s)A); l0.045-tt.045