Chapter Five

Aboriginal Customary Law and the Criminal Justice System

Contents

Introduction

In this chapter the Commission considers the need for recognition of Aboriginal customary law in the criminal justice system. In its Discussion Paper the Commission observed that judicial recognition of Aboriginal customary law in the Western Australian criminal justice system has generally been limited to the recognition of physical traditional punishments during sentencing proceedings. Additionally, the recognition 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.[1] Many of the Commission's recommendations in this chapter are designed to achieve more consistent and reliable 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 recommendations in this Report 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'.[2]

The Commission concluded in its Discussion Paper that the Western Australian criminal justice system is 'failing Aboriginal people and it is time for a new approach'.[3] Despite the recent public debate which has inferred that Aboriginal customary law is somehow responsible for the extent of violence and sexual abuse in Aboriginal communities, the Commission is of the view that it is the breakdown of Aboriginal customary law in many communities that has contributed to this problem.[4] In fact, the Commission's consultations with Aboriginal people and research strongly support the conclusion that processes developed consistently with Aboriginal law and culture may assist in solving law and order issues in Aboriginal communities. In particular, the Commission aims to enhance the cultural authority of Elders and other respected persons by providing an opportunity for their direct participation in the administration of the criminal justice system.

During the Commission's consultations with Aboriginal people across the state, the recognition of Aboriginal customary law was paramount. At the same time many Aboriginal people were concerned about practical issues that impacted upon their dealings with the criminal justice system. Therefore, the objective of many of the recommendations in this chapter is to improve the way in which the criminal justice system deals with Aboriginal people and to provide ways in which Aboriginal people can be directly involved in decisions that affect them and their communities.

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 83.
2. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Porject No 94 (January 2006) 235, 241.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 83.
4. See discussion under 'Customary Law Does Not Condone Family Violence or Sexual Abuse', Chapter One, above pp 19—22.

Traditional Aboriginal Law and Punishment

The Commission concluded in its Discussion Paper that it is not possible to identify all traditional law offences, traditional punishments and dispute resolution methods employed by Aboriginal people because of the diversity of Aboriginal people in Western Australia and because some aspects of Aboriginal customary law are secret. In any event, the Commission does not consider that it is necessary or desirable to attempt any codification of Aboriginal customary laws.[1] Bearing in mind that this Report deals with the interaction of the Western Australian legal system and Aboriginal law and culture, it is necessary to consider those aspects of traditional law and punishment that may conflict with Western Australian laws.

Although many aspects of the practice of traditional Aboriginal law have changed over time, the Commission's consultations and research revealed that many Aboriginal people in Western Australia remain subject to Aboriginal customary law offences and punishments.[2] In its Discussion Paper the Commission 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 traditional Aboriginal law, the concept of responsibility under Aboriginal law, traditional offences and punishments, and traditional dispute resolution methods, the Commission has found that there are three main areas of conflict between Aboriginal customary law and the Western Australian criminal justice system.[3]

Conflict Between Aboriginal and Australian Law

Traditional punishments and practices may constitute an offence against Western Australian law

An Aboriginal person who inflicts traditional physical punishments under Aboriginal customary law may commit an offence against Western Australian law. For example, spearing may amount to an offence of unlawful wounding, assault occasioning bodily harm or grievous bodily harm.[4] Similarly, certain initiation practices under customary law may constitute a criminal offence.[5]

One way of addressing this conflict would be to recommend that all traditional Aboriginal punishments and practices should be lawful under the Western Australian legal system. The Commission is firmly of the view that this is not appropriate. This approach would be contrary to international human rights standards and would fail to ensure that Aboriginal people are fully protected under Australian law.[6] Nevertheless, depending on the circumstances there may be some traditional physical punishments and practices that will not be unlawful. This will often depend upon the consent and age of the people involved. In line with the Commission's overall approach to the recognition of Aboriginal customary law, the

1. See discussion under 'How Should Aboriginal Customary Law Be Recognised?', Chapter Four, above pp 70–71; LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 62.
2. LRCWA, ibid 91–92.
3. Ibid 84–91.
4. See discussion under 'Consent', below pp 139–48.
5. See discussion under 'Traditional initiation practices', below pp 143–45.
6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 171.

question of the lawfulness or otherwise of traditional practices must be determined on a case-by-case basis.[7]

When considering the relevant offences under the Western Australian *Criminal Code* the Commission has identified inconsistencies between the requirements for the offence of unlawful wounding and assault occasioning bodily harm. While Aboriginal people are affected by these inconsistencies—in terms of how the law in Western Australia deals with traditional punishment and other practices—the impact is in fact much wider. Therefore, the Commission considers that it is appropriate to recommend legislative amendment that would remove the inconsistency for all Western Australians.[8]

Double punishment

Under Australian law a person convicted of a crime is liable to punishment. 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'. It is a principle under Australian law that a person should not be punished twice for the same offence.[9] In response to this issue, Aboriginal people consulted by the Commission generally supported an appropriate balance between the punishment imposed under customary law and the sentence imposed by the court.[10] The Commission has made a recommendation in respect of Aboriginal customary law and sentencing that will, among other things, enable courts to properly take into account any punishment that has been imposed or will be imposed under customary law.[11]

Dispute resolution methods

There are significant differences between traditional Aboriginal dispute resolution methods and the Australian criminal justice system. These differences include that:

- Aboriginal dispute resolution methods involve the family and communities, while in the Western legal system strangers determine disputes and impose punishments;
- the disputants are directly involved in customary law processes compared with the use of advocates under the Australian legal system; and
- Aboriginal customary law decision-making is collective and by consensus, rather than the hierarchal nature of decision-making found under Australian law.[12]

The Commission concluded in its Discussion Paper that as a consequence of these differences, Aboriginal people often feel alienated from the criminal justice system. Further, because family and community members are involved in dealing with 'offenders' under customary law, there is a strong case for establishing mechanisms whereby Aboriginal people can be directly involved in the criminal justice system.[13] The Commission has recommended the establishment of Aboriginal courts.[14] This recommendation recognises the need for Aboriginal people to be more actively involved in mainstream criminal justice processes in order to remove the alienation and distrust of that system felt by many Aboriginal people.

In making its recommendations the Commission has also taken account of the importance of recognising the potential role of Elders in Aboriginal justice strategies.[15] The Commission's recommendations, in particular the recommendation for community justice groups, are designed to assist dispute resolution in Aboriginal communities by creating the means by which the cultural authority of Elders and other respected Aboriginal persons can be recognised and strengthened. Where appropriate the Commission has also recommended 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.[16]

7. Ibid.
8. See Recommendation 25, below p 148.
9. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 214.
10. Ibid.
11. See Recommendation 38, below p 183.
12. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 92.
13. Ibid 92–93.
14. See Recommendation 24, below p 136.
15. The importance of Elders and concern for their declining cultural authority was stressed by many Aboriginal people consulted for this reference. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 92.
16. Ibid.

Aboriginal People and the Criminal Justice System

Over-Representation in the Criminal Justice System

Historically, Aboriginal people have been discriminated against in the criminal justice system. In its Discussion Paper the Commission emphasised that past discriminatory government polices and laws have shaped Aboriginal peoples' contemporary perceptions of the justice system.[1] Despite the abolition of blatant discriminatory laws and policies, the Commission observed that 'structural racism' or bias within the Western Australian justice system remains. Structural racism refers to the discriminatory *impact* of laws, policies and practices, rather than individual racist attitudes.[2] An important aim underlying many of the Commission's recommendations in this chapter is to remove discrimination and disadvantages experienced by Aboriginal people in the justice system.

The Commission considers that it is important to again emphasise the unacceptable level of Aboriginal imprisonment in this state. In its Discussion Paper the Commission reported that Western Australia has the highest disproportionate rate of adult imprisonment and juvenile detention of Aboriginal people in Australia.[3] Although only constituting about three per cent of the state's population, in 2004 Aboriginal people made up approximately 40 per cent of the adult prison population and 70 per cent of children in Western Australian detention centres.[4] In 2004, the detention rate of Aboriginal children in Western Australia was 52 times greater than the detention rate of non-Aboriginal children and double the national rate.[5] It does not appear that there has been any reduction in the rate of Aboriginal imprisonment and detention over the last two years.[6]

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. It is sometimes assumed that the *only* reason Aboriginal people are over-represented is because they commit more offences. However, 'crime statistics do not measure the incidence of criminal conduct as such, but rather who gets apprehended and punished for it, which is a very different thing'.[7] While offending rates are clearly 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.[8] The effect of structural

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 94.
2. Office of the Inspector of Custodial Services, *Report of an Unannounced Inspection of Eastern Goldfields Regional Prison*, Report No. 4 (August 2001) 9–10.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 95.
4. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005) ix & 126.
5. Ibid vii.
6. Department of Corrective Services, *Weekly Offender Statistics* (15 June 2006) 1. On 15 June 2006, 39.7 per cent of adults in prison were Aboriginal and 70.3 per cent of children in detention centres were Aboriginal.
7. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co Ltd, 1991) 245.
8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 94–95. The Office of Inspector of Custodial Services has also concluded that the unacceptable level of over-representation of Aboriginal people in the criminal justice system is in part attributable to structural racism within the criminal justice system itself: see Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No. 30 (November 2005) 5–6. According to the Mahoney Inquiry, the former Department of Justice acknowledged that systemic discrimination is one cause of the high rates of Indigenous over-representation: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.24].

Western Australia has the highest disproportionate rate of adult imprisonment and juvenile detention of Aboriginal people in Australia.

bias is evidenced by the higher disproportionate rate of imprisonment and detention in Western Australia compared to other states and territories. As stated by Morgan and Motteram:

> [U]nless one espouses the absurd notion that Aboriginal Western Australians are many times more evil than their inter-state colleagues, this cannot explain why Western Australia's Aboriginal imprisonment rate is so much higher than the rest of the country.[9]

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.[10] The general under-representation of Aboriginal children in diversionary options has also contributed to the disproportionate rate of Aboriginal detention.[11]

The Commission acknowledges that there are numerous and complex underlying factors that contribute to high rates of Aboriginal offending and imprisonment. While the focus in this chapter is on issues within the criminal justice system, the Commission maintains that any significant reduction in the high rates of Aboriginal imprisonment and detention will only be achieved through a comprehensive reform agenda: a whole-of-government approach to addressing the current state of Indigenous disadvantage;[12] substantial improvements to the way in which the criminal justice system operates for Aboriginal people; and the recognition and strengthening of Aboriginal law and culture.[13] The Commission accepts that these reforms will require significant resources. However, research commissioned for this reference suggests that the cost of Aboriginal over-representation in the Western Australian criminal justice system is considerable.[14]

Problems Experienced by Aboriginal People in the Criminal Justice System

Alienation from the criminal justice system

The Commission reported in its Discussion Paper that Aboriginal people often 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; language and communication barriers; and the differences between Aboriginal dispute resolution methods and Western criminal justice processes.[15] The lack of Aboriginal people working in the criminal justice system also contributes to the sense of alienation and the diminished understanding by some Aboriginal people of western justice processes. Aboriginal people consulted by the Commission supported increased employment of Aboriginal people by government justice agencies.[16] The Commission has recognised that it can be difficult to recruit Aboriginal staff because some Aboriginal people are reluctant to work for government agencies due to past negative experiences.[17] The Commission

9. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 313.
10. The proportion of Aboriginal people that are dealt with in the courts is less than the proportion of Aboriginal people that are sentenced to imprisonment or detention. For example, about one-third of the children dealt with in the Children's Court are Aboriginal but Aboriginal children account for 70 per cent of all children in detention: see Morgan & Motteram, ibid 238.
11. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 96.
12. See Recommendation 1, p 48.
13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 98. See also Blagg H, Morgan N, Cunneen C & Ferrante A, *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System* (Melbourne: Equal Opportunity Commission of Victoria, 2005) 176.
14. See Appendix C.
15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 99.
16. LRCWA, Discussion Paper community consultation – Bunbury, 17 March 2006; LRCWA, *Thematic Summary of Consultations – Manguri*, 4 November 2002, 5; *Mirrabooka*, 18 November 2002, 12; *Midland*, 16 December 2002, 37; *Laverton*, 6 March 2003, 14; *Kalgoorlie* 25 March 2003, 25; *Geraldton* 26–27 May 2003, 15–16; *Albany* 18 November 2003, 15. The Kimberley Aboriginal Reference Group also found that many Aboriginal people in the Kimberley were eager to become more involved in the administration of justice: see Kimberley Aboriginal Reference Group, *Initial Recommendations Toward the* Kimberley *Custodial Plan* (October 2005) 7.
17. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 105.

has recommended the establishment of community justice groups and it is anticipated that these groups will be actively involved in criminal justice issues such as diversion, crime prevention, sentencing options and providing information to courts. Because members of a community justice group will be accountable to their community, there will be a greater incentive for Aboriginal people to become involved in justice issues.[18]

The motivation for many of the Commission's recommendations is the aim of improving Aboriginal people's understanding of the Western Australian criminal justice system. Problems arising from language and communication barriers and the need for interpreters are dealt with in Chapter Nine. Other recommendations that will assist Aboriginal people in their understanding of the criminal justice system include Aboriginal courts,[19] cultural awareness training,[20] Aboriginal liaison officers,[21] and community education programs with respect to the criminal law.[22]

Programs and services

In its Discussion Paper the Commission commented that Aboriginal people generally have less access than non-Aboriginal people to adequate services and programs within the criminal justice system.[23] Morgan and Motteram, in their background paper for this reference, provided an overview of government-owned justice programs and services. They concluded that:

> [M]any existing programs are not reaching Aboriginal people to the extent that their numbers in the system would require, and that many of the initiatives remain on the drawing board or in their infancy. In summary, the promises of policy documents remain as yet unfulfilled.[24]

Morgan and Motteram highlighted, among other things, the lack of services for Aboriginal victims; lack of interpreting services; lack of programs to address sexual offending, violence and substance abuse; and the limited number of programs for children.[25] The Commission also observed in its Discussion Paper that despite Aboriginal women constituting half of all female prisoners in Western Australia they 'remain largely invisible to policy makers and program designers with very little attention devoted to their specific situation and needs'.[26]

The Commission accepts that the since the paper by Morgan and Motteram was published the position with respect to justice programs and services for Aboriginal people may well have changed. Nevertheless, it is apparent that problems remain. In 2005 the *Inquiry into the Management of Offenders in Custody and in the Community* (the Mahoney Inquiry) reported that there is a serious deficiency with respect to Aboriginal-specific programs and services designed to reduce offending behaviour. It was stated that the 'lack of appropriate programs for Indigenous offenders may in part explain the high rates of recidivism'.[27] Also, the Commission has received submissions arguing that there are inadequate programs and services available for Aboriginal people. The Public Advocate asserted that there are insufficient culturally appropriate programs and services for Aboriginal adults with decision-making disabilities who come into contact with the criminal justice system.[28] She reported that the 'prevalence of decision-making disability in Aboriginal communities is estimated to be twice that of non-Aboriginal communities'.[29] In 2005 the Public Advocate recommended that culturally specific programs for Aboriginal people with decision-making disabilities must be developed.[30]

18. Ibid; see Recommendation 17, below pp 112–113.
19. See Recommendation 24, below p 136.
20. See Recommendations 11, 12, 128.
21. See Recommendation 127, Chapter Nine, below p 347.
22. See Recommendation 26, below p 150.
23. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 100.
24. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 295.
25. Ibid 313.
26. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2001* (2002) 15.
27. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.92]. It was recommended that programs and educational courses for offenders should be adapted for Aboriginal offenders: Recommendation 92.
28. Michelle Scott, Office of the Public Advocate, Submission No. 13 (18 April 2006) 4. The Public Advocate has defined a person with a decision-making disability as someone who lacks the 'capacity to make reasoned decisions': see Office of the Public Advocate, *Report into Programs and Services for People with Decision-Making Disabilities in the Department of Justice in Western Australia* (August 2005) 7.
29. Michelle Scott, Office of the Public Advocate, Submission No. 13 (18 April 2006) 5.
30. Office of the Public Advocate, *Report into Programs and Services for People with Decision-Making Disabilities in the Department of Justice in Western Australia* (August 2005) 43. Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner has reported that there are limited resources for Indigenous young people with a cognitive disability or a mental illness and he emphasised the need for culturally appropriate programs and services: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Indigenous Young People with Cognitive Disabilities and Australian Juvenile Justice Systems* (December 2005) 29.

Aboriginal people generally have less access than non-Aboriginal people to adequate services and programs within the criminal justice system.

The Commission observed in its Discussion Paper that Aboriginal people in Western Australia are over-represented as victims.[31] In 2003 Aboriginal people were eight times more likely than non-Aboriginal people to be victims of violence.[32] For Aboriginal women the position is disturbing: they are 45 times more likely than non-Aboriginal women to be victims of family violence by spouses or partners. Aboriginal children are also more likely to suffer abuse than non-Aboriginal children.[33] In Chapter Seven the Commission explains that the lack of appropriate services for Aboriginal victims is one reason for the under-reporting of sexual abuse and violence.[34] Inadequate support services for Aboriginal victims was emphasised by the Ngaanyatjarra Council and during community meetings following the Discussion Paper.[35]

The Victim Support Service, run by the Department of the Attorney General, provides counselling and support services for all victims of crime. It operates in the metropolitan area and has 13 regional offices. The Commission understands that following the recommendations of the Gordon Inquiry an Aboriginal Services Officer was employed by the Victim Support Service.[36] Morgan and Motteram argued that although there have been initiatives designed to improve the services available for Aboriginal victims, 'there appears to be a long way to go before service provision meets required levels'.[37] The Commission has been informed that there is an urgent need for more Aboriginal staff to be employed by the Victim Support Service and the Child Witness Service.[38] The Department of the Attorney General's website contains a link for victim services available for Aboriginal people. Most of the services listed are either medical services or crisis accommodation services. There appears to be a deficiency in Aboriginal-specific victim support services that offer a broad range of services (such as counselling, support, advocacy and referral services).[39] The Commission is of the view that the Department of the Attorney General should immediately review the adequacy of services for Aboriginal victims.[40] Further, the Commission considers that there is an urgent need for more appropriate and accessible services for victims of family violence and sexual abuse.

The lack of culturally appropriate and effective programs and services for Aboriginal people means that Aboriginal people are disadvantaged: they have fewer opportunities for rehabilitation and are therefore more likely to re-offend and come into contact with the justice system again. Adopting Harry Blagg's distinction between community-based and community-owned initiatives,[41] the Commission is of the view that the Western Australian government should give priority to the development and support of community-owned programs and services. The Commission contends that its recommendation for the establishment of community justice groups will facilitate the development of Aboriginal-owned programs and services within the criminal justice system. The Commission acknowledges, however, that the implementation of its recommendation for community justice groups will take time and community justice groups will not

31. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 98.
32. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 16.
33. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002) 46.
34. See discussion under 'Lack of appropriate support services for Aboriginal victims', Chapter Seven, p 287.
35. LRCWA, Discussion Paper community consultation – Geraldton, 3 April 2006; Brain Steels, Mawarnkarra Health Service, consultation (28 April 2006); Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 50.
36. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 255. The Aboriginal Services Officer also works for the Child Witness Service. The Child Witness Service is run by the Department of the Attorney General and provides support to children who are witnesses in court proceedings.
37. Ibid 310.
38. Confidential Submission No. 55 (12 July 2006).
39. There were only three services described in this manner: one each in Derby, Broome and Geraldton.
40. The Commission notes that the Mahoney Inquiry recommended that the Department of the Attorney General should be responsible for the coordination of victims' issues across the criminal justice system: see Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) Recommendation 53, [7.421].
41. Blagg H, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 317, 319.

necessarily be established in all locations. Therefore, it is necessary to reinforce the need for adequate and culturally appropriate programs and services to be made available for Aboriginal people within the criminal justice system.[42]

Recommendation 7

Programs and services for Aboriginal people within the criminal justice system

1. That the Department of the Attorney General and the Department of Corrective Services immediately review the existing programs and services available for Aboriginal people in the criminal justice system.
2. That the Western Australian government provide resources to ensure that there are adequate and accessible culturally appropriate programs and services for Aboriginal people at all levels of the criminal justice system.
3. That when allocating resources for the provision of programs and services for Aboriginal people, priority should be given to establishing and supporting Aboriginal-owned programs and services.
4. Where it is not possible to establish an Aboriginal-owned program or service, the Western Australian government should ensure that Aboriginal people are involved in the design and delivery of government-owned programs and services.
5. That the Western Australian government pay particular attention to ensuring that there are adequate and accessible culturally appropriate services for Aboriginal victims of family violence and sexual abuse.

Mandatory sentencing

In 1996 the Western Australian government introduced mandatory sentencing laws for offences of home burglary (commonly known as the 'three-strikes' laws).[43] These mandatory sentencing laws have been subject to extensive criticism, mainly due to their discriminatory impact on Aboriginal youth. A review of these laws in 2001 indicated that Aboriginal children constituted approximately 80 per cent of all children dealt with under the laws.[44] In regional areas (where there are currently no juvenile detention facilities) this figure escalates to 90 per cent. Young Aboriginal people from regional locations who are sentenced to detention are taken from their families, communities and culture and must spend at least six months in a detention centre in Perth.[45] According to the Department of Corrective Services, between 2000 and September 2005 approximately 87 per cent of all children sentenced under the mandatory sentencing laws were Aboriginal.[46] The Commission proposed in its Discussion Paper that the mandatory sentencing laws should be abolished.[47]

It is generally accepted that the mandatory sentencing laws have not reduced the rate of home burglary in Western Australia.[48] In contrast, the Office of the Director of Public Prosecutions (DPP) argued that the mandatory sentencing laws have been a 'major factor' impacting upon the rates of home burglary in this state and did not support the repeal of the laws. The DPP stated that the levels of reported home burglary offences have declined in recent years.[49] However, the mandatory sentencing laws were introduced in 1996 and research has shown that immediately following the introduction of the laws the rate of home burglary actually increased.[50] As acknowledged by the DPP, there are other factors which have contributed to the

42. The Aboriginal Legal Service submitted that there should be an increase in culturally appropriate services for Aboriginal people: see Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4.
43. *Criminal Code Amendment Act (No. 2) 1996* (WA).
44. Department of Justice, *Review of Section 401 of the Criminal Code* (2001) 24–25.
45. For a detailed discussion of the impact of the laws on Aboriginal children and a selection of case studies: see Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001) 63–72. The Commission acknowledged in its Discussion Paper that Aboriginal children may commit more home burglary offences than non-Aboriginal children. But part of the reason for the high numbers of Aboriginal children caught by the laws is that they have less access to those diversionary options (such as a caution or a referral to a juvenile justice team) that do not count as a relevant conviction for the purpose of the 'three-strikes' law: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 101; see also Morgan N, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 *Criminal Law Journal* 293, 310.
46. The Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 4. The Department also indicated that about 87 per cent of Aboriginal juveniles sentenced under the laws were from regional locations.
47. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 101, Proposal 6.
48. Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000* (Commonwealth Parliament, 2002) 21.
49. The Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 1. In its submission the DPP stated that the number of reported home burglaries was 39,913 in 2000/2001 and 26,813 in 2004/2005.
50. Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001) 67. In this report it was noted that home burglary rates appeared to fluctuate over time.

reduction in the rate of home burglary: the introduction of legislation in 2002 to enable police officers to obtain DNA from suspects and offenders; and a greater focus by the police in responding to home burglary offences.[51] Interestingly police statistics indicate that there was a significant decline in the number of reported home burglary offences in the year following the DNA legislation.[52]

The Department of Corrective Services also opposed the Commission's proposal to repeal the mandatory sentencing laws.[53] The Department stated that the government believes 'detention is an appropriate way to deal with very serious repeat offenders'.[54] However, as the Commission observed in its Discussion Paper, the mandatory sentencing laws are largely irrelevant for repeat adult offenders because they would nearly always receive the mandatory sentence of 12 months' imprisonment for a third burglary conviction. Similarly, a large proportion of juveniles (especially serious repeat offenders) would also inevitably receive a sentence of detention.[55] Therefore, the negative impact of the laws is felt by those offenders whose circumstances call for leniency.

The Commission also observed that mandatory sentencing prevents a court from taking into account any relevant aspects of customary law in mitigation of sentence and prevents a court from utilising appropriate diversionary options. Therefore, any Aboriginal community processes (based on customary law or otherwise) to deal with young Aboriginal offenders will be impeded by mandatory sentencing laws.[56] The Commission has received strong expressions of support for the repeal of the mandatory sentencing laws.[57] The Commission remains convinced that the mandatory sentencing laws should be repealed because the laws are unjust and unprincipled; there is no evidence to suggest that they are effective in reducing crime; and they continue to impact disproportionately on Aboriginal children.

Recommendation 8

Repeal mandatory sentencing laws for home burglary

That the mandatory sentencing laws for home burglary in Western Australia be repealed.

Legal representation

Because of the alienation felt by Aboriginal people from the criminal justice system, adequate legal representation is essential. For many Aboriginal people their first contact with the system is with police and that experience is rarely perceived as positive. The next point of contact may be with a legal representative. The Commission stressed in its Discussion Paper that if cultural differences are not recognised at this point, serious injustices may result: a judicial officer will generally assume that because an accused is legally represented all relevant issues will have been considered.[58]

In Western Australia, Aboriginal people are most often legally represented by the Aboriginal Legal Service (ALS). Some are represented by the Legal Aid Commission (LAC), community legal centres, private lawyers and smaller Indigenous-specific providers such as Family Violence Prevention Legal Services.[59] The importance of maintaining adequate Indigenous-specific legal services has been well noted. In 2004 the Commonwealth Senate Legal and Constitutional References Committee concluded that there is a 'clear need for targeted, culturally sensitive and specialised Indigenous legal aid services in order to enable Indigenous people to achieve access to justice'.[60] Similarly, the 2005 inquiry, *Access of Indigenous Australians to Law and Justice Services*, observed that Indigenous-specific legal services are particularly beneficial because they are community-owned; have

51. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 1.
52. Western Australia Police Crime Statistics 2002–2003, 2003–2004 and 2004–2005. In 2002–2003 there were 40,639 reported home burglary offences and in 2003–2004 there were 33,917. This trend continued in 2004-2005 which would be expected with the increasing database of DNA evidence.
53. The Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 3.
54. Ibid.
55. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 101.
56. Ibid.
57. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 50; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 24 (2 May 2006) 3; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 12; Law Society of Western Australia, Submission No. 36 (16 May 2006) 3; Law Council of Australia, Submission No. 41 (29 May 2006) 9–10; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 1.
58. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 101–102.
59. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services,* Report No. 403 (Canberra, 2005) 1–2.
60. Commonwealth Senate Legal and Constitutional Committee, *Legal Aid and Access to Justice*, Final Report (June 2004) 108.

a strong awareness of cultural issues; and are more accessible to Aboriginal people.[61] Both of these federal inquires called for increased funding for Indigenous-specific legal services.[62] The Commission is of the view that effective legal representation and legal educational services for Aboriginal people in Western Australia will significantly enhance the practical recognition of Aboriginal law and culture throughout the criminal justice system.

Funding of the Aboriginal Legal Service

During the Commission's initial consultations many Aboriginal people identified problems with legal representation, especially the inadequate funding of the ALS.[63] These concerns were reiterated during community meetings following the release of the Commission's Discussion Paper.[64] The Commission has noted that Aboriginal accused may be less likely to obtain the services of a lawyer despite the existence of Aboriginal legal services.[65] This is particularly relevant in remote Western Australian locations where ALS representatives may not always be present.[66]

The Department of the Attorney General has developed a management plan for self-represented persons in all areas of the legal system, including criminal justice.[67] During the development of this management plan the ALS argued that its current resources are insufficient to meet any increased demands that are likely to occur as a result of the establishment of additional police stations in remote areas and extra court circuits in regional areas.[68] In the criminal justice system there may be serious consequences for accused people if they are unrepresented. Accused people may plead guilty to offences even though they have a legal defence or they may not present all relevant matters to the court during sentencing proceedings. The Department of the Attorney General has highlighted that in the period from 2003–2004 approximately 25 per cent of all defendants imprisoned in the Magistrates Court were unrepresented.[69] The Department's management plan states that the adequacy of funding to the ALS (and the LAC) is outside its terms of reference. It acknowledges, however, that increased funding to the ALS (and the LAC) would be likely to improve the ability of these organisations to represent accused appearing before the Magistrates Court on relative serious charges that may result in a term of imprisonment.[70]

During the 2005 federal inquiry *Access of Indigenous Australians to Law and Justice Services* it was recognised that Aboriginal and Torres Strait Islander legal services (ATSILS) operate in a 'climate of static funding and increasing demand'.[71] This inquiry also observed that ATSILS find it difficult to attract and retain experienced staff because remuneration levels are much less than those received by staff in the LAC.[72] The inquiry supported increased funding, particularly for family and civil law, to Indigenous-specific services dealing with family violence in order to improve access to legal services for Aboriginal women.[73] It was not suggested that there should be gender-specific services because this would disadvantage women who should have access to the experience of ATSILS in dealing with criminal justice issues.[74] In its submission the Law

61. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services,* Report No. 403 (Canberra, 2005) 2.
62. The 2004 inquiry into *Legal Aid and Access to Justice* recommended that the Commonwealth government urgently increase the legal of funding to Indigenous legal services: The Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (2004) Recommendation 27. Similarly, the Commonwealth Senate Legal and Constitutional Committee recommended in its inquiry that the Commonwealth increase funding for ATSILS and that the Commonwealth and state/territory governments provide sufficient funding for Indigenous legal services and Family Violence Prevention Legal Services to enable effective legal services for Indigenous women: see Commonwealth Senate Legal and Constitutional Committee, *Legal Aid and Access to Justice*, Final Report (June 2004) 109.
63. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 102.
64. LRCWA, Discussion Paper community consultations – Kalgoorlie, 28 February 2006; Broome, 7 March 2006; Fitzroy Crossing, 9 March 2006.
65. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 102.
66. Even where a lawyer is available, research has shown that excessively long lists, language and communication barriers, and inadequate time to take appropriate instructions may impede proper legal representation for Aboriginal people from remote communities: see Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) 28 *Monash University Law Review* 268. See also Siegel N, 'Bush Courts of Remote Australia' (2002) 76 *Australian Law Journal* 640, 644.
67. The Department of the Attorney General, *Self-Represented Persons in Western Australian Courts and Tribunals: Management Plan* (May 2006).
68. Ibid 21.
69. Ibid 19.
70. Ibid 25.
71. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services,* Report No. 403 (Canberra, 2005) 17.
72. Ibid 40–44 & 52. It was recommended that the Commonwealth Attorney-General's department develop a comparative scale of remuneration between ATSILS and LAC. The discrepancy between the salaries for lawyers working at ATSILS and those working for Legal Aid was also referred to by the Law Council of Australia in its submission: see Law Council of Australia, Submission No. 41 (29 May 2006) 10.
73. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services,* Report No. 403 (Canberra, 2005) 37–38. The Commission notes that in May 2006 the federal Attorney-General announced that the Commonwealth government would be increasing funding for the expansion of Family Violence Prevention Legal Services (including, one in Broome and the South West): see Attorney General, The Hon Philip Ruddock, *Indigenous Law and Justice Initiatives*, media statement (9 May 2006).
74. Joint Committee of Public Accounts and Audit, ibid 37–38.

Effective legal representation and legal educational services for Aboriginal people will enhance the practical recognition of Aboriginal law and culture throughout the criminal justice system.

Council of Australia argued that 'significantly more funding for ATSILS is urgently required to ensure that Indigenous people receive appropriate access to justice'.[75]

ATSILS are predominantly funded by the Commonwealth government. While the Commission agrees that the Commonwealth government should consider increasing its funding to ATSILS and other Indigenous legal service providers (such as those which provide legal services in relation to family violence), any recommendation in this regard is beyond the Commission's mandate. With respect to the question of state funding it has been observed that:

> An on-going source of complaint from ATSILSs was that they were funded as providers of services that were supplementary to mainstream legal aid providers, however state and territory governments viewed Indigenous affairs as a Commonwealth responsibility.[76]

The 2005 inquiry recommended that the federal Attorney General should discuss the funding arrangements of ATSILS (and Family Violence Prevention Legal Services) with states and territories with a view to obtaining state/territory contribution to the funding of these services.[77] The Commission understands that ATSILS in Queensland and Victoria receive limited funding from their state governments.[78]

Without commenting on whether the Western Australian government should provide ongoing funding to the ALS, the Commission is of the view that the implementation of many of the recommendations in this Report will significantly increase the workload of staff at the ALS. For example:

- Aboriginal courts generally take longer to determine each case and therefore the time spent by defence counsel appearing in those courts will increase.[79]
- The recognition of Aboriginal customary law and culture throughout the criminal justice system (for example, during bail and sentencing proceedings[80]) will necessarily require defence counsel to spend more time preparing cases and representing Aboriginal people.
- The amendments in relation to traffic offences will require additional resources for legal representation and education.[81]
- The provision of culturally appropriate information about the obligations of bail and surety undertakings will require extra resources.[82]
- The preparation of wills for Aboriginal people will necessitate additional resources for legal representation.[83]

The Commission considers that the Western Australian government should provide additional resources to the ALS for specific purposes arising from the

75. Law Council of Australia, Submission No. 41 (29 May 2006) 11.
76. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services,* Report No. 403 (Canberra, 2005) 59–60.
77. Ibid 66.
78. The Commonwealth Senate Legal and Constitutional Committee observed that state and territory governments have provided funding for ATSILS: see Commonwealth Senate Legal and Constitutional Committee, *Legal Aid and Access to Justice*, Final Report (June 2004) 76. The Finance Officer from the Victorian Aboriginal Legal Service has advised the Commission that it receives limited state funding (applied for on a case-by-case basis) for specific projects and state-based legal issues such as community legal education: Sam Firouzian, Finance Executive Officer, Victorian Aboriginal Legal Service, telephone consultation (17 August 2006). The Chief Executive Officer of the Queensland Aboriginal and Torres Strait Islander Community Legal Service (Townsville) has advised that it receives funding from the state via legal aid grants on a case-by-case basis: Randall Ross, Chief Executive Officer Queensland Aboriginal and Torres Strait Islander Community Legal Service – Townsville, telephone consultation (10 August 2006). The Commission is also aware that the Aboriginal Legal Rights Movement in South Australia is in the process of applying for funding from the state government for a number of purposes, including the provision of adequate salaries for legal staff and the employment of additional staff in particular locations or for specific purposes: Neil Gillespie, Chief Executive Officer, Aboriginal Legal Rights Movement Inc – South Australia, telephone consultation (14 August 2006).
79. See Recommendation 24, below p 136. See also Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 50.
80. See Recommendations 34, below p 168; Recommendation 38 & 39, below pp 183–84.
81. See discussion under 'Traffic offences and related matters', below p 93.
82. See Recommendation 35, below p 170.
83. See Recommendation 70, Chapter Six, below p 241.

implementation of the recommendations in this Report.[84] For example, resources could be provided to employ a designated lawyer to work in a specific Aboriginal court; to facilitate the development of appropriate educational material for Aboriginal people; and to enable legal representation for specific purposes such as an application for an extraordinary licence or the preparation of a will.

Recommendation 9

Funding for the Aboriginal Legal Service of Western Australia

That the Western Australian government consult with the Aboriginal Legal Service with a view to providing funding for specific projects or to assist Aboriginal people obtain adequate legal representation as a consequence of the recommendations in this Report.

Protocols for lawyers working with Aboriginal people

During the Commission's consultations in Kalgoorlie it was suggested that there should be 'protocols to guide lawyers in their dealings with Aboriginal clients'.[85] In 2004 the Law Society of the Northern Territory developed protocols for lawyers dealing with Aboriginal people. The underlying aim of these protocols is to avoid problems arising from miscommunication between non-Aboriginal lawyers and their Aboriginal clients. There are three main protocols: a test to determine whether the client requires the services of an interpreter; an obligation on lawyers to fully explain their role; and a requirement to use plain English. The protocols also contain information about cultural differences and aspects of Aboriginal customary law. In its Discussion Paper the Commission noted that the Law Society of Western Australia was in the process of adapting these protocols for use in this state.[86] The Commission expressed its support for the establishment of these protocols and suggested that they should be used not only by ALS and LAC lawyers, but also by community legal centres, private practitioners and lawyers employed by the DPP.[87]

The Commission understands that the Law Society has agreed to develop and amend the Northern Territory Indigenous Protocols for Lawyers for use in Western Australia. However, during discussions with consultants regarding this project, the Law Society was informed that there would be extensive work involved, including the need to consult relevant Aboriginal people. The Law Society considers that the project requires more than simply amending the references to Northern Territory laws and procedures. As a consequence, the project scope is far wider than originally anticipated and therefore it has been delayed principally due to the Law Society not having the resources or funding to undertake such a significant project.[88]

In Chapter Nine the Commission suggests that the protocols should include information about effective and culturally appropriate methods of leading evidence from Aboriginal witnesses.[89] The Commission has also recommended that the Department of the Attorney General develop guidelines to assist courts to determine when a person appearing in court requires the services of an interpreter[90] and that the Western Australia Police develop protocols to determine when a suspect requires the services of an interpreter.[91] Clearly, there should be collaboration between the agencies responsible for developing these protocols and guidelines.

Bearing in mind the potential benefits for Aboriginal people in Western Australia and the criminal justice system in general, the Commission is of the view that the development of protocols for lawyers working with Aboriginal people should be a priority and should be adequately resourced. The Commission has therefore recommended that the Western Australian government provide funding to the Law Society to ensure that such protocols are developed as a priority.

84. The Commission notes that the ALS is seeking funding from both the state and federal governments for the establishment of a statewide interpreter service: see further discussion under 'Aboriginal Legal Service proposal' Chapter Nine, below pp 336–38.
85. LRCWA, *Thematic Summary of Consultations – Kalgoorlie,* 25 March 2003, 27.
86. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 103.
87. In its Discussion Paper the Commission noted that prosecutors are required to examine Aboriginal witnesses and victims and therefore they need to be fully aware of any language, communication or cultural issues that may impact upon the person's understanding of the process. Prosecutors may also be required to object to unfair or inappropriate questions put to an Aboriginal witness during cross-examination: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 103.
88. David Price, Executive Director, Law Society of Western Australia, email (18 August 2006).
89. See 'Educating those who work in the legal system about Aboriginal culture', Chapter Nine, below p 347.
90. See Recommendation 122, Chapter Nine, below p 341.
91. See Recommendation 53, below p 208.

Recommendation 10

Protocols for lawyers working with Aboriginal people

1. That the Western Australian government provide funding to the Law Society of Western Austarlia for the purpose of developing protocols for lawyers who work with Aboriginal people.
2. That in developing these protocols the Law Society should consult with relevant Aboriginal people and organisations including the Aboriginal Legal Service and Aboriginal interpreting services.

Cultural awareness training for lawyers

In addition to the development of protocols the Commission concluded in its Discussion Paper that lawyers who regularly work with Aboriginal people should undertake cultural awareness training, preferably presented by Aboriginal people. The Commission suggested that with adequate resources the Law Society of Western Australia would be the most appropriate agency to coordinate cultural awareness training programs for legal practitioners and proposed that the Western Australian government should provide adequate resources for the development of such programs.[92] The response to this proposal has been extremely positive. The Commission has received support from Aboriginal people, legal services and organisations, and the Department of the Attorney General.[93] The Law Society has indicated that it is willing to consider the coordination of the development of cultural awareness training programs for lawyers.[94]

The Department of the Attorney General suggested that these training programs could be incorporated into the Legal Practice Board's proposed mandatory continuing legal education program,[95] which is expected to commence in 2007.[96] The Legal Practice Board has advised the Commission that, under its draft program, lawyers will be able to choose from a number of subjects, but they must complete a required number of subjects each year.[97]

The Commission received one submission suggesting that its proposal for cultural awareness training should be funded by the legal profession.[98] The Commission proposed that the government provide resources for the *development* of appropriate cultural awareness programs. It is a separate question whether the government should seek to recoup these costs from the lawyers who subsequently attend the programs. In this regard the Commission emphasises that the majority of lawyers who represent or work with Aboriginal people are employees of not-for-profit organisations[99] and therefore it is vital to ensure that attendance at the relevant programs is not cost prohibitive for those people. The Commission does not consider that it is appropriate to determine at this stage the precise details with respect to the costs associated with attending these programs. The focus of the Commission is on the development and availability of Aboriginal cultural awareness programs for lawyers.

92. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 103, Proposal 7.
93. Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006) 2; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of the Attorney General, Submission No. 34 (11 May 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 3; Law Society of Western Australia, Submission No. 36 (16 May 2006) 1; Law Council of Australia, Submission No. 41 (29 May 2006) 10; Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 1; LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006; Women's Congress, consultation (28 March 2006).
94. David Price, Executive Director, Law Society of Western Australia, email (18 August 2006).
95. Department of the Attorney General, Submission No. 34 (11 May 2006) 2.
96. Clare Thompson, Legal Practice Board of Western Australia, Submission No. 52 (27 June 2006) 2. The program cannot be implemented until amendments to the *Legal Practice Act 2003* (WA) have been made.
97. Ibid 1–2. It is expected that the subjects will be delivered by universities, law firms, law associations and commercial providers.
98. Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006) 2. The Commission notes that it is anticipated that the proposed mandatory continuing legal education program will be partly funded by the legal profession in the same way that voluntary education programs are funded now. Presently, continuing legal education seminars are provided to practitioners by the Law Society, courts and commercial providers. The costs of these seminars are usually met by the participant or the participant's employer and in some cases participation is free: see Clare Thompson, Legal Practice Board, telephone consultation (9 August 2006)
99. Also in many cases private lawyers who represent Aboriginal people are funded by the Legal Aid Commission.

In Chapter Three, the Commission recommends that government employees and contractors who work directly or have regular dealings with Aboriginal people be required to undertake cultural awareness training. The Commission emphasises, among other things, the need for cultural awareness training to be locally based and to include presentations by Aboriginal people.[100] In the context of legal representation, cultural awareness programs should be available for lawyers working in regional areas and reflect different local circumstances where possible. The Commission highlights that its recommendation for cultural awareness training for lawyers should be read in conjunction with Recommendation 2.

Recommendation 11

Cultural awareness training for lawyers

1. That the Western Australian government provide resources for the development of Aboriginal cultural awareness training programs for lawyers.
2. That the Law Society of Western Australia should coordinate the development of Aboriginal cultural awareness training programs for lawyers.
3. That the Law Society should ensure that Aboriginal cultural awareness training programs are developed in conjunction with Aboriginal people and, where possible, they should be presented by Aboriginal people.
4. That the Law Society should apply for Aboriginal cultural awareness training programs to be accredited as approved programs under the Legal Practice Board's mandatory continuing legal education program (if and when it commences).

Cultural awareness training for government justice agencies

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.[101] The Commission has made separate recommendations for cultural awareness training for judicial officers, police and lawyers.[102] In its Discussion Paper the Commission explained that many (but not all) employees of the former Department of Justice participated in cultural awareness training.[103] In February 2006, as a consequence of the Mahoney Inquiry, the Department of Justice was divided into two Departments: the Department of the Attorney General and the Department of Corrective Services.[104] The Commission proposed that all departmental employees (who work directly with Aboriginal people) should be required to undertake cultural awareness training and, further, that such training should be made available for relevant volunteer workers.[105]

All submissions received by the Commission in relation to this proposal were supportive, including the submissions from the Department of the Attorney General and the Department of Corrective Services.[106] The Department of Corrective Services indicated that additional resources would be required for 'community and custodial officers to be released from their operational duties'.[107] The Department expressed support for locally based training for staff who work with remote and regional Aboriginal communities.[108] The ALS submitted that cultural awareness training for staff at the Department of Corrective Services is an immediate priority. As mentioned above, the Commission has also made a general recommendation for cultural awareness training for all government employees and contractors.[109] The Commission reiterates that recommendations for agency specific cultural awareness training must be read together with Recommendation 2.

100. See Recommendation 2, Chapter Three, above p 51.
101. LRCWA, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 9 ; *Geraldton* 26–27 May 2003, 16; *Broome*, 17–19 August 2003, 21–22; *Bunbury*, 28–29 October 2003, 11; *Albany* 18 November 2003, 19. Because of the differences between Aboriginal communities the focus was on localised training.
102. See Recommendation 128, Chapter Nine, below p 348; Recommendation 56, below p 212; and Recommendation 11.
103. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 104.
104. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 1. From now on the Commission will refer to the Department of the Attorney General and the Department of Corrective Services.
105. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 104, Proposal 8.
106. Marian Lester, Submission No. 18 (27 April 2006) 1; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 4; Department of the Attorney General, Submission No. 34 (11 May 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 3; Law Society of Western Australia, Submission No. 36 (16 May 2006) 1; The Law Council of Australia, Submission No. 41 (29 May 2006) 12; Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 1.
107. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 4.
108. Ibid.
109. See Recommendation 2, above p 51.

People working for criminal justice agencies should be provided with more effective cultural awareness training.

Recommendation 12

Cultural awareness training for staff and volunteers in the Department of the Attorney General and the Department of Corrective Services

1. That employees of the Department of the Attorney General and the Department of Corrective Services who work directly with Aboriginal people (such as community corrections officers, prison officers and court staff) be required to undertake cultural awareness training.
2. That cultural awareness training be made available at no cost for volunteers who deal with Aboriginal people on behalf of the Department of the Attorney General or the Department of Corrective Services.
3. That cultural awareness training be specific to local Aboriginal communities and include programs presented by Aboriginal people.

Traffic offences and related matters

Aboriginal people are disproportionately represented in custody for traffic offences. In 2004 Aboriginal prisoners accounted for 64 per cent of all prison receptions for motor vehicle and driving offences.[110] Aboriginal people are also significantly over-represented in drivers licence suspension orders that result from fine default.[111] Consequently, there a large number of Aboriginal people who are not lawfully entitled to drive. The Commission observed in its Discussion Paper that this has significant implications for Aboriginal people in remote communities.[112] In these communities, where there is no public transport, Aboriginal people need to drive for the purposes of court attendance, to comply with cultural obligations such as attending ceremonies or to obtain medical treatment. Cultural obligations may also require an Aboriginal person to transport another for these purposes. It has been observed that it may constitute a breach of customary law to refuse a request to drive another person, if that person stands in a special relationship to the driver.[113] Therefore, the Commission examined relevant legislative provisions to determine if any changes were required.

Pursuant to s 76 of the *Road Traffic Act 1976* (WA) a person who has been disqualified from holding or obtaining a drivers licence may apply to a court for an extraordinary drivers licence. In all cases there is a time period that must expire before the person can make an application. The amount of time depends upon the nature of the offence that led to the disqualification.[114] If granted, an extraordinary drivers licence will allow the person to drive subject to specific conditions imposed by the court. Conditions may relate to the purpose of driving, the hours that the person is permitted to drive and the place or road on which the person is entitled to drive.[115]

When deciding whether to grant an extraordinary licence the court is required to consider the safety of the public, the character of the applicant, the nature of the offences which led to the disqualification and the applicant's conduct since the licence was disqualified. In addition the court must take into account the 'degree of hardship and inconvenience which would otherwise result to the applicant and his family'[116] if an extraordinary licence was not granted.

In the case of a special application (made within one to two months of a disqualification for certain offences

110. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005) ix. This was also referred to in the Mahoney Inquiry: see Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.31].
111. Ferrante A, *The Disqualified Driver Study: A study of factors relevant to the use of licence disqualification as an effective legal sanction in Western Australia* (Perth: Crime Research Centre, 2005) 70.
112. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 105.
113. Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within Our Legal System?' (2002) 28 *Monash University Law Review* 268, 289.
114. *Road Traffic Act 1976* (WA) s 76(1)(a).
115. *Road Traffic Act 1976* (WA) s 76(5).
116. *Road Traffic Act 1976* (WA) s 76(3)(f).

related to drink driving or refusing to comply with the requirements of a breath-test) the court can only grant an extraordinary licence if satisfied that the applicant will suffer extreme hardship.[117] Extreme hardship is limited to medical treatment for the applicant or his or her family or for the purposes of employment.[118] The Commission proposed in its Discussion Paper that the relevant criteria for deciding whether to grant an extraordinary drivers licence should be extended to take into account Aboriginal kinship, and cultural and customary law obligations.[119] The Commission anticipated that its proposal would allow a respected member of an Aboriginal community (or a member of a community justice group) to apply for an extraordinary drivers licence for the purpose of transporting community members to court or to funerals, or when someone is in need of urgent medical treatment.

Under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) a person is not entitled to apply for an extraordinary drivers licence if his or her licence is suspended for unpaid fines.[120] Instead, an application must be made to the registrar of the Fines Enforcement Registry for the licence suspension order to be cancelled. The grounds of the application are that the applicant requires a drivers licence for employment or needs urgent medical treatment for him or herself of a member of his or her family.[121] If the registrar grants the application the offender is required to pay the outstanding fine by instalments. The Commission proposed that the grounds for making an application to cancel a fines suspension order include that it would deprive the applicant or a member of his or her community of the means of obtaining urgent medical attention, or travelling to court or a funeral.[122]

The Commission received support for both these proposals from the Law Society of Western Australia, the DPP, the Law Council of Australia and the Criminal Lawyers Association.[123] A court security and custodial services officer in Broome also expressed support for these proposals highlighting that Aboriginal people from remote areas in the Kimberley suffer particular hardship when there are no other transport options available.[124]

The DPP agreed with the Commission's conclusion that where there are no other feasible transport options a court should take into account customary law obligations when assessing the degree of hardship or inconvenience. However, the DPP qualified its support for the proposals in two ways.[125] Firstly, the DPP argued that the right to make the relevant application should only be available for a respected member of an Aboriginal community, such as a member of a community justice group. As stated above the Commission expects that it would be likely that members of a community justice group would apply because the ability to drive would assist them in their obligations to their community. Nevertheless, the Commission does not see any reason to limit its recommendation to specific Aboriginal people. In any particular case the court will be required to consider all relevant factors and determine the likelihood that the applicant will need to drive for customary law purposes or to assist members of his or her community.

Secondly, the DPP submitted that an Aboriginal applicant should be required to provide independent evidence 'to establish the standing of the applicant, the lack of other feasible transport options, and a lack of other drivers able to transport members of the community'.[126] It would be prudent for any applicant to present the most reliable and compelling evidence possible in order to convince the court that the application should be granted. But the Commission does not consider that there is any justification for requiring that only Aboriginal people must independently corroborate evidence with respect to these applications.

The Western Australia Police opposed the Commission's proposal with respect to an application to cancel a fines suspension order because it was considered inappropriate for there to be a 'further opportunity for an individual to avoid taking responsibility'.[127] The Commission's proposal does not create a further opportunity to avoid responsibility for the unpaid fines. The option of applying to cancel a fines suspension order is already available. The Commission's proposal simply extends the relevant criteria to reflect the

117. *Road Traffic Act 1976* (WA) s 76(3)(a).
118. *Road Traffic Act 1976* (WA) s 76(3)(b).
119. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 106, Proposal 9.
120. *Road Traffic Act 1976* (WA) s 76(1)(aa).
121. *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 27A, 55A.
122. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 106, Proposal 10.
123. Law Society of Western Australia, Submission No. 36 (16 May 2006) 3; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 2; Law Council of Australia, Submission No. 41 (29 May 2006) 12; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 1.
124. Marian Lester, Submission No. 18 (27 April 2006) 1.
125. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 2.
126. Ibid.
127. Office of the Commissioner of Police, Submission No. 46 (77 June 2006) 4.

circumstances of many Aboriginal people. If an application to cancel a fines suspension order is successful, the applicant will be required to pay the fine in instalments and failure to do so will result in a further suspension order.

The ALS submitted, as an alternative to the Commission's proposals, that there should be a legislated customary law defence for driving without a valid drivers licence.[128] The ALS argued that such a defence was necessary because it takes a long time to obtain an extraordinary licence and in many cases the need to drive (to attend a funeral or medical attention) arises as a matter of urgency. The Commission understands this concern but is of the view that a customary law defence is inappropriate for a number of reasons:

- A customary law defence would generally not cover the need to attend court or medical attention.[129]
- If Aboriginal people are required to rely on a customary law defence they will still be charged by the police; possibly spend time in custody; and need to attend court and present evidence in support of their defence.
- A customary law defence for Aboriginal people who drive without a valid licence or while legally prohibited from driving would create two different laws: one for Aboriginal people and one for non-Aboriginal people.
- The Commission believes that its proposal will be effective if particular Aboriginal people could apply in advance for an extraordinary licence on the basis that there must be a certain number of people in any community who can drive for important reasons such as medical attention, funeral attendance and attendance at court.

The Commission does, however, acknowledge that its proposal will be ineffective if Aboriginal people are not aware of their options and are not in a position to make the relevant application. In this regard the Law Council of Australia emphasised that many Aboriginal people would find it difficult to make an application without legal representation. The Law Council suggested that a court should consider these issues at the time of sentencing rather than requiring an application to be made at a later date.[130] However, in many cases the *Road Traffic Act 1976* provides mandatory minimum disqualification for driving offences. Instead, the Commission has included in its recommendation that the government provide resources to the ALS for the purpose of educating Aboriginal people about these new options[131] and for legal representation.[132]

Recommendation 13

Extraordinary drivers licences

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:

1. Where there are no other feasible transport options, Aboriginal customary law obligations should 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.

2. When 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.

128. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10.
129. Unless if could be argued that the person driving was under a customary law obligation to drive another person. The Commission notes that the need to drive for the purposes of *urgent* medical attention may be excused in circumstances amounting at an extraordinary emergency pursuant to s 25 of the *Criminal Code* (WA).
130. Law Council of Australia, Submission No. 41 (29 May 2006) 12.
131. See also Recommendation 26, below p 150.
132. The Commission has recommended that the Western Australian government should provide additional resources to the ALS because the implementation of many recommendations in this report will significantly impact upon the workload and existing resources of the Aboriginal Legal Service (Recommendation 9). This is one example. The Commission understands that the ALS does not currently provide legal representation for people applying for an extraordinary drivers licence; however, staff at the ALS may provide advice to a person about how to complete the relevant application forms. The ALS also does not pay for the court filing fee: see Aboriginal Legal Service (WA), *Extraordinary drivers licence,* Brochure <http://www.als.org.au/Brochures/elicence.html>.

Recommendation 14

Application to cancel a licence suspension order

That the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) be amended to provide that an Aboriginal person[133] may apply to the registrar 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.

Recommendation 15

Education and legal representation for traffic matters

1. That the Western Australian government provide resources to the Aboriginal Legal Service for the purpose of providing educative strategies for Aboriginal people across the state (in particular in remote locations) about the changes to the criteria for applying for an extraordinary drivers licence or the cancellation of a licence suspension order.
2. That the Western Australian government provide resources to the Aboriginal Legal Service for the purpose of providing legal representation for Aboriginal people who are applying for an extraordinary drivers licence or for the cancellation of a licence suspension order.

133. The Commission notes that the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) will need to be amended to provide for a definition of an Aboriginal person to include a Torres Strait Islander person. See also Recommendatiion 4, above p 63.

Aboriginal Community Justice Groups

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.[1] Throughout this Report, the Commission has emphasised the importance of developing and supporting community-owned initiatives in order to effectively respond to the needs of Aboriginal communities. Similarly, Aboriginal community justice mechanisms should be community-owned rather than merely community-based.[2] The Commission recognises that the justice needs of Aboriginal communities are diverse and that any reform must, therefore, be flexible. The precise role that each community may wish to take with respect to its involvement in the criminal justice system and in dealing with its own social and justice issues will inevitably vary.

In its Discussion Paper, the Commission 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.[3] The Commission acknowledged that there is a number of existing Aboriginal community justice mechanisms in Western Australia; however, current developments in this area are informal and dependent upon specific individuals and government policy at the time. The Commission's proposals for reform did not attempt to take away from existing initiatives but rather to empower Aboriginal communities to increase their ability to determine their own justice issues and solutions and to recognise Aboriginal customary law processes for dealing with justice matters. Importantly, the Commission found that because there is no formal recognition of Aboriginal community justice mechanisms in Western Australia, there is no provision for these mechanisms to operate within the criminal justice system.

The Establishment of Community Justice Groups

In its Discussion Paper, the Commission proposed the establishment of community justice groups in Western Australia.[4] The aim of this proposal was twofold: to increase the participation of Aboriginal people in the operation of the criminal justice system and to provide support for the development of community-owned justice processes. As a consequence of the proposed role for community justice groups to directly participate in the criminal justice system, the Commission concluded that it was necessary for community justice groups to be formally established.[5] The recognition of Aboriginal customary law in the criminal justice system will depend heavily on the ability of courts and other justice agencies to access the expertise, community and customary law knowledge, and authority of community justice groups.

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 109–10. 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.
2. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 110. See also 'Principle Five: Community-based and community-owned initiatives', Chapter Two, above pp 36–37. In his background paper Blagg distinguishes between community-based initiatives, which are created by government and criminal justice agencies to operate in a community setting, and community-owned initiatives that empower communities to determine their own solutions: see Blagg H, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 317, 318.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 109–31.
4. Ibid 140, Proposal 18.
5. The Commission proposed that community justice groups should be formally established under new legislation; namely, the 'Aboriginal Communities and Community Justice Groups Act'. This proposed new legislation was suggested because the Commission proposed in its Discussion Paper that the *Aboriginal Communities Act 1979* (WA) be repealed. However, the Commission has decided not to recommend the repeal of the by-law scheme under *Aboriginal Communities Act* (the reasons for this conclusion are discussed in detail below). Therefore, it is now considered appropriate for community justice groups to be established under the existing *Aboriginal Communities Act.*

Aboriginal Justice Advisory Council

The Commission explained, in its Discussion Paper, that the implementation of its proposal for community justice groups would require consultation with Aboriginal communities. In addition, Aboriginal communities may need advice and support in order to establish a community justice group. To this end, it was proposed that an Aboriginal Justice Advisory Council (AJAC) should be established, comprising of members from both the Aboriginal community and government departments.[6] The Aboriginal and Torres Strait Islander Social Justice Commissioner expressed strong support for community justice groups but, at the same time, emphasised that prior to the implementation of this proposal there must be a 'comprehensive process of consultation with Aboriginal communities'.[7] In this regard, it was stated that the establishment of an AJAC was 'critical to the success of any Indigenous justice initiatives'.[8] Similarly, Aboriginal people have told the Commission that it is essential that they are fully informed about their options under this proposal.[9] The Commission maintains its view that there must be a statewide body, comprised of Aboriginal people and government representatives, whose primary function is to consult with Aboriginal communities and initiate the implementation of the Commission's recommendation for community justice groups.

Existing Aboriginal groups and committees

In its Discussion Paper, the Commission acknowledged the work that is being undertaken with respect to the Aboriginal Justice Agreement and the development of regional and local justice plans. It was concluded that community justice groups could easily operate in tandem with these other arrangements.[10] However, the Office of the Director of Public Prosecutions (DPP) stated that it is not clear where the Commission's proposal for community justice groups will fit within the plans under the Aboriginal Justice Agreement and the recommendations of the *Inquiry into the Management of Offenders in Custody and in the Community* (the Mahoney Inquiry). The DPP suggested that the Commission's proposal may result in unnecessary duplication.[11] Similarly, the Commission was told that community justice groups may merely replicate existing local groups in some Aboriginal communities.[12] For example, in the South West some communities have established community action groups. The Commission understands that community action groups are a 'local Noongar initiative based on traditional family structures' and were developed in conjunction with the Department of Indigenous Affairs.[13] Community action groups have equal representation from all family groups in the relevant community, and these groups liaise with government agencies and local bodies in relation to key issues of concern to the community.[14] The Commission understands that it is not a prerequisite for community action groups to have an equal number of men and women.[15] Further, the Commission understands there are plans under the Aboriginal Justice Agreement to establish local justice groups.[16]

The Department of the Attorney General suggested in its submission, that community justice groups would be more effective if they had representatives from government agencies.[17] The Commission considers that community justice groups will need advice and support from government agencies. This can be achieved in a number of ways and the Commission does not agree that it necessitates government representation on community justice groups. The AJAC will provide expertise and support to Aboriginal communities at the start of the process. Once community justice groups are established, ongoing support can be achieved by collaboration between community justice groups, government agencies and other relevant groups. There is no reason why a community justice group could not request government representatives to participate in

6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 133.
7. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.
8. Ibid.
9. Carol Martin MLA and community members in Broome, consultation (20 May 2006).
10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 133–34.
11. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 3.
12. Aboriginal Corporate Development Team, Western Australia Police, consultation (26 June 2006).
13. Department of Indigenous Affairs, *Community Action Groups: Final Report to the Department of Families, Community Services and Indigenous Affairs* (June 2006) 1. Community action groups have received funding from the Commonwealth Department of Families, Community Services and Indigenous Affairs.
14. Ibid.
15. Anthony Galante, Acting Director Assistant Regional Management, Department of Indigenous Affairs, telephone consultation (3 July 2006).
16. Blagg H, *Draft Aboriginal Justice Agreement Implementation Plan* (undated) 35.
17. Department of the Attorney General, Submission No. 34 (11 May 2006) 4. The Commission notes the contention that community justice groups do not have to be comprised wholly of Aboriginal people is in direct conflict with the Department's other argument that the gender balance requirements may not reflect traditional authority structures.

forums dealing with specific issues. A community justice group may choose to meet regularly with local government representatives.

The Commission is also well aware that it is planned to establish a State Aboriginal Justice Forum and Regional Aboriginal Justice Forums under the Aboriginal Justice Agreement.[18] Similarly, the Mahoney Inquiry recommended the establishment of a State Indigenous Justice Advisory Group and Regional Justice Advisory Groups.[19] The Commission understands that simultaneous plans for different Aboriginal groups and committees may be confusing and appear repetitive. However, the Commission does not consider that its proposal for community justice groups is simply a duplication of other recommendations. The Commission's focus is on Aboriginal-controlled initiatives at the *local* level. Existing local initiatives do not necessarily require the membership of the relevant group to be comprised entirely of Aboriginal people. Further, the Commission's recommendation stipulates that a community justice group must have an equal number of men and women.[20] The Commission has not made any recommendations with respect to regional groups but recognises the importance of regional groups working in conjunction with local community justice groups.[21] At the state level, the Commission suggests that if a statewide body has been established prior to the implementation of the Commission's recommendations, then depending upon its structure and focus it could take on the role of consulting, advising and supporting Aboriginal communities with respect to community justice groups.

Discrete Aboriginal communities

The Commission's proposal distinguished between discrete Aboriginal communities and other Aboriginal communities, such as those in metropolitan areas or in close proximity to regional centres. Discrete Aboriginal communities are those communities which have identifiable physical boundaries.[22] The Commission made a distinction between discrete and non-discrete Aboriginal communities because it concluded that under its proposal only discrete Aboriginal communities would be able to set community rules and community sanctions. The concept of community rules and sanctions envisages that members of the community will voluntarily abide by the sanctions that are agreed upon and, if sanctions are not followed, the community has the option to request that a member of the community leave for a specified period of time. Where there are no identifiable physical boundaries this option would not be possible.[23]

In order for a discrete Aboriginal community to establish a community justice group it will be necessary for the community to be declared as a discrete Aboriginal community under the *Aboriginal Communities Act 1979* (WA).[24] The Commission proposed that the relevant legislation provide that the Minister for Indigenous Affairs is to declare a discrete community if he or she is satisfied that there is provision for adequate consultation between the community members and a community justice group, especially in relation to the determination of community rules and sanctions. Once declared under the legislation, a discrete Aboriginal community would be able to apply to the Minister for Indigenous Affairs for approval of their community justice group.[25]

Most discrete communities occupy land pursuant to a crown lease or a pastoral lease. For these communities, the Commission proposed that there should be a general legislative definition which provides that the community lands are the entire reserve area or pastoral lease, whichever is applicable.[26] The Commission noted in its Discussion Paper that there may be some discrete Aboriginal communities that occupy land without any formal agreement specifying the boundaries of the community and that these communities may wish to

18. Blagg H, *Draft Aboriginal Justice Agreement Implementation Plan* (undated) 37.
19. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.48].
20. See discussion under 'Membership criteria', below p 100.
21. LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006. These comments were endorsed by the Kimberley Aboriginal Law and Culture Centre: see Kimberley Aboriginal Law and Culture Centre Submission No. 17 (17 April 2006) 1.
22. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 133.
23. Ibid.
24. The Commission notes that some discrete communities are already declared under the *Aboriginal Communities Act 1979* (WA) for the purposes of the by-law scheme. The Commission considers that these communities should be separately declared for the purpose of establishing a community justice group to ensure that there are structures and provisions in place that require the community justice group to consult with community members about community rules and sanctions.
25. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 134.
26. The Commission observed in its Discussion Paper that for communities with by-laws, the community lands declared under the *Aboriginal Communities Act* have sometimes only included the administrative and residential areas in the community while in other cases the declared lands covered the entire reserve or pastoral lease. The benefit of defining community lands as the entire reserve or pastoral lease is that the Governor would not be required to declare the community lands: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 119.

apply for approval of a community justice group. In this situation it was proposed that the legislation should provide for the Minister to declare the boundaries of the particular community by giving notice in the government gazette.

Non-discrete Aboriginal communities

As mentioned above, the Commission's proposal for community justice groups did not provide for non-discrete communities to set community rules and sanctions. However, it was suggested that a community justice group in a non-discrete community would be able to undertake any of the potential roles and functions within the criminal justice system. These include the provision of customary law or cultural information to courts, the supervision of offenders and the development of diversionary options.[27]

In its submission, the Department of the Attorney General questioned why non-discrete Aboriginal communities could not also develop their own responses to community justice issues. The Department stated that the absence of a physical boundary does not mean that an Aboriginal community is void of social rules or customs.[28] The Commission agrees that any Aboriginal community may have its own customary laws and impose sanctions upon members when those rules are broken. The capacity for an Aboriginal community to enforce informal sanctions (irrespective of whether they are based on customary law) will largely be dependent upon the willingness of all those involved. For discrete Aboriginal communities the Commission has strengthened the legal or formal authority for the community to expel a member (subject to specific conditions) in order to assist those communities to enforce their community rules.[29] The absence of physical boundaries precludes this option for non-discrete communities.

Membership criteria

The Commission concluded in its Discussion Paper that membership of a community justice group must be representative of the different family, social or skin groups within the relevant community. The necessity for members to be selected by their own community, rather than by government, was incorporated into the Commission's proposal by the provision that each family, social or skin group must nominate an equal number of members.[30] The Commission anticipated that community justice group members would be Elders or respected members of each family, social or skin group and it was observed that the requirement that each group nominate its representatives would ensure that a community justice group has community support. A number of submissions responded positively to the Commission's proposal that members of a community justice group should be selected by the community.[31]

In addition to the requirement for equal family group representation, the Commission concluded that, in order to safeguard the rights of Aboriginal women and children, the membership of a community justice group must be comprised of an equal number of men and women.[32] In other words, each relevant family or social group must nominate an equal number of men and women. The Commission believes that the high incidence of family violence and sexual abuse in many Aboriginal communities demands that Aboriginal women have an equal say in justice issues and decisions affecting their community. More specifically, the need for criminal justice agencies (in particular, courts) to be reliably informed about Aboriginal law and culture requires that any information is presented by both Aboriginal men and women.[33] The Commission has received a number of submissions supporting the requirement for community justice groups to have an equal number of men and women as well as an equal number of representatives from each relevant family or social group in the community.[34]

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27. LRCWA, ibid 134.
28. Department of the Attorney General, Submission No. 34 (11 May 2006) 4.
29. See discussion under 'Trespass', below pp 106–109.
30. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 134–35.
31. In its submission the Law Society of Western Australia emphasised the importance of community justice group members being elected on a 'bottom-up' basis rather than selected from a 'top-down' process: see Law Society of Western Australia, Submission No. 36 (16 May 2006) 4. Similarly, the Aboriginal Legal Service warned against government 'handpicking' representative without consultation with the relevant community: see Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4. See also Dr Brian Steels, consultation (28 April 2006).
32.. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 135.
33. For further discussion, see 'Evidence of Aboriginal customary law in Sentencing', below pp 183–84 and 'Customary Law as an Excuse for Violence and Abuse', Chapter One, above pp 23–26.
34. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4; LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006. These comments were endorsed by the Kimberley Aboriginal Law and Culture Centre: see Kimberley Aboriginal Law and Culture Centre, Submission No. 17 (17 April 2006) 1; Carol Martin MLA and community members in Broome, consultation (20 May 2006). The Western Australia Police stated, in its submission, that equal representation of all family groups is necessary to ensure that the community justice group is representative

Aboriginal women must be supported and empowered to act against abuse and violence, and this can only be achieved by ensuring they have an equal voice in their communities.

The Department of the Attorney General argued in its submission that the gender balance requirements under the Commission's proposal may not necessarily mirror traditional authority structures.[35] However, the Commission found that both Aboriginal men and Aboriginal women have important roles in decision-making and dispute resolution under Aboriginal law and culture.[36] During a meeting in Broome, the Commission was advised that the membership criteria in its proposal accurately reflect existing authority structures.[37] Nevertheless, the Commission wishes to underline that the requirement for gender balance only relates to the membership structure of a community justice group. There is nothing in the Commission's proposal that stipulates how a community justice group should conduct its business. The Commission is fully aware there will be certain issues that can only be discussed by Aboriginal men and other matters that can only be discussed by Aboriginal women.[38] There is no reason why a community justice group cannot hold separate men's and separate women's meetings when necessary. Further, the responses and processes developed by a community justice group may differ for each gender. For example, the Kapululangu Aboriginal Women's Association in Balgo has recently described how it organised specific cultural camps and activities for Aboriginal girls (and pre-pubescent boys[39]) and at the same time it has provided support for male Elders in developing cultural activities for older boys.[40]

The DPP did not agree that gender balance would assist in the protection of Aboriginal women and children and claimed that 'there is no regular and systematic evidence that [Aboriginal] women actively protect their children' from abuse.[41] In Chapter One, the Commission has referred to examples where Aboriginal women have initiated responses to violence and sexual abuse in their communities. While the Commission acknowledges that there is an element of silence surrounding violence and sexual abuse in Aboriginal communities, some Aboriginal women have shown great resolve to prevent abuse in the face of extreme disadvantage and lack of government assistance.[42] The Commission believes that Aboriginal women must be supported and empowered to act against abuse and violence, and that this can only be achieved by ensuring Aboriginal women have an equal voice in their communities and the wider community.

The DPP also submitted that there may not be enough suitably qualified people to act as community justice group members. In support of this contention, the DPP stated that it is *often* Elders or other influential people in Aboriginal communities who are the perpetrators of sexual abuse and violence.[43] In Chapter One, the Commission has rejected the argument that Aboriginal male Elders are primarily responsible for the extent of family violence and sexual abuse in Aboriginal communities.[44] The Commission accepts that *some*

of the community: see Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6. Despite the consistency between this observation and the Commission's proposal, the Western Australia Police did not support the proposal for community justice groups. The Commission notes that the DPP suggested that family loyalties would give rise to potential conflicts of interest: Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4. However, the Commission is of the opinion that the requirement of equal family group representation adequately deals with any potential conflict of interest.

35. Department of the Attorney General, Submission No. 34 (11 May 2006) 4. The Commission notes that the requirement for gender balance was not embraced during a meeting in Warburton; however, only one Aboriginal woman was present during the meeting: see LRCWA, Discussion Paper community consultation – Warburton 27 February 2006.
36. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 86. This was reiterated to the Commission during meetings following the Commission's Discussion Paper: see Carol Martin, consultation (10 May 2006); Carol Martin MLA and community members in Broome, consultation (20 May 2006).
37. Carol Martin MLA and community members in Broome, consultation (20 May 2006).
38. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 232 & 408; Carol Martin MLA and community members in Broome, consultation (20 May 2006).
39. It was explained that women Elders are responsible for raising 'girls and pre-pubescent boys in cultural and customary life-skills': see Kapululanga Aboriginal Women's Association, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities*, Submission to the Senate Community Affairs References Committee (13 June 2006) 1.
40. Kapululanga Aboriginal Women's Association, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities*, Submission to the Senate Community Affairs References Committee (13 June 2006) 1.
41. Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 2–3.
42. See 'The Role of Aboriginal Women', Chapter One, above pp 27–28.
43. The Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4.
44. See discussion under 'Aboriginal Elders Should Not be Stereotyped as Offenders', Chapter One, above pp 22–23.

Aboriginal Elders and leaders may be responsible for serious offences against women and children but this does not mean that all Elders should be stereotyped as perpetrators of abuse. Overall, the Commission believes that there are many respected and suitable Aboriginal Elders and others in the community who can take on the role of community justice group members.

Other submissions received mentioned specific concerns about how the Commission's membership requirements will operate in practice. It was suggested that where there is significant feuding within a family group it may be difficult for that family group to agree about the choice of a male and female representative.[45] The Commission emphasises that there is no reason why there cannot be more than one male and one female representative from each family, social or skin group. On the other hand, the Commission was advised that in order for the Warburton community to satisfy the membership requirement, a Warburton community justice group would have approximately 40 members. It was suggested that this could become unmanageable.[46] The Commission appreciates that such a large number of members may be difficult; however, the Commission's recommendation does not impose any requirements about how a community justice group should operate. In some cases it may be appropriate for a large community justice group to form sub-groups for specific purposes.

A few submissions also suggested that young people should be represented on community justice groups.[47] The Aboriginal Legal Service (ALS) submitted that younger Aboriginal people should be involved in order to 'communicate the social issues and values of young Aboriginal people in contemporary society'.[48] The Commission does not consider that it is appropriate to specify that there must be a certain number of young people on a community justice group. The Commission's recommendation does not specify the age or status of a community justice group member. The Commission believes that in most cases community justice groups will be made up of Elders and respected people because this reflects traditional authority structures. However, the Commission's recommendation does not prevent young people from being a member of a community justice group. In addition, the Commission emphasises that a community justice group could set up sub-groups or committees to deal with specific issues. The Commission encourages community justice groups to involve young people in its activities and processes.

Police clearances and spent convictions

Many of the Commission's recommendations (including community justice groups) anticipate the appointment of Aboriginal people to work within the criminal justice system. Given the high numbers of Aboriginal people dealt with by the criminal justice system, many Aboriginal people have a criminal record. However, the existence of a criminal record should not automatically preclude a person from being a member of a community justice group or generally working within the criminal justice system. Past convictions may be related to minor offences, and the offences may have occurred a long time ago. Further, a person who has offended in the past may now have reformed. In terms of assisting other offenders in their rehabilitation, such a person may be able to offer advice and support because of past experiences with the criminal justice system.[49] It should also be noted that providing employment for Aboriginal people is one solution to the continuing high rates of over-representation of Aboriginal people in custody.[50]

In Western Australia an application can be made at a police station for a national police clearance.[51] A police clearance will prove to a prospective employer that the person does not have a criminal record. If a person does have a criminal record, depending upon the length of time since the conviction, the person can apply for that conviction to be spent. Once a spent conviction is obtained the person will then be able to apply for a police clearance. Generally, a person cannot be discriminated against because of a spent conviction.[52]

45. Aboriginal Corporate Development Team, Western Australia Police, consultation (26 June 2006).
46. LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006.
47. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4; Law Society of Western Australia, Submission No. 36 (16 May 2006) 4. A similar observation was also made by Dr Brian Steels, consultation (28 April 2006).
48. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4. Similar comments were made by Dr Brian Steels, consultation (28 April 2006).
49. Victorian Aboriginal Legal Service Co-operative Ltd, *Submission on the Discrimination in Employment on the Basis of Criminal Record Discussion Paper December 2004* (March 2005) 2.
50. Ibid 3.
51. See <http://www.police.gov.wa.au/Services/Services.asp>.
52. *Spent Convictions Act 1988* (WA) Div 3. There are various exceptions under the *Spent Convictions Act 1988* (WA) such as justices of the peace, police officers, prison officers, licensed security officers and specific positions in the Department of Corrective Services and the Department of Education. There are also numerous exceptions for employment relating to children: see Schedule 3.

The Commission encourages community justice groups to involve young people in its activities and processes.

The purpose of a spent conviction regime is to facilitate the rehabilitation of offenders by ensuring that past convictions do not continue to negatively affect the person's prospects for reform. The provision to grant spent convictions reflects the principle that 'in the absence of re-offending, the relevance of a criminal conviction diminishes over time'.[53] In general terms, a person in Western Australia can apply for a spent conviction after ten years has elapsed since the relevant conviction if, in that time period, there have been no further convictions.[54] For a 'lesser conviction' the person must apply to the Commissioner of Police. If the application is made in the prescribed form the Commissioner of Police must grant the application.[55] Therefore, the granting of a spent conviction for lesser convictions is *effectively* automatic. However, the seemingly unnecessary requirement for an application to be made may cause injustice. For example, the Commission was told that one person applied for a police clearance and because she had a minor conviction for shoplifting 30 years earlier, she was required to wait five weeks to obtain a spent conviction and police clearance. In the meantime, an offer of employment was lost.[56] The current process will only be effective if the person recalls the existence of an old conviction and is aware of the option to apply for a spent conviction. The Commission is of the view that lesser convictions should be automatically wiped from a person's record, without the need for an application to be made, after a certain period of time.

For serious convictions (which are defined as a conviction resulting in imprisonment for more than 12 months or a fine of $15,000 or more) the person must apply to the District Court for a spent conviction.[57] In this situation, the court has discretion whether to grant the application. The Commission notes that many people would have received a sentence of more than 12 months' imprisonment for offences usually dealt with in a Magistrates Court (such as traffic offences, assault, damage and stealing). For many Aboriginal people, an application to the District Court may be particularly difficult because of remoteness, language and communication barriers, and the application may be cost prohibitive.

The Commission is aware that the Standing Committee of Attorney Generals (SCAG) is currently considering uniform spent convictions legislation for all Australian states and territories.[58] The proposed uniform model suggests that spent convictions should be automatically granted.[59] The Commission agrees with this approach. However, the model also proposes that the spent conviction regime should be limited to convictions that resulted in a sentence of less than 24 months' imprisonment and that for adults the waiting period should be ten years.[60] The Commission strongly encourages SCAG to consider more flexible provisions. It may be appropriate to establish separate rules for different categories of convictions. For example, less serious convictions should be automatically spent after a certain period of time. For more serious matters, the person should be entitled to apply to a court for a spent conviction to be granted.

The Western Australia Police stated in its submission that community justice group members must have a police clearance in order to 'screen out perpetrators of abuse'.[61] However, a police clearance does not only relate to convictions for serious offences such as sexual abuse or violence; it covers all convictions, including traffic matters, stealing, damage and disorderly conduct. The Commission is of the view that the existence of a criminal record should not preclude a person from being a member of a community justice group (or otherwise working in the criminal justice system).

53. Standing Committee of Attorneys General, *Uniform Spent Convictions: Proposed Model* (July 2004) 4.
54. *Spent Convictions Act 1988* (WA) s11.
55. *Spent Convictions Act 1988* (WA) s 7.
56. Anonymous, Submission No. 14 (11 April 2006).
57. *Spent Convictions Act 1988* (WA) ss 6 & 9.
58. Standing Committee of Attorneys General, *Uniform Spent Convictions: Proposed Model* (July 2004).
59. Ibid 9.
60. Ibid 6.
61. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6.

However, for serious offences relating to violence or child abuse the Commission considers that, in order to protect Aboriginal communities, it is necessary to ensure that a potential community justice group member has a Working with Children Check (WWCC).[62] This scheme commenced in January 2006 and provides that people who are engaged in child-related work must have a WWCC. The WWCC covers specific convictions and charges (for offences that may suggest the person is a risk to children).[63] The DPP agreed, in its submission, that community justice group members should be required to have a WWCC.[64] The Commission has included in its recommendation that before approving the membership of a community justice group, the Minister must be satisfied that each proposed member has a WWCC.

Criteria for approval of a community justice group

In making its proposal, the Commission was concerned to avoid external interference in the establishment and operation of community justice groups. The Commission's intention was that each community can develop its own structures and processes to deal with social and justice issues. For this reason, the Commission proposed that the legislative criteria for approval of a community justice group should be that the membership of the group provide for equal representation of all relevant family, social or skin groups in the community and equal representation of both men and women, and that there has been adequate consultation with the members of the community and that a majority of community members support the establishment of a community justice group.[65]

After taking into account various concerns raised in submissions, the Commission now considers that the criteria for approval of a community justice group should be:

- That the membership of the group provides for equal representation of all relevant family, social or skin groups in the community and equal representation of both men and women.
- That there has been adequate consultation with the members of the community and that a majority of community members support the establishment of a community justice group.
- That, in the case of a discrete Aboriginal community, a majority of the community supports the community justice group setting community rules and sanctions.
- That each proposed member of a community justice group must have a WWCC and that at regular intervals the Minister for Indigenous Affairs review the membership to determine if all members are still eligible for a WWCC.

Further, the Commission considers that at regular intervals the Minister for Indigenous Affairs should provide the community with an opportunity to approve the continuation of any existing members or, alternatively, nominate new members for each relevant family or social grouping. The legislation should also stipulate that, at regular intervals, the Minister for Indigenous Affairs should provide the community with an opportunity to approve or otherwise the continuation of the community justice group. The Commission does not consider that it is appropriate to specify at this stage how often the Minister should reassess the membership of a community justice group or its continued viability. This should be determined in consultation with Aboriginal communities.

Roles of Community Justice Groups

Community rules and sanctions

Under the Commission's proposal, a community justice group in a discrete Aboriginal community would be able to set community rules and community sanctions. Consistent with the aim of facilitating the highest degree of autonomy possible, the Commission did not consider that it was appropriate to restrict the nature of community rules and sanctions other than by the constraints of Australian law.[66] In other words, a community would not be able to have a sanction that involved inflicting physical punishment which amounted to an offence under the criminal law. Nor would it be able to impose a sanction which involved the unlawful detention of a person. The Commission considers that

62. Aboriginal people in Geraldton were concerned that some Elders were responsible for sexual abuse and violence and therefore should not be allowed to sit as a member of a community justice group: LRCWA, Discussion Paper community consultation – Geraldton, 3 April 2006.
63. See discussion under 'Working with Children Check', Chapter Seven, below pp 293–94.
64. Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 4.
65. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 135–36.
66. Ibid 136.

the AJAC should advise Aboriginal communities during the consultation process about what they can and cannot lawfully do. The Commission noted that its proposal for community rules and sanctions assumes that community members will in most cases voluntarily abide by any community sanctions imposed. However, it was concluded that, if an Aboriginal person does not agree to comply with both the community rules and the community sanctions, the community should have the power through its community council to refuse to allow that person to remain in the community for a specified period of time.[67]

A flexible approach allows each community to decide for themselves the rules and sanctions, and allows the incorporation of matters that are offences against Australian law and offences against Aboriginal customary law. Of course, the rules could include matters which are neither general criminal offences nor offences against customary law, such as the consumption of alcohol and intoxicants.[68] Importantly, the Commission's proposal allows for community rules and sanctions to reflect Aboriginal customary laws without the need for any codification of those laws.[69] The Commission stresses that each discrete community can determine its own rules and sanctions. Whether these reflect customary law or not is entirely up to them.

The Ngaanyatjarra Council and the DPP opposed community justice groups setting community rules and sanctions. The Ngaanyatjarra Council stated that it opposed community rules and sanctions 'as a substitute for, or in the absence of' by-laws.[70] However, the Commission has not recommended the repeal of the by-law scheme. Some discrete communities may wish to rely on the existing by-laws scheme and others may wish to establish a community justice group to set community rules and sanctions. A community may choose to have both. In this regard, the Commission highlights that there are over 300 discrete Aboriginal communities in Western Australia.[71] Only 26 of these communities currently have by-laws in force.

The DPP opposed the Commission's proposal for community justice groups for a number of reasons.[72] In relation to community rules and sanctions, the DPP questioned whether 'legislatively enshrined powers should be so open-ended'.[73] The Commission has concluded that it is not appropriate to specify in the legislation the exact nature of community rules and sanctions because this would defeat the objectives of flexibility and having community-owned processes. It would also amount to codifying aspects of customary law.[74] However, it is essential that the relevant community fully supports its community justice group making community rules and sanctions. Therefore, the Commission has recommended that the Minister of Indigenous Affairs must be satisfied before approving a community justice group that a majority of the community wish for the community justice group to set rules and sanctions. The Commission also proposed that, before declaring a discrete Aboriginal community under the legislation, the Minister would have to be satisfied that there are structures in place to ensure that the community has an input into the nature of community rules and sanctions. It is not appropriate to specify at this stage what those structures should be. This should be determined during the consultation phase of this recommendation.

The DPP also argued that the establishment of community justice groups with the power to set community rules and sanctions would create 'two coexistent legitimate systems of criminal law' and a community justice group member would have a 'quasi-judicial status'.[75] However, the Commission considers that there is only one system of criminal law in Western Australia. Community rules and sanctions are an informal code of behaviour. The members of a community justice group will not be administering and adjudicating Australian laws; they will be administering their own community rules.[76]

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67. See discussion under 'Trespass', below p 106.
68. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 136–37.
69. In its Discussion Paper, the Commission rejected any codification of customary laws for a number of reasons: see ibid 62. The Department of the Attorney General stated in its submission that the effect of the Commission's proposal is that breaches of customary laws would be subject to legislated sanctions (such as community work, banishment, shaming and compensation). However, these examples were listed in the Discussion Paper for illustrative purposes. The Commission clearly stated that community rules and sanctions should not be contained in legislation: see Department of the Attorney General, Submission No. 34 (11 May 2006) 3.
70. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 41.
71. Dennis Callaghan, Department of Indigenous Affairs, telephone consultation (6 September 2006).
72. Many of the arguments raised by the DPP concerned the relationship between Aboriginal customary law and family violence and sexual abuse in Aboriginal communities. The Commission has examined this in detail in Chapter One.
73. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 1.
74. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 62.
75. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 3.
76. Examples of other organisations or bodies that may set rules and impose penalties include schools, universities, sporting groups and the Western Australia Bar Association.

There may be some community rules that mirror offences against Australian law. The DPP submitted that community justice groups may impede the ability of police to deal with offenders by protecting an alleged offender and attempting to deal with the matter without recourse to the police.[77] The Commission acknowledges that, where a matter is both a breach of community rules and a breach of the general criminal law, those involved (including the alleged offender, the victim and the community justice group) may choose not to refer the matter to the police. The rules set by a community justice group do not replace mainstream law and the police retain full discretion about whether they charge an offender. The under-reporting of family violence and sexual abuse in Aboriginal communities is well-known and is happening now in the absence of community justice groups.[78] The Commission believes that community justice groups will assist in increasing the number of Aboriginal victims who report serious offences to the police because Aboriginal women will be actively involved and community justice groups will generally work more closely with criminal justice agencies than is currently the case.

Who is bound by community rules and sanctions?

As discussed in Chapter Four, it is the Commission's view that the question who is bound (and who should be bound) by Aboriginal customary law is a matter for Aboriginal people themselves.[79] In the context of community rules and sanctions established by community justice groups (some of which may reflect Aboriginal customary law), it is likely that membership of the community will require adherence to these rules and the community will be empowered to exclude members that refuse to comply with community rules. In its Discussion Paper, the Commission considered the position of service providers who are required to reside in the community as part of their employment.[80] Service providers, such as nurses and teachers, would be required to comply with any community rules that also fall within Australian law. For matters that are not covered by Australian law, the Commission considered that it is an issue which should best be left for negotiation between service providers and the specific Aboriginal community. Some communities may choose to exempt service providers from certain community rules and sanctions, especially those that reflect aspects of Aboriginal customary law. However, others may not, and it should be the right of a particular Aboriginal community to exclude a person who shows no respect for their customary law.

The Ngaanyatjarra Council provided the only submission about this issue and expressed its concern that the ultimate sanction available for the community for a non-Aboriginal person is that the community could request that person to leave.[81] It was argued that in practice this would be ineffective because of the difficulties in finding staff to work in remote locations and, therefore, communities would be reluctant to ask a service provider to leave.[82] The clear preference of the Ngaanyatjarra Council is to retain its by-laws because they specifically apply to anyone on community lands. The Commission has not recommended the repeal of the by-law scheme and therefore, the Ngaanyatjarra communities or any other community will be able to retain by-laws that apply to all people on their community lands.

Trespass

In its Discussion Paper, the Commission observed that the offence of trespass under s 70A of the *Criminal Code* would be relevant to 'outsiders' who enter an Aboriginal community without permission. However, this offence is not necessarily applicable to a member of the community who may have been asked to leave.[83] Under the *Aboriginal Communities Act* some communities have enacted by-laws permitting the community council to exclude members of the community. Three of the 26 Aboriginal communities with by-laws include a by-law that allows the community council to ask a member of the community to leave. The Bindi Bindi Aboriginal Community By-laws provide that, if a person has been convicted of an offence against the by-laws or the general criminal law and this offence was committed on community lands, the council can ask the person to leave and may also 'revoke the person's membership of the community'.[84] The

77. Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 4.
78. See discussion under 'Under-reporting of family violence and sexual abuse', Chapter Seven, below pp 284–87.
79. See discussion under 'Who is bound (and who should be bound) by customary law?', Chapter Four, above p 65.
80. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 137.
81. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 42.
82. Ibid 43.
83. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 122–23.
84. The Bindi Bindi Aboriginal Community By-laws 2001, by-law 12.

Kundat Djaru Community By-laws provide that the council can order any person to leave the community lands if the person is under the influence of an illegal drug or harmful substance.[85] Similarly, the Wongatha Wonganarra Aboriginal Community By-laws provide that the council can order a person who is drunk to leave the community lands.[86] For all other communities with by-laws, a member of the community can only be removed from the community by a police officer for the purpose of being arrested for breaching a by-law.

The Commission proposed in its Discussion Paper that the legislation governing community justice groups should include a provision relating to the prohibition and restriction of people on community lands and a specific provision in relation to the exclusion of community members. It was proposed that community members must be given reasonable notice before being required to leave.[87] In making this proposal the Commission observed that it would be rare for an Aboriginal community to exclude one of its members, but the Commission considered that Aboriginal communities should be afforded the protection that the right to exclude entails.[88]

The Commission has received only one submission addressing the proposed general offence of trespass for a person to enter community lands without permission. The Department of Corrective Services was concerned that this proposal may prevent community corrections staff from entering a community to conduct their lawful business.[89] While the Commission considers that staff from government agencies would have a lawful right to enter an Aboriginal community, if necessary, this could be clarified by including specific exceptions.[90]

In response to the proposed provision in relation to the members of a community, the Ngaanyatjarra Council advised that there are no recorded examples of Ngaanyatjarra communities wishing to exclude a member of their own communities.[91] While recognising that some Aboriginal communities have included in their by-laws the right of a community council to exclude a member of the community, the Ngaanyatjarra Council stated that it was not appropriate for this right to be given to all Aboriginal communities. It was explained that such a right could be open to abuse, for example, the community council could order a person to leave the community for 'political reasons'.[92] The Western Australia Police and the Department of Indigenous Affairs also submitted that the power to exclude a member may be open to abuse because community councils are not necessarily representative of all family groups and may be dysfunctional.[93] The Commission agrees and has refined its recommendation so that a community council can only request a member of the community to leave if it has been recommended by a community justice group.

The right to exclude a member from a community is akin to the customary law punishment of banishment. The Ngaanyatjarra Council questioned the relevance of banishment as a punishment under customary law and indicated that some Ngaanyatjarra people did not consider that banishment would be an effective sanction.[94] It was explained that if a person was banished from his or her community and later something happened to that person, the community justice group members could be liable under Aboriginal customary law for what had happened.[95] The Department of Indigenous Affairs expressed concern that a person who has been excluded may have no accommodation, money or family support.[96] The Commission notes that banishment under customary law does not necessarily involve a person being sent away with no support. In its Discussion Paper, the Commission observed that

85. The Kundat Djaru Community By-laws 2005, by-law 10.
86. The Wongatha Wonganarra Aboriginal Community By-laws 2003, by-law 9.
87. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 122–23, Proposal 14
88. The Department of the Attorney General expressed concern that the Commission's proposal for an offence of trespass (to be inserted into the *Aboriginal Communities Act*) may increase the levels of imprisonment of Aboriginal people because the penalty includes imprisonment: see Department of the Attorney General, Submission No. 34 (11 May 2006) 3. The Commission proposed that the offence of trespass should have the same penalties as trespass under the Criminal Code – $12,000 and 12 months' imprisonment. The Commission does not expect that the right to ask a member of a community would be utilised often and would only be used when considered necessary.
89. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5.
90. The Commission notes that s 31 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) provides that in the absence of a permit it is an offence for any person to enter an Aboriginal reserve unless the person is an Aboriginal person, member of Parliament, police officer, public health officer, officer of a public authority or otherwise lawfully authorised.
91. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 20.
92. Ibid 20–21.
93. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 8; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6.
94. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 44.
95. Ibid 44–45.
96. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 8.

temporary banishment to another location, where it was known that there were family members present, was employed by the Yolngu people in Yirrkala.[97] In *R v Miyatatawuy* [98] the accused person had been banished to a dry community outstation with his wife in order to overcome their problems associated with alcohol. It has been reported that community justice groups in Queensland have successfully used banishment as a sanction by sending offenders to an outstation.[99]

Nevertheless, the Commission understands that community justice group members may be reluctant to banish or exclude a member of the community if to do so would place that person's safety in jeopardy. If a person who had been excluded was harmed or died, the community justice group members may then be liable to punishment under customary law. The Commission believes that this factor operates as a potential safeguard for any abuse of this power. The Commission considers that it is appropriate to recommend that a community council (of a discrete Aboriginal community) can only ask a member of the community to leave if that option has been recommended by a majority of the community justice group. Further, it should be provided in the legislation that a member of the community can only be asked to leave with reasonable notice[100] and only where it would not cause immediate danger to the health or safety of the person (or their dependants). Therefore, a community justice group may need to consider whether there is an alternative place where the person could reside and various options could be worked out in conjunction with regional justice groups.[101] These issues demonstrate the need for adequate resources to be provided to Aboriginal communities for alternatives such as outstations.

In its Discussion Paper, the Commission recognised that there may be circumstances where an Aboriginal person has been asked to leave a community for a specified period of time and is subsequently required to return for a specific customary law purpose, such as participation in a ceremony. It was also noted that in this context the customary law obligations of traditional owners need to be acknowledged. The Commission invited submissions as to whether (and if so, on what terms) there should be a customary law defence to the proposed offence of trespass.[102] The Department of Indigenous Affairs, the Law Council of Australia and the Criminal Lawyers Association agreed that there should be a customary law defence for Aboriginal people who are charged with trespass for entering community lands.[103] The Commission agrees that it is entirely appropriate for a customary law defence to apply in this situation.

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97. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 98.
98. (1996) 135 FLR 173
99. Wright H, 'Hand in Hand to a Safer Future: Indigenous family violence and community justice groups' (2004) 6(1) *Indigenous Law Bulletin* 17, 18.
100. The Department of Indigenous Affairs mentioned that a person may have obligations under a tenancy agreement or in relation to employment in the community and therefore immediate banishment may cause difficulties: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 8.
101. The Commission notes that Aboriginal people were concerned that if a troublemaker was banished from one community he or she would just become a problem to the next community. It was suggested that regional justice groups could be actively involved in negotiating alternative places for some people: see LRCWA, Discussion Paper community consultations – Fitzroy Crossing, 9 March 2006; Broome, 10 March 2006.
102. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 123, Invitation to Submit 3. The Commission also invited submissions about how often the customary law defence under the by-laws had been used: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 116, Invitation to Submit 2. Only the Department of Indigenous Affairs responded to the latter invitation and explained that there are no records to assist in this regard: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 12.
103. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 12; Law Council of Australia, Submission No. 41 (29 May 2006) 17; Criminal Lawyers Association, Submission No. 58 (4 September 2006)1.

Recommendation 16

Trespass

1. That the *Aboriginal Communities Act 1979* (WA) 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 (who is not a member of the community) into their community and, if permission for entry is granted, to determine on what conditions the person may remain on the community. The provision should also state that it is an offence, without lawful excuse, to fail to comply with the conditions or enter without permission and that this offence has the same penalty as the offence of trespass under the *Criminal Code* (WA).

2. That the *Aboriginal Communities Act 1979* (WA) include a specific provision in relation to community members. This provision should state:

   (a) That the community council of a discrete Aboriginal community which has been declared under Part II of the Act 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.

   (b) That the community council can only ask a member of the community to leave if a majority of the community justice group in the community has recommended that the person be asked to leave.

   (c) That the community council cannot ask a member of the community to leave if it would cause immediate danger to the health of safety of the person (or their dependents).

   (d) That failure to leave the community within a reasonable time, or returning to the community during the specified period, without lawful excuse, constitutes an offence of trespass.

   (e) That a lawful excuse includes that the person was required to stay in or enter the community for Aboriginal customary law purposes.

   (f) That a member of the Western Australia Police can remove a person who has not complied, within a reasonable time, with the request of the community council to leave the community.

Roles within the criminal justice system

The Commission proposed that any community justice group could have a significant role within the Western Australian criminal justice system. For example, for sentencing and bail purposes, members of a community justice group may present information to courts about an accused who is a member of their community and provide information or evidence about Aboriginal customary law and culture. In addition, community justice groups may be involved in diversionary programs and participate in the supervision of offenders who are subject to court orders. The Commission also suggested 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.[104] The Commission has received extensive support for community justice groups to be directly involved in working in the criminal justice system. The Ngaanyatjarra Council did not support community justice groups being involved in the supervision of offenders for the reason that the communities do not have sufficient resources to take on this role.[105] However, the Ngaanyatjarra Council did support the involvement of community justice groups in diversionary process and in providing cultural information to courts.[106] The ALS agreed that the relationship between Aboriginal

104. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 138.
105. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 42. Also the Western Australia Police did not support community justice groups supervising offenders on court orders, bail or parole. Instead, these matters should continue to be undertaken by the Department of Corrective Services: see Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6.
106. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 48.

community justice groups and the legal system would be extremely beneficial to Aboriginal people in this state.[107] The Public Advocate expressed support for the Commission's proposal for community justice groups and suggested that such groups would assist her office in establishing links with remote and regional Aboriginal communities.[108]

The need for community justice group members to undertake appropriate training and be provided with support was mentioned in a number of submissions.[109] The Aboriginal and Torres Strait Islander Social Justice Commissioner emphasised the importance of training for members, in particular with respect to the roles within the criminal justice system. In addition it was submitted that other criminal justice agencies, such as the police and judicial officers, should also receive training about the operation of community justice groups.[110] The ALS highlighted the need for interpreters and Aboriginal liaison officers to assist community justice members in their dealings with the criminal justice system.[111] The Commission has included in its recommendation that appropriate training be provided to community justice group members.

The Commission concluded in its Discussion Paper that members of an Aboriginal community, who provide services (such as patrols), operate diversionary programs, supervise offenders and provide evidence or information to courts, should be appropriately reimbursed.[112] This was supported by a number of submissions[113] and the Commission has made a recommendation to this effect.

Conclusion

The Commission has received general support for its proposal for community justice groups from numerous Aboriginal people, communities, government agencies and individuals.[114] Even the two main opponents, the DPP and Ngaanyatjarra Council, supported the involvement of community justice groups in the criminal justice system. Notably, the Aboriginal and Torres Strait Islander Social Justice Commissioner emphasised that community justice groups, 'when well resourced and community driven, can make a real difference to the communities in which they operate'.[115] The Law Council of Australia stated that the 'proposed changes provide a sensible approach to empowering Aboriginal communities' and the model provides a 'more flexible approach for individual communities wishing to develop governance structures that are culturally appropriate to the differing circumstances in each community'.[116]

A number of submissions expressed specific concerns and, where appropriate, the Commission has addressed these concerns in its final recommendation. In conclusion, the Commission wishes to underline the following issues that must be taken into account in the implementation of its recommendation for community justice groups:

- **Ongoing funding and resources:** The need for adequate resources to be provided for community justice groups was highlighted in submissions.[117] The Aboriginal and Torres Strait Islander Social Justice Commissioner observed that the legislative

107. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4.
108. Michelle Scott, Office of the Public Advocate, Submission No. 13 (18 April 2006) 3–4.
109. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 11; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 6; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6. In opposing community justice groups, the DPP relied on the fact that Elders may not have sufficient skills to undertake the role as community justice group members: see Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4.
110. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10. The submission referred to the National Indigenous Legal Advocacy Courses and suggested that these courses are a useful model for training for these purposes: see <http://www.humanrights.gov.au/social-_justice/nilac/index.html>.
111. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5.
112. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 139.
113. LRCWA, Discussion Paper community consultations – Broome, 10 March 2006; Geraldton, 3 April 2006; Dr Kate Auty SM, telephone consultation (16 March 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5; Aboriginal Corporate Development Team, Western Australia Police, consultation (26 June 2006).
114. Michelle Scott, Office of the Public Advocate, Submission No. 13 (18 April 2006) 4; Kimberley Aboriginal Law and Culture Centre, Submission No. 17 (17 April 2006) 4; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 10; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 1; Department of the Attorney General, Submission No. 34 (11 May 2006) 3; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4; Law Society of Western Australia, Submission No. 36 (16 May 2006) 4; Law Council of Australia, Submission No. 41 (29 May 2006) 12; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 9; LRCWA, Discussion Paper community consultations – Warburton, 27 February 2006; Broome Regional Prison, 7 March 2006; Fitzroy Crossing, 9 March 2006; Broome, 10 March 2006; Bunbury, 17 March 2006. The Commission notes that Aboriginal people in Warburton only supported community justice groups if by-laws remain.
115. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.
116. Law Council of Australia, Submission No. 41 (29 May 2006) 12.
117. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 449; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 6; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.

The Commission's recommendation for community justice groups will not be effective unless there are adequate resources and ongoing funding.

recognition of community justice groups will be more likely to ensure that there is ongoing and adequate funding for community justice groups.[118] The Commission's recommendation for community justice groups will not be effective unless there are adequate resources and ongoing funding.[119]

- **The need for flexibility:** The Commission's recommendation for community justice groups is a framework for Aboriginal communities and government agencies to work with to ensure that Aboriginal people are provided with the resources, support and encouragement to develop their own justice processes.[120] It is not a 'one-size-fits-all' model because the functions, roles, processes and procedures are to be determined by individual communities.[121]
- **Voluntariness:** The DPP warned in its submission that the Commission's recommendation should not be 'superimposed' upon Aboriginal communities.[122] The Department of Corrective Services suggested that some communities may be satisfied with their existing governance structures.[123] The Commission emphasises that the establishment of a community justice group is entirely voluntary. Further, the various roles that a community justice group may choose to undertake are also voluntary.
- **Capacity:** The Commission understands that the capacity of each Aboriginal community in Western Australia to establish a community justice group and take on its varying functions will differ from one community to another.[124] Some communities will need support and capacity building in order to establish a community justice group, while others communities will already be in a position to establish a community justice group. For example, Aboriginal people in Fitzroy Crossing considered that a community justice group would work well in that community.[125] Therefore, the implementation of this recommendation will necessarily be incremental.
- **Evaluation and monitoring:** In Chapter Two, the Commission has emphasised the need for independent monitoring of the implementation of the recommendations in this report.[126] The Commission has recommended the establishment of an independent Commissioner for Indigenous Affairs.[127] Specifically, in relation to community justice groups, the Department of Corrective Services submitted that implementation of this recommendation must be evaluated and monitored.[128] The Commission is firmly of the view that the implementation of its recommendation for community justice groups must be monitored and, further, community justice groups should be evaluated once established throughout the state.

118. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.
119. It has been observed that following the success of community justice groups in Queensland, these groups are being given more and more responsibilities but the resources and support provided is insufficient to cover additional tasks: see Wright H, 'Hand in Hand to a Safer Future: Indigenous Family Violence and Community Justice Groups' (2004) 6(1) *Indigenous Law Bulletin* 17, 18–19.
120. The Commission notes that Article 19 of the revised *Declaration on the Rights of Indigenous Peoples* provides that 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions': see UN Doc A/HRC/1/I.3 (23 June 2006). For a discussion about the status of this Declaration, see 'Recognition and the Relevance of International Law', Chapter Four, above p 67.
121. The Aboriginal and Torres Strait Islander Social Justice Commissioner stressed the importance of not adopting a one-size-fits all approach: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.
122. Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 3.
123. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5.
124. The Commission was advised that in some areas (in particular, in the metropolitan area) it would be difficult for a community to select equal representatives because of feuding: Aboriginal Corporate Development Team, Western Australia Police, consultation (26 June 2006). See also Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.
125. LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006. These comments were endorsed by the Kimberley Aboriginal Law and Culture Centre: see Kimberley Aboriginal Law and Culture Centre Submission No. 17 (17 April 2006) 1. It was also suggested to the Commission by Carol Martin, MLA and other Kimberley women that communities in the Kimberley (and in particular, Fitzroy Crossing) would be ready to establish a community justice group: see Carol Martin, MLA Kimberley, Submission No. 33 (10 May 2006); LRCWA, Carol Martin MLA and community members in Broome, consultation (20 May 2006).
126. See discussion under 'Ongoing monitoring and evaluation', Chapter Two, above p 39.
127. See Recommendation 3, above p 58.
128. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 1 & 5.

Recommendation 17

Community justice groups

1. That the *Aboriginal Communities Act 1979* (WA) provide for the establishment of community justice groups upon the application, approved by the Minister for Indigenous Affairs, of an Aboriginal community.
2. That the current provisions of the *Aboriginal Communities Act 1979* (WA) be incorporated into Part I and that there be a separate part (Part II) of the Act dealing with community justice groups.
3. That Part II of the *Aboriginal Communities Act 1979* (WA) distinguish between discrete Aboriginal communities and all other Aboriginal communities.
4. That for a discrete Aboriginal community to establish a community justice group the community must be declared as a discrete Aboriginal community under Part II of the *Aboriginal Communities Act 1979* (WA).
5. That the Minister for Indigenous Affairs is to declare that an Aboriginal community is a discrete Aboriginal community to which Part II of the Act applies, if satisfied, that
   (a) A majority of the community supports the community justice group setting community rules and community sanctions; and
   (b) 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.
6. That both discrete and non-discrete Aboriginal communities may apply to the Minister for Indigenous Affairs for approval of a community justice group.
7. That Part II of the *Aboriginal Communities Act 1979* (WA) provide that the Minister for Indigenous Affairs must approve a community justice group if satisfied:
   (a) That the membership of the group provides for equal representation of all relevant family, social or skin groups in the community and equal representation of both men and women from each relevant family, social or skin group.
   (b) That there has been adequate consultation with the members of the community and that a majority of community members support the establishment of a community justice group.
   (c) That each proposed member of a community justice group must have a Working with Children Check and that at regular intervals the Minister for Indigenous Affairs review the membership to determine if all members are still eligible for a Working with Children Check.
8. That at regular intervals the Minister for Indigenous Affairs provide the community with an opportunity to approve the continuation of any existing members or alternatively, nominate new members for each relevant family, social or skin group.
9. That at regular intervals, the Minister for Indigenous Affairs provide the community with an opportunity to approve or otherwise the continuation of the community justice group.
10. That Part II of the *Aboriginal Communities Act 1979* (WA) define what constitutes community lands.
    (a) 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.
    (b) For other communities the Minister is to declare the boundaries of the community lands in consultation with the community.
11. That Part II of the *Aboriginal Communities Act 1979* (WA) provide that the functions of a community justice group include but are not limited to the establishment of local justice strategies and crime prevention programs; the provision of diversionary options for offenders; the supervision of offenders subject to community-based orders, bail or parole; and the provision of information to courts.
12. That Part II of the *Aboriginal Communities Act 1979* (WA) provide that the functions of a community justice group in a discrete Aboriginal community include setting community rules and community sanctions and that these rules and sanctions are subject to the laws of Australia.
13. That Part II of the *Aboriginal Communities Act 1979* (WA) include an appropriate indemnity

provision for members of a community justice group.

14. That the Western Australian government establish or appoint an Aboriginal Justice Advisory Council to oversee the implementation of this recommendation. 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 and agencies including the Department of Indigenous Affairs, the Department of the Attorney General, the Department of Corrective Services, and the Western Australia Police. 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. The Aboriginal Justice Advisory Council be responsible for:

    (a) Consultation with Aboriginal communities about their options under this recommendation.

    (b) Providing advice and support to communities who wish to establish a community justice group.

15. That community justice group members be paid when performing functions within the Western Australian criminal justice system.

16. That the Department of Indigenous Affairs in conjunction with the Department of the Attorney General provide appropriate training for community justice group members.

17. That the Commissioner for Indigenous Affairs review and evaluate community justice groups at a time to be determined by the Commissioner for Indigenous Affairs.

Western Australian Aboriginal Community By-Law Scheme

The Commission comprehensively analysed the Western Australian Aboriginal community by-law scheme under the *Aboriginal Communities Act 1979* (WA).[129] The scheme, which commenced in the late 1970s, aimed to assist certain Aboriginal communities to control and manage behaviour on their community lands. Although originally piloted in only three communities, the Commission understands that there are now 26 Aboriginal communities with by-laws established under the scheme.[130] Following a detailed consideration of the arguments in support of and against the by-law scheme the Commission proposed in its Discussion Paper that the *Aboriginal Communities Act* should be repealed.[131]

One of the main reasons for this proposal was that the by-laws appear to simply create another layer of law applicable only to Aboriginal communities. If a person breaches a by-law they may be charged with an offence and dealt with in court in the usual manner. It was observed that most of the by-laws enacted cover similar conduct that is addressed by the general criminal law, such as disorderly conduct, damage, traffic control, possession of firearms and entering houses without permission. However, there are other matters which are not dealt with by the general criminal law; the most notable being the prohibition of possession and use of alcohol and volatile substances. The Commission also observed, from the perspective of recognising Aboriginal customary law, that by-laws are not generally directly relevant to customary law issues. Some communities have included a by-law which provides that, where the person was acting under a custom of the community, it is a defence to a charge of breaching a by-law.[132] The Commission noted that this defence may be potentially applicable to offences of entry onto lands without permission, causing disturbances and the interruption of meetings.[133]

The Commission also formed the view that the by-law scheme does not appear to have any cultural basis in

129. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 115–20.
130. The Department of Indigenous Affairs stated in its submission that there were 19 communities with by-laws as at September 2005 and since then three additional communities have enacted by-laws: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 6. However, the Commission notes that there are 26 separate sets of by-laws enacted and listed on the state law publisher's website.
131. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 120, Proposal 11.
132. See, for example, Wongatha Wonganarra Aboriginal Community By-Laws 2003, by-law 13; Djarindjin Aboriginal Community By-Laws 1997, by-law 14. Note that the ALRC was informed by a magistrate that this defence had been rarely used and when so, with limited success: see ALRC *Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals,* Research Paper No. 11/12 (1984) 69.
133. The Commission invited submissions as to the extent to which this defence has been used (Invitation to Submit 2) and in response the Department of Indigenous Affairs stated that it was not aware of any records which would provide this information: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 12.

the custom of the relevant communities. The by-law scheme is controlled by community councils which may not necessarily be reflective of traditional authority structures. Further, the Commission was told that the content of the by-laws is sometimes dependent upon the personality of the chairperson of the community council. In one example, an Aboriginal person told the Commission that if the chairperson wants to drink alcohol then the by-laws will not prohibit the use of alcohol, irrespective of the views of the community.[134] The Commission also took into account that because by-laws can only be enforced by police (and in many Aboriginal communities there is no regular police presence) there have been significant problems with respect to the enforcement of the breaches of community by-laws.

When making its proposal to repeal the by-law scheme under the *Aboriginal Communities Act,* the Commission was of the view that its proposal for community justice groups would be a far more effective and culturally appropriate way for Aboriginal communities to determine their own justice issues and processes. In this regard, it was considered that community justice groups would be able to incorporate processes under Aboriginal customary law when appropriate and desired. However, regardless of the Commission's view about the by-law scheme, it was recognised that individual communities must support this initiative. It was suggested that all relevant communities should be consulted about whether they wish to establish a community justice group and if they wish to abolish their by-laws.[135]

The majority of submissions in response to this proposal have opposed the repeal of the by-law scheme under the *Aboriginal Communities Act*.[136] The Ngaanyatjarra Council expressed the strongest resistance to the repeal of by-laws. The predominant reasons included that:

- The Ngaanyatjarra communities have a sense of ownership in the by-laws.[137] The Ngaanyatjarra Council stated that the by-laws are not imposed upon communities and that they reflect the views of Ngaanyatjarra peoples.[138] The Department of Indigenous Affairs agreed with these views.[139]
- The by-law scheme provides a degree of self-management and self-control.[140] Similarly, the ALS submitted that the by-law scheme provides a 'source of empowerment and self determination for Aboriginal people'.[141] The Commission remains of the view that community justice groups could potentially provide a greater degree of self-management and empowerment.
- By-laws are useful to deal with matters that fall in between Australian law and Aboriginal customary law, such as the possession of alcohol and inhalants.[142] The Ngaanyatjarra Council was very concerned that because the Commission did not support the general criminalisation of inhalant use, if by-laws were repealed the community would be significantly disadvantaged.[143] Maggie Brady submitted that the Ngaanyatjarra Council by-laws 'provide the people of that region with a valuable structure which serves to support and validate their attempts to deal with alcohol and inhalant use'.[144]
- With sufficient police presence, the by-laws are an effective method for controlling behaviour on communities because of the threat of 'white' authority.[145]

134. LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006. A review of the by-law scheme observed that some communities complained that council members themselves breached by-laws, in particular with respect to alcohol: see McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 22.
135. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 121.
136. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 3; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 3; Department of the Attorney General, Submission No. 34 (11 May 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5; Office of the Director of Public Prosecutions, Submission No. 40A (16 June 2006) 1; Dr Maggie Brady, Australian National University, Submission No. 45 (31 May 2006) 1–2; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 4; LRCWA, Discussion Paper community consultations – Warburton, 27 February 2006; Kalgoorlie, 28 February 2006; Broome Regional Prison, 7 March 2006; Leanne Stedman, Ngaanyatjarra Council, telephone consultation (7 March 2006).
137. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 16; LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006.
138. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 8.
139. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 6. Similarly, Maggie Brady stated that the Ngaanyatjarra communities had considerable input into their by-laws: see Dr Maggie Brady, Australian National University, Submission No. 45 (31 May 2006) 1.
140. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 5.
141. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5.
142. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 10; LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006; Leanne Stedman, Ngaanyatjarra Council, telephone consultation (7 March 2006). This was also mentioned by Department of Indigenous Affairs: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 5.
143. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 11. The Commission has made recommendations directly below to cover some of the deficiencies that exist in Australian law but has concluded that it is not appropriate to criminalise inhalant use.
144. Dr Maggie Brady, Australian National University, Submission No. 45 (31 May 2006) 1.
145. Ngaanyatjarra Council, Submission No. 21 (28 April 2006)18; Leanne Stedman, Ngaanyatjarra Council, telephone consultation (7 March 2006). The importance of the threat of 'white' authority was also mentioned during community consultation in Kalgoorlie: LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006.

Some submissions opposed the proposal primarily because it was not considered necessary for the by-laws to be repealed in order for community justice groups to operate.[146] Other submissions have suggested that any repeal of the by-laws should not take place until there is further consultation with all relevant communities.[147] In contrast, the Law Council of Australia supported the proposal to repeal the by-law scheme (and replace it with community justice groups). The Law Council agreed that community justice groups would provide greater flexibility and more effectively empower Aboriginal communities.[148]

The Commission has been persuaded by submissions that, because some Aboriginal communities have a strong sense of 'ownership' of their by-laws and believe that they are an effective way to control behaviour in their communities, it would be inappropriate to recommend the repeal of the by-law scheme. In these circumstances, the Commission acknowledges that such repeal would be contrary to the Commission's guiding principle of voluntariness.[149] This conclusion is also consistent with the view expressed in the Commission's Discussion Paper that any repeal of the by-laws must not be undertaken in the absence of consultation with the relevant communities.

The Commission recognises that it is not necessary for the by-laws scheme to be repealed in order for a community to establish a community justice group. There is no reason that a community could not retain its by-laws in addition to the establishment of a community justice group. Alternatively, some communities may wish to rely solely on the existing by-law scheme and others may wish to have a community justice group without any by-laws.[150] Having said this, the Commission has not departed from its original conclusion that the by-law scheme has significant problems and is not necessarily the most effective way for Aboriginal people to control and determine their own responses to law and justice issues in communities. The Commission understands why some communities may be reluctant to give up their one source of self-management in the absence of a proven workable alternative. The Commission believes that once community justice groups have been established, the by-law scheme should be reviewed to determine if Aboriginal communities still support the by-law scheme. In Chapter Three, the Commission has recommended the establishment of an independent Commissioner for Indigenous Affairs.[151] The Commission considers that the Commissioner for Indigenous Affairs should comprehensively review the by-law scheme and consult with all relevant Aboriginal communities as to whether there is any continuing support for by-laws once community justice groups are well-established.

Recommendation 18

Review of the by-law scheme under the *Aboriginal Communities Act 1979* (WA)

1. That the Commissioner for Indigenous Affairs review and evaluate the by-law scheme under the *Aboriginal Communities Act 1979* (WA).
2. That the review take place at a time to be determined by the Commissioner for Indigenous Affairs but the review should take place approximately three to five years after the establishment of at least five community justice groups in Western Australia.
3. That this review should consider whether by-laws are still considered necessary and supported by Aboriginal people.
4. That in undertaking this review, the Commissioner for Indigenous Affairs consult with Aboriginal community council members, community justice group members and community members.
5. That if it is concluded that the by-law scheme should be abolished then the Commissioner for Indigenous Affairs consider whether any other legislative changes are required.[152]

146. Department of Indigenous Affairs, Submission No. 29 (2 May 2006); Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5.
147. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 6–7; Department of the Attorney General, Submission No. 34 (11 May 2006) 2; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 4. The DPP suggested that because the by-law scheme is currently being reviewed by Department of Indigenous Affairs it would be premature to recommend that the by-law scheme be repealed: see Office of the Director of Public Prosecutions, Submission No. 40A (16 June 2006) 1. However, the Department of Indigenous Affairs has explained that this review (completed in 2005) was a 'desk-top' audit which essentially looked at administrative and procedural matters associated with the existing by-laws. Although some additional communities have apparently indicated a desire to enact by-laws, it does not appear that this review fully analysed the effectiveness of the by-law scheme nor did it consider alternatives. No written report of this review is available: see Charles Vinci, Acting Director General, Department of Indigenous Affairs, letter (15 May 2006).
148. Law Council of Australia, Submission No. 41 (29 May 2006) 12.
149. See discussion under 'Voluntariness and consent', Chapter Two, above p 35.
150. This view was expressed by the Aboriginal Legal Service: see Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5.
151. See Recommendation 3, above p 58.
152. For example, discussion directly below about disorderly conduct. The Commission also notes that the Department of Indigenous Affairs explained in

Recommendation 19

Statistics and records in relation to by-laws

That in order to facilitate the review of the by-law scheme, the Department of the Attorney General immediately establish procedures to keep accurate statistics about all charges arising from a breach of a by-law enacted under the *Aboriginal Communities Act 1979* (WA) and that these records include the outcome of the court proceeding.

Specific Australian Laws and Discrete Aboriginal Communities

The Commission has observed that by-laws currently deal with a number of matters that are also covered by the general criminal law, such as damage, disorderly conduct, trespass, drink driving, careless driving and littering. However, the general law provisions are not necessarily applicable to discrete Aboriginal communities; that is, communities with identifiable physical boundaries. The Commission proposed amendments, where appropriate, to ensure that the general law is applicable to the circumstances in discrete Aboriginal communities. The principal reason for these proposals was to ensure that in the absence of by-laws Aboriginal communities would still have recourse to Australian law. In re-examining these Australian laws, it has been necessary to consider whether reform is required now that the Commission has not proceeded with its proposal to repeal the by-law scheme. In this regard, the Commission notes that there are about 300 discrete Aboriginal communities that do not currently have by-laws in place.

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'. Public place is defined in s 1 of the *Criminal Code* to include 'a place to which the public, or any section of the public, has or is permitted to have access, whether on payment or otherwise'. In its Discussion Paper, the Commission proposed that the definition of a public place in s 1 of the *Criminal Code* be amended to include a discrete Aboriginal community other than an area of that community which is used for private residential purposes.[153]

The Commission has not received any submissions directly addressing the substance of this proposal. The Commission is of the view that most discrete Aboriginal communities would probably fall within the definition of a public place in s 1 of the *Criminal Code* but it is not convinced that all discrete Aboriginal communities would be considered a public place.[154] However, the Commission does not consider that it is necessary to amend the *Criminal Code* at this stage because of the relatively minor nature of the offence of disorderly conduct. If following the review of the *Aboriginal Communities Act,* the Commissioner for Indigenous Affairs concludes that the by-law scheme should be repealed then it may be necessary to revisit this issue.

Traffic offences

For offences that regulate the manner of driving (such as careless driving, dangerous driving and drink driving) the alleged driving must, pursuant to s 73 of the *Road Traffic Act 1974 (WA)*, 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 proposed in its Discussion Paper that s 73 of the *Road Traffic Act* be amended to include the lands of a discrete Aboriginal community.[155]

In response, the Department of Corrective Services stated that it was concerned that this proposal would result in more Aboriginal people being arrested and imprisoned.[156] However, the Commission believes that in most cases, the definition in s 73 of the *Road Traffic Act* would already be applicable to discrete Aboriginal communities because these communities would be

its submission, that in the absence of by-laws other less serious *Road Traffic Act* offences would be immune from prosecution in Aboriginal communities: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 7. For example, driving without a licence under s 49 of the *Road Traffic Act* and various offences under the *Road Traffic Code* are only applicable to driving on a road and do not extend to places where the public are permitted to have access. The Commission suggests if the by-laws are to be repealed in the future it will be necessary to also consider if any legislative changes are required with respect to other traffic matters.

153. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 121, Proposal 12.
154. Under reg 8 of the *Aboriginal Affairs Planning Authority Act Regulations 1972* the Minister of Indigenous Affairs can grant permits to members of the public to enter certain Aboriginal communities.
155. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 122, Proposal 13.
156. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 4.

places where members of the public have access. The Commission has been advised that people who have driven in a discrete Aboriginal community, contrary to relevant sections of the *Road Traffic Act*, have been charged by the police and convicted.[157] However, unlike the case of disorderly conduct, the relevant traffic offences are potentially very serious, such as dangerous driving causing death. The Commission is concerned that some discrete Aboriginal communities may fall outside the definition in s 73 of the *Road Traffic Act*. Aboriginal people living in these communities deserve full protection under Australian law. It would be extremely unfortunate if a person could escape criminal liability for dangerous driving causing death because it was ruled that a particular community was not a place where the public are permitted to have access. The Commission notes that this situation could arise when a person who is not a member of the community drives dangerously through the community and causes the death of a community member. The Commission has received support for its proposal from the Law Council of Australia and the Western Australia Police.[158] The Commission has concluded that it is preferable to remove any doubt and amend s 73 of the *Road Traffic Act* to include discrete Aboriginal communities.

Recommendation 20

Definition of driving under s 73 of the *Road Traffic Act 1974* (WA)

That in order to remove any doubt and ensure that Aboriginal people living in discrete Aboriginal communities are protected by the provisions of the *Road Traffic Act 1974* (WA), s 73 of the *Road Traffic Act 1974* (WA) be amended to bring the community lands of an Aboriginal community declared under the *Aboriginal Communities Act 1979* (WA) within the definition of 'driving'.

Substance abuse

The Commission's consultations with Aboriginal people revealed that substance abuse, in particular petrol-sniffing, was of serious concern to many Aboriginal communities, both in regional and metropolitan areas. The devastation caused by the abuse of solvents such as petrol, is well known. Recently, the Senate Community Affairs References Committee has completed an inquiry into petrol sniffing. A number of recommendations have been made to address the problem of petrol sniffing across Australia.[159] This inquiry found that there are a number of possible strategies to address petrol sniffing, including the supply of alternative fuels, effective policing strategies, legislative intervention, permanent police presence in Aboriginal communities, community night patrols, the recruitment of community members as Aboriginal liaison and community officers to work alongside sworn police officers, and community-based initiatives.[160]

By-laws

One response in Western Australia for dealing with substance abuse has been the enactment of by-laws prohibiting the possession, sale and supply of deleterious substances. Currently, 16 Aboriginal communities have by-laws to this effect. Apart from these communities, it is not an offence to posses or use inhalants. There are conflicting views as to whether by-laws are effective in preventing inhalant abuse. The recent Senate inquiry observed that by-laws are not always enforced and that, in some cases, petrol sniffers will simply relocate to another place that does not prohibit inhalant use.[161] The Commission remains of the opinion that the general criminalisation of inhalant use is inappropriate. Nevertheless, because the Commission has not proceeded with its proposal to repeal the by-law scheme, those communities who wish to enact by-laws making it an offence to posses or use inhalants will be able to do so.[162]

157. A person has been convicted for dangerous driving causing death in Balgo: Superintendent Steve Robins, Kimberly District Office, Western Australia Police, telephone consultation (31 August 2006).
158. Law Council of Australia, Submission No. 41 (29 May 2006) 12; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 5. Other submissions opposed the proposal on the basis that the repeal of the by-law was not supported: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 7; Department of the Attorney General, Submission No. 34 (11 May 2006) 3; Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 1.
159. The Senate Community Affairs References Committee, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities*, (June 2006).
160. Ibid.
161. The Senate Community Affairs References Committee, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities*, (June 2006) 62–63 & 68. The inquiry noted that a Northern Territory Select Committee on substance abuse had previously observed that the impact of the by-laws in Ngaanyatjarra communities was that 'those who wanted to sniff simply crossed to communities on Ngaanyatjarra lands in the Northern Territory'. Nevertheless, it was noted that sniffing is less prevalent in Ngaanyatjarra communities than the Pitjantjatjara communities in South Australia.
162. The Commission has taken into account in its decision not to recommend the repeal of the by-laws that the Ngaanyatjarra Council has expressed strong support for the retention of by-laws prohibiting the possession and use of inhalants: see Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 33.

Police powers to seize intoxicants

In its Discussion Paper, the Commission also examined the *Protective Custody Act 2000* (WA) in order to determine whether this legislation was applicable to or effective for discrete Aboriginal communities. Under the *Protective Custody Act* the police have the power to seize intoxicants; however, this power is limited to public places. The power to seize an intoxicant (which includes alcohol, drugs and volatile substances) applies to children who are consuming (or about to consume) an intoxicant in a public place or to both adults and children who have been apprehended because they were already intoxicated. Apart from police, this power may be exercised by authorised officers,[163] including public transport security officers and community officers.[164]

The Commission proposed that the definition of public place should include discrete Aboriginal communities.[165] The Department of Indigenous Affairs supported this proposal but noted that extending the definition of public place could mean that residences in the community would fall within the definition and therefore police would be authorised to enter people's homes.[166] The Ngaanyatjarra Council observed that the current definition of public place would probably not cover a child in his or her front yard. The Ngaanyatjarra Council also expressed concern that the Commission's proposal would cause unintended consequences and questioned whether a sorry camp, single men's camp or place where women conduct law business would be included in the definition of public place.[167]

Public place is defined in s 3 of the *Protective Custody Act* to include, among other things, 'a place to which the public are admitted on the payment of money or other consideration, the test of admittance being only the payment of money or other consideration'. This definition is different from the definition of public place in the *Criminal Code.* A discrete Aboriginal community could only fit within this definition if it was a place to which the public are admitted on the payment of money or other consideration. This is different to the Code definition which provides that a place is a public place if members of the public are permitted to have access whether on payment or otherwise. The Commission understands that generally the permit system for Aboriginal communities does not require the payment of a fee.

The Commission is of the view that it would be useful for the sake of clarity to include discrete Aboriginal communities within the definition of a public place under the *Protective Custody Act*. However, the Commission does not believe that it is appropriate for residences to be included in the ambit of the legislation. Private residences are not included for other people in the general community.[168] Also, there may be particular areas within a community that have special cultural significance and it may not be appropriate for these areas to be included in the definition of public place under the *Protective Custody Act*. Because of these issues, the Commission considers that further consultation with Aboriginal communities is necessary before any changes are made to the definition of a public place under the *Protective Custody Act.*

Community officers

The Commission noted in its Discussion Paper that in 2002 the Commissioner of Police had not yet appointed any community officers.[169] During the Second Reading Speech for the Protective Custody Bill 2000 it was explained that the provision to appoint community officers was aimed at recognising the work of Aboriginal community groups such as patrols.[170] The Commission proposed that the Commissioner of Police seek nominations from Aboriginal community councils for the appointment of persons as community officers under

163. *Protective Custody Act 2000* (WA) ss 5, 6, 9.
164. *Protective Custody Act 2000* (WA) ss 3, 27. A public transport security officer can only seize intoxicants on property defined under the *Public Transport Act Authority Act 2003* (WA). Note that a community officer is a voluntary position appointed by the Commissioner of Police. The Gordon Inquiry noted that at the time of its report the Commissioner of Police had not yet appointed any community officers: see Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 227.
165. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 124, Proposal 15.
166. Department of Indigenous Affairs, Submission No. 29 (2 May 2006)10. The Commission notes that the Law Council of Australia also supported this proposal: Law Council of Australia, Submission No. 41 (29 May 2006) 12. The Department of the Attorney General and the DPP both opposed the proposal only on the basis that they did not support the repeal of the by-law scheme: see Department of the Attorney General, Submission No. 34 (11 May 2006) 3; Office of the Director of Public Prosecutions, Submission No. 40A (16 June 2006) 1.
167. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 38.
168. *Protective Custody Act 2000* (WA) s 3.
169. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 124; and see Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 227.
170. Western Australia, *Parliamentary Debates*, Legislative Council, 11 May 2000, 6865–6866 (Mr Peter Foss, Attorney General).

s 27 of the *Protective Custody Act*.[171] It was suggested that this would allow members of a community justice group or other community members (such as patrol members or wardens) to be appointed and have the power to confiscate substances in their own communities. In its submission to this reference, the Western Australia Police did not comment at all on this proposal.[172] The Commission has subsequently been advised that there have still been no appointments for community officers made under the legislation.[173]

The Department of Indigenous Affairs supported this proposal and submitted that community officers would need training and resources to ensure compliance with the legislation, such as keeping adequate records. It was also highlighted by the Department of Indigenous Affairs that in practice the option of appointing community officers will be ineffective if there are no appropriate places to detain intoxicated people.[174] Further, the Department noted that under the *Protective Custody Act* community officers cannot be paid. It was suggested that community officers could be paid through CDEP or such other future similar schemes and that it would be worthwhile if current Aboriginal patrols could be incorporated into the *Protective Custody Act* regime.[175]

The Ngaanyatjarra Council did not consider that the appointment of community officers would assist in dealing with inhalant abuse in its communities. It was stated that Ngaanyatjarra people cannot directly intervene when a person is using inhalants because of cultural barriers.[176] In her submission, Maggie Brady explained that while all people would face difficulties when dealing with family members or close relatives, it is particularly problematic for Aboriginal people:

> For Aboriginal people, these difficulties are magnified because of socially and culturally embedded notions of individual autonomy and an ethos of non-interference in the affairs of others.[177]

Maggie Brady has reported that some Aboriginal communities had appointed a male Aboriginal community worker to act as a 'warden' and this person's role was to patrol the community and discourage people from sniffing. It was stated that this was 'usually accomplished by confronting users and pouring out their petrol supplies, breaking up using groups and urging youngsters to return to their houses or camps'.[178] Brady's research suggests that some Aboriginal people do not support these types of local interventions[179] but these interventions have nonetheless taken place. There are examples where Aboriginal people intervene in the lives of others to prevent destructive behaviour. In the Senate inquiry report the Northern Territory Mt Theo program is described in detail. The program involves Yuendumu Warlpiri Elders sending young petrol

171. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 123–24, Proposal 15.
172. Office of the Commissioner of Police, Submission No. 46 (7 June 2006).
173. Robert Skesteris, Manager Corporate Research and Development, Western Australia Police, telephone consultation (15 September 2006).
174. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 9. The Criminal Lawyers Association noted in its submission that members of a community justice group or Aboriginal community should be able to confiscate volatile substances from people in their own communities: see Criminal Lawyers Association, Submission No. 58 (4 September 2006) 1.
175. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 9.
176. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 39.
177. Dr Maggie Brady, Australian National University, Submission No. 45 (31 May 2006) 2. Maggie Brady made similar observations in her submission to the recent senate inquiry into petrol sniffing: see Senate Community Affairs References Committee, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities* (June 2006) 28. Maggie Brady has stated that '[a]utonomy of action and the belief in the right to control one's own body are inherent in Aboriginal social life. Those momentarily deranged by the ingestion of drugs will assert that they have the right to do as they please and that no-one can stop them': see Brady M, *Heavy Metal: The social meaning of petrol sniffing in Australia* (Canberra: Aboriginal Studies Press, 1992) 75.
178. Brady M, *Heavy Metal,* ibid 100.
179. Ibid 101–102.

sniffers to the Mt Theo outstation to provide guidance and instruction about traditional law. It was stated that today 'petrol sniffing is a rare occurrence in Yuendumu and the zero tolerance approach of the community ensures early intervention if any one is found sniffing'.[180]

The Ngaanyatjarra Council submitted that providing legislative authority for Ngaanyatjarra people to seize intoxicants would not remove the cultural constraints.[181] During the recent Senate inquiry it was similarly observed that for some Aboriginal communities it may be culturally inappropriate for an Aboriginal person to be involved in enforcement of laws on other Aboriginal people but, in some communities it may be possible.[182] The Commission also recognised in its Discussion Paper that Aboriginal night patrols operate in a non-coercive manner and patrol members would only transport an intoxicated person to a safe place with that person's consent.[183] The exact nature of any intervention in relation to the use of inhalants will no doubt vary from one community to another.

The Commission is concerned, however, that no appointments for community officers have been made and is still of the view that if agreed to by the relevant Aboriginal community this would be a useful tool in preventing volatile substance abuse. It is clear that these issues concerning the *Protective Custody Act* and discrete Aboriginal communities need further consideration. The Commission has concluded that the Western Australia Police in conjunction with the Department of Indigenous Affairs should immediately review the option of community officers under the *Protective Custody Act*. Aboriginal communities should be consulted to determine if there are any members of the community who are willing and able to take on this role. If so, consideration will need to be given to the nature of any training and support that is required. The Commission also agrees with Department of Indigenous Affairs that community officers should be paid. The provision of a salary for a community may facilitate the employment of Aboriginal people from another location who may therefore be able to more effectively intervene.

Recommendation 21

Community officers under the *Protective Custody Act 2000* (WA)

1. That the Western Australia Police and the Department of Indigenous Affairs jointly review the option of community officers under s 27 of the *Protective Custody Act 2000* (WA).
2. That as part of this review the Western Australia Police and the Department of Indigenous Affairs consult with Aboriginal communities as to whether there are any community members who are willing and able to act as community officers under the *Protective Custody Act 2000* (WA).
3. That as part of this review the Western Australia Police and the Department of Indigenous Affairs consider the training and support requirements of and payment for community officers.
4. That as part of this review the Western Australia Police and Department of Indigenous Affairs consider in consultation with Aboriginal communities if it is necessary for the definition of public place to expressly include discrete Aboriginal communities (or parts of those communities) which have been declared under the *Aboriginal Communities Act 1979* (WA).

Alcohol

Regulating the use of alcohol

The Commission noted in its Discussion Paper that the prohibition and regulation of alcohol use is one of the main reasons that many Aboriginal communities have joined the by-law scheme.[184] Currently, 25 communities have by-laws which prohibit the possession or use of alcohol on community lands.[185] Generally, the scheme does not appear to have been successful in preventing alcohol use and it has been even less effective for

180. The Senate Community Affairs References Committee, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities* (June 2006) 80.
181. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 39.
182. The Senate Community Affairs References Committee, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities* (June 2006) 67.
183. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 113.
184. Ibid 125.
185. Five of these communities have by-laws that provide for the community council to grant permission for a person to possess or use alcohol on community lands. For the communities that allow the council to grant permission, see Bidyadanga Community By-laws 2004, by-law 9; Kalumburu Aboriginal Corporation By-laws, by-law 10; Looma Community Inc By-laws, by-law 10; Mindibungu Aboriginal Corporation By-laws, by-law 10; Oombulgurri Association Incorporated By-laws, by-law 10.

communities located near towns where alcohol is freely available.[186] Because of the problems identified with the by-law scheme generally, the Commission concluded that a complementary model, which encompasses both community and statutory control, is the preferable way to deal with alcohol restrictions in Aboriginal communities.

The review of the *Liquor Licensing Act 1988* (WA) in 2005 recommended that the Director General of the Department of Indigenous Affairs should be able to apply to the licensing authority for regulations to support restrictions proposed by a community under the *Aboriginal Communities Act 1979* (WA).[187] The regulations would create offences and provide penalties for breaching the provisions. In other words, provisions similar to those that currently appear in Aboriginal community by-laws could be included in the *Liquor Licensing Regulations 1989* (WA). The Commission proposed in its Discussion Paper, as an alternative to by-laws, 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 would have the power to apply for regulations on behalf of a discrete Aboriginal community. The proposal stated that an application could only be made if it was supported by a majority of the community. The enactment of regulations would mean that any use of alcohol contrary to the regulations would constitute an offence.[188] The Commission also emphasised that Aboriginal communities could at the same time develop other 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 received support for this proposal from the Department of Indigenous Affairs, the Department of Corrective Services, and the Department of the Attorney General.[189] The Department of Indigenous Affairs also suggested that if this proposal is implemented there should be a review after two years to determine if the enactment of regulations has improved the health and wellbeing of Aboriginal communities.[190] The ALS supported the right of Aboriginal people to determine appropriate liquor licensing laws for their individual communities.[191]

The Commission's original proposal provided that an application to apply for liquor licensing regulations could only be made if it had the support of the majority of the community members. The importance of ensuring community support was emphasised by the Aboriginal and Torres Strait Islander Social Justice Commissioner. It was explained that legislative restrictions which are

186. McCallum A, *Review of the Aboriginal Communities Act 1979 (WA*) (Perth: Aboriginal Affairs Planning Authority, July 1992) 18; LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 40–41.
187. Independent Review Committee, *Liquor Licensing Act 1988: Report of the Independent Review Committee* (Perth, May 2005) 76–77. In its Discussion Paper the Commission noted that it is vital that any prohibition or restriction to the use of alcohol is only imposed with the support of the community. If not, a prohibition may infringe the *Racial Discrimination Act 1975* (Cth): see Calma T, Acting Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Implications of the Racial Discrimination Act 1975 with Reference to State and Territory Liquor Licensing Legislation' (Paper presented at the 34th Australasian Liquor Licensing Authorities' Conference, Hobart, 26–29 October 2004).
188. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 125–26, Proposal 16.
189. Department of Indigenous Affairs, Submission No. 25 (2 May 2006) 10; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5; Department of the Attorney General, Submission No. 34 (11 May 2006) 3. The Catholic Social Justice Council and the Law Council of Australia also supported this proposal but the Law Council only expressed support on the basis that it supported the repeal of the by-laws scheme; see Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Law Council of Australia, Submission No. 41 (29 May 2006) 12.
190. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 10.
191. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 6.

specific to Aboriginal people may contravene the *Racial Discrimination Act 1975* (Cth) unless classified as a 'special measure'. In order to meet the criteria to be considered a special measure, it is necessary for the wishes of the community to be taken into account. Special measures usually confer a benefit on a disadvantaged group. From one perspective, alcohol restrictions cause a detriment because the relevant class of persons is not entitled to lawfully drink alcohol. Therefore, as stated by the Aboriginal and Torres Strait Islander Social Justice Commissioner, if alcohol restrictions are imposed against the will of the community they will not meet the necessary standards of a special measure and will therefore be contrary to the *Racial Discrimination Act*.[192]

The Ngaanyatjarra Council opposed the proposal and argued that the liquor licensing scheme is not an appropriate vehicle to regulate the use of alcohol in Ngaanyatjarra communities.[193] It was submitted that the liquor licensing authority is required by legislation to balance competing interests. Therefore, the Ngaanyatjarra Council was concerned that the interest of non-community members such as licensees (or prospective licensees) or four-wheel-drive tourist operators may take priority over the interests of the Aboriginal community. Further, the Ngaanyatjarra Council submitted that it has chosen a zero-tolerance approach to alcohol use and this is in conflict with the harm minimisation policy adopted by the liquor licensing authority.[194]

The Commission has decided not to recommend the repeal of the by-laws and therefore the Ngaanyatjarra Council and any other community will be able to keep its by-laws if they wish to. However, there are many Aboriginal communities without by-laws. Some of these communities may wish to prohibit or regulate the possession and use of alcohol, but do not want by-laws that will regulate other behaviour. The Commission is of the view that it is appropriate to recommend that regulations can be enacted for this purpose under the *Liquor Licensing Regulations*, but it must be established that the community supports the regulations and that all of the requirements of a special measure under the *Racial Discrimination Act* have been met.

Recommendation 22

The prohibition or restriction of alcohol in discrete Aboriginal communities

1. That the Director General of the Department of Indigenous Affairs can apply to the liquor licensing authority, on behalf of an Aboriginal community declared under the *Aboriginal Communities Act 1979* (WA), for regulations in relation to the restriction or prohibition of alcohol.
2. That the Director General of the Department of Indigenous Affairs ensure that prior to making the application he or she is satisfied that the regulations would not contravene the *Racial Discrimination Act 1975* (Cth).
3. That an application can only be made by the Director General if the majority of the community members support the application.
4. That the regulations provide that breaching the restrictions or prohibition imposed is an offence.
5. That any regulations made under this recommendation can only be amended with the support of the majority of the community.
6. That the Commissioner for Indigenous Affairs review (at a time to be determined by the Commissioner for Indigenous Affairs) the effectiveness of any regulations made under this recommendation.

Supply or sale of alcohol

In its Discussion Paper the Commission recognised the serious implications for Aboriginal communities that have prohibited the use of alcohol when an 'outsider' brings alcohol into the community or supplies/sells alcohol to a community member. The Commission expressed support for the recommendation in the review of *Liquor Licensing Act 1988* (WA) that there should be an additional offence under the legislation in relation to the illegal sale of liquor to Aboriginal communities with

192. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 16–18.
193. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 23. Maggie Brady also opposed the proposal and supported the retention of by-laws to deal with alcohol prohibition: see Dr Maggie Brady, Australian National University, Submission No. 45 (31 May 2006) 1–2. The DPP opposed the proposal only on the basis that it did not support the repeal of the by-laws: Office of the Director of Public Prosecutions, Submission 40A (14 June 2006) 1. In Warburton the Commission was told that the initiatives linked to the liquor licensing authority may be poorly received because its measures introduced in Laverton have not been successful: LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006.
194. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 24–30.

strong deterrent penalties.[195] The Commission notes that s 109 of the *Liquor Licensing Act 1988* (WA) creates an offence for selling liquor without a licence or a permit and the maximum penalty is a $10,000 fine. The review recommended that the maximum penalty should be increased to $20,000. However, this offence is only applicable to the sale of alcohol and would not cover people who knowingly supply alcohol to Aboriginal communities. The Commission proposed that it should be an offence for a person to sell or supply alcohol to another where that person knows, or it is reasonable to suspect, that the alcohol will be taken into an Aboriginal community which has prohibited the consumption of alcohol under the Liquor Licensing Regulations.[196]

The Commission received a number of submissions in support of this proposal.[197] The Western Australia Police confirmed that people taking alcohol into Aboriginal communities remains a significant problem.[198] However, the Commission's proposal was opposed by the Aboriginal Legal Service. It was argued that it would be very difficult for a seller to know the intent of the person purchasing the alcohol. It was suggested that all Aboriginal people may be suspected of breaching this law and therefore Aboriginal people would be discriminated against as consumers.[199] Similarly, the Department of the Attorney General contended that the Commission's proposal would place an 'unusual onus' on alcohol suppliers – to know which Aboriginal communities had prohibited alcohol use as well as all individuals who live in these communities.[200]

The Commission's aim was not to prevent Aboriginal people from purchasing alcohol from licensed suppliers in locations that do not prohibit the use of alcohol. Therefore, the Commission has clarified that licensed suppliers will only be committing an offence if they know that the person will take the alcohol into an Aboriginal community that has prohibited the use or possession of alcohol. Because the Commission has not proceeded with its proposal to repeal the by-laws, there will be some Aboriginal communities that prohibit alcohol use under by-laws and others that may adopt the above recommendation to apply for regulations under the *Liquor Licensing Act*. Of course, some communities may use both. Thus, both types of provision are included in the recommendation. The Commission emphasises that, even where by-laws exist, any supply of alcohol outside the community lands (even if only just outside) will not be caught by the by-law provisions.

Recommendation 23

Sale or supply of alcohol in discrete Aboriginal communities

1. 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 through by-laws enacted under the *Aboriginal Communities Act 1979 (WA)* and/or under the *Liquor Licensing Regulations 1989* (WA).

2. That the *Liquor Licensing Act 1988* (WA) provide that this provision is only applicable to a licensed supplier of alcohol if that person actually knows that the alcohol will be taken into an Aboriginal community which has prohibited the consumption of liquor through by-laws enacted under the *Aboriginal Communities Act 1979 (WA)* and/or under the *Liquor Licensing Regulations 1989* (WA).

195. Independent Review Committee, *Liquor Licensing Act 1988: Report of the Independent Review Committee* (Perth, May 2005) 76. See also McCallum's comments that it was well-known that taxi drivers performed 'grog-runs' in the Kimberley and because they did not necessarily enter the community lands the by-laws were ineffective in dealing with this problem: McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 22.
196. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 127, Proposal 17.
197. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Indigenous Affairs, Submission No. 29 (2 May 2006)10; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5; Law Council of Australia, Submission No. 41 (29 May 2006)12; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.
198. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6. The Commission was also told in Fitzroy Crossing that school teachers bring alcohol into communities and the ALS stated that taxi drivers are sometimes known to bring alcohol into communities for profit. See LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 6.
199. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 6. The DPP also opposed this proposal but only on the basis that it opposed the Commission's proposal to repeal the by-law scheme: see Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 1.
200. Department of the Attorney General, Submission No. 34 (11 May 2006) 3.

Aboriginal Courts

In its Discussion Paper the Commission considered the development of Aboriginal courts throughout Australia.[1] The term 'Aboriginal courts' is used by the Commission to refer to all the current models in Australia where Aboriginal Elders or other respected persons are involved in sentencing proceedings. These models currently exist in various forms in most Australian states and territories and include the Nunga Court, Koori Court, Murri Court and circle sentencing.[2]

The number of Aboriginal courts in Australia is increasing. Since the preparation of the Commission's Discussion Paper additional courts have been established.[3] In Western Australia, an Aboriginal court commenced at Norseman in February 2006. From February until June 2006 the Norseman Community Court has convened on a monthly basis. There is a pool of six Aboriginal community members (both Elders and respected persons) who are available to sit with the magistrate.[4] The traditional court layout has been altered by removing the bar table and having all participants sitting in chairs in a circle.[5] In May 2006 the Department of the Attorney General announced plans for an Aboriginal court at Kalgoorlie.[6] The Commission understands that consultations have taken place with the local community and it is anticipated that the Kalgoorlie Community Court will commence in November 2006.[7]

Contrary to claims that Aboriginal courts represent a separate system of law for Aboriginal people, these courts operate within the boundaries of the Australian legal system and in no case does an Aboriginal Elder have the authority to decide a case or impose punishment.[8] The role of Elders and respected persons is primarily to advise the court and in some cases Elders may speak to the accused (about the consequences of their behaviour) in a culturally appropriate manner. A magistrate in an Aboriginal court can only impose a penalty that is available as a sentencing option under the general law of the relevant jurisdiction.

Aboriginal-Controlled Courts

The Commission has distinguished Aboriginal courts from Aboriginal-controlled courts. The latter are courts where Aboriginal Elders or other community members are vested with the authority to determine the final outcome of a case. In its Discussion Paper the Commission did not support the establishment of Aboriginal-controlled courts because court-like structures or processes do not appear to be part of Aboriginal customary law. The Commission concluded that it is preferable to establish structures which do not involve the exercise of western judicial power. For this reason the Commission has recommended the

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 142–57.
2. Ibid.
3. In Victoria the Koori Court has been extended to Mildura: see <http://www.magistratescourt.vic.gov.au>; and a Koori Children's Court has commenced in Melbourne: see Office of the Attorney General Victoria, *First Children's Koori Court opens in Melbourne*, media statement (9 September 2005) <http://www.dpc.vic.gov.au/domino/Web_Notes/ newmedia.nsf>. In Queensland the Murri Court has been extended to Caboolture (children only) and Townsville (both adults and children); and the Murri Courts at Rockhampton and Mt Isa also now operate for children: see <http://www.justice.qld.gov.au/courts/factsht/C11MurriCourt.htm>. In New South Wales circle sentencing operates in eight locations and recently it has been extended to Mount Druitt: see <http:www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_announcements#Mount%20Druitt>. The Commission notes that Mount Druitt will be the first metropolitan location for circle sentencing in New South Wales. The Ngambra circle sentencing court in Canberra is now permanent: see Legislative Assembly for the Australian Capital Territory Standing Committee on Legal Affairs, Transcript of Evidence, Canberra (10 November 2005) 81. Circle courts have also commenced in the Northern Territory: see Bradley S, 'Applying Restorative Justice Principles in the Sentencing of Indigenous Offenders and Children' (Paper presented to the *Sentencing: Principles, Perspectives and Possibilities* conference, Canberra, 10–12 February 2006) 2. In its Discussion Paper the Commission referred to the Wiluna Aboriginal court which was instigated by Magistrate Wilson in 2001: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 147. Information received by the Commission from the present magistrate indicates that Aboriginal Elders currently only sit with the magistrate on an irregular basis: S Richardson SM, Magistrates Court of Western Australia Carnarvon, email (23 June 2006).
4. Bradley Mitchell, Project Manager Kalgoorlie Magistrates Court, email (7 July 2006).
5. Daly K, 'WA's First Aboriginal Court: Bid to stem skyrocketing incarceration rates', *The Kalgoorlie Miner*, 15 February 2006, 3.
6. Department of the Attorney-General, *$16m for new DotAG initiatives in state budget*, media statement (11 May 2006) <http://www.justice.wa.gov.au/portal/server.pt/gateway>.
7. Bradley Mitchell, Project Manager, Kalgoorlie Magistrates Court, email (13 September 2006).
8. See Spencer B, 'Courts to Recognise Tribal Punishment', *The West Australian*, 7 February 2006, 1. In this article the establishment of Aboriginal courts was relied on as one example of how the Commission's proposals would create a separate legal system for Aboriginal people. The Commission has rejected this argument: see discussion under, 'Two Separate Systems of Law?', Chapter One, above pp 13–17.

Aboriginal courts operate within the boundaries of the Australian legal system and in no case does an Aboriginal Elder have the authority to decide a case or impose punishment.

establishment of community justice groups.[9] While the members of a community justice group will necessarily be bound by Australian law, the Commission's recommendation enables Aboriginal communities to determine their own culturally appropriate processes for responding to justice issues. Any attempt to create an Aboriginal-controlled court which is partly based on Aboriginal customary law and partly based on general legal principles is fraught with difficulties.[10] The Commission has received only one submission advocating Aboriginal-controlled courts.[11] It was argued that, in circumstances where an offender and victim are from the same community, the matter could be dealt with 'in a customary court, presided over by a tribal elder and be conducted in the tribal language'.[12] The Commission remains of the view that such courts are inappropriate. The establishment of Aboriginal-controlled courts by the Western Australian legal system could significantly distort Aboriginal customary law. In addition, Aboriginal-controlled courts could arguably be viewed as creating a separate legal system for Aboriginal people.

Problem-Solving Courts and Therapeutic Jurisprudence

The Commission noted in its Discussion Paper the development of specialist courts and problem-solving courts. In addition, the practice of therapeutic jurisprudence was discussed.[13] The Commission considered how Aboriginal courts fit within these categories and indicated that it had strong reservations about the categorisation of Aboriginal courts as problem-orientated or problem-solving courts.[14] It was noted:

> If there is a problem to be solved it is the failure of the criminal justice system to accommodate the needs of Aboriginal people and to ensure that they are fairly treated within that system.[15]

Nonetheless, the Commission acknowledges that therapeutic jurisprudence initiatives or restorative justice may be effective for Aboriginal offenders.[16] In this regard the Commission welcomes the plan to commence a therapeutic jurisprudence-based program targeting Aboriginal family and domestic violence. While the program is not Aboriginal-specific, the aim is to provide culturally appropriate programs for Aboriginal people.[17]

In April 2006 the Department of the Attorney General announced that an Aboriginal family violence court will commence in Geraldton. An Aboriginal reference group is working in tandem with the Department of the Attorney General and the Department of Corrective Services to formulate a 'model to address family and domestic violence and Aboriginal imprisonment'.[18] The Commission understands that consultations are underway with the Aboriginal community in Geraldton and that the community has indicated its support for

9. See Recommendation 17, below pp 112–13.
10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 142–44.
11. R Titelius, Submission No. 16 (27 April 2006) 1.
12. Ibid 3.
13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 145–46.
14. Dr Peggy Dwyer recently observed that although there may be some similarities between Aboriginal courts and problem-solving courts and the practice of therapeutic and restorative justice, 'indigenous court structures defy classification into existing models and must be recognised as having a unique place in the Australian criminal justice system': see Dwyer P, 'Sentencing Aboriginal Offenders: The future of Indigenous justice models' (Paper presented at the 19th International Conference of the International Society for the Reform of Criminal Law, Edinburgh, 26–30 June 2005) 2–3.
15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 146. Dr Michael King SM has acknowledged that 'Aboriginal courts are a response to the problem of the legal system's inadequate response to the law-related needs of Aboriginal people' but has also argued that Aboriginal courts do fit within the practice of therapeutic jurisprudence: see King M, 'Problem-Solving Court Programs in Western Australia' (Paper presented to the *Sentencing: Principles, Perspectives and Possibilities* conference, Canberra, 10–12 February 2006).
16. In its Discussion Paper the Commission referred to the work the Geraldton Alternative Sentencing Regime: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 148. The Commission has received further comments about the benefits of therapeutic jurisprudence for Aboriginal people: see Dr Brian Steels, consultation (28 April 2006). The Commission is aware that there is a restorative justice project underway in Roebourne: see Campione E & Steels B (Untitled paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006). The Commission will further consider the link between therapeutic jurisprudence and problem-orientated courts in the reference on Problem-orientated Courts and Judicial Case Management, Project No. 96.
17. Mallon J, Department of the Attorney General, email (25 May 2006).
18. Department of the Attorney General, *Project addresses Aboriginal imprisonment*, media statement (10 April 2006), <http://www.justice.wa.gov.au>.

the involvement of Aboriginal respected persons during the court process. Further, it is anticipated that the court will be supported by programs specifically designed for Aboriginal people.[19]

The Value and Effectiveness of Aboriginal Courts

In its Discussion Paper the Commission observed that it was too early to comprehensively judge the effectiveness of Aboriginal courts. Nevertheless, it did appear that Aboriginal courts had achieved significant gains in justice outcomes for Aboriginal people. The Commission noted that Aboriginal courts had achieved substantial improvements in court attendance rates. Also it appeared that offenders were more likely to comply with court orders as a direct result of the involvement of their Aboriginal community.[20]

In making its final recommendations the Commission has taken into account the recently published evaluation of the Koori Courts at Shepparton and Broadmeadows in Victoria. It was reported that this evaluation 'found that in virtually all of the stated aims of the Koori Court Pilot Program, it has been a *resounding success'*.[21] Following are some of the achievements identified in this evaluation report.

- The Koori Courts have experienced reduced levels of recidivism. At the time of the Koori Court evaluation report the general rate of recidivism in Victoria was about 30 per cent. Over the two-year evaluation period the rate of recidivism in the Shepparton Koori Court was 12.5 per cent and in the Broadmeadows Koori Court it was 15.5 per cent.
- There have been improvements in the rate at which defendants appear in court.
- There have been reductions in the breach rate for community-based orders.
- There has been increased involvement by the Koori community in the criminal justice system.
- The Koori Courts provide a less alienating court process for participants.
- The Koori Courts encourage cultural matters to be taken into account during sentencing.
- The cultural authority of Elders and respected persons, and the Koori community in general has been strengthened.[22]

Similar outcomes have been observed in relation to other Aboriginal courts. Although only newly established, it has been noted that there are significantly less children appearing in the Murri Children's Court at Townsville than previously in the mainstream Children's Court.[23] Both circle sentencing courts in New South Wales and the Murri Courts in Queensland have shown positive results in relation to recidivism rates.[24] In relation to the Murri Court it has been noted that 'perhaps initially unforseen, but arguably the most significant, benefit has been the reconnection of offenders with their communities'.[25]

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 general criminal justice system and are subject to the same sentencing principles as any other court. Reports from people working in Aboriginal courts do not support the contention that they are a 'soft option'. Magistrate Dick from New South Wales stated:

> We have even experienced the unexpected, that is, a victim protesting that the penalty of the circle was too harsh. Sentences imposed by Circle Courts to date have consistently fallen in the heavier end of the scale of penalties. [26]

As indicated by the Commission in its Discussion Paper, it is not easy for Aboriginal offenders to face their Elders in court.[27] It was reported that Elders involved in the

19. Nichole Councillor, Department of the Attorney-General, email (17 July 2006); Steve Sharratt SM, telephone consultation (17 July 2006).
20. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 155.
21. Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission Into Aboriginal Deaths in Custody*, Review Report (Vol 1, October 2005) 485. This review recommended that the Victorian Attorney General give 'urgent attention' to expanding Koori Courts to other areas in consultation with Indigenous communities: see Recommendation 114.
22. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 8, 85 & 92.
23. Opening of the Murri Court at Townsville, 2 March 2006, Transcript of Proceedings, 3
24. Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage – Key Indicators 2005* (July 2005) 9.9.
25. Hennessy A, 'Reconnection to Community as a Sentencing Tool (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 3.
26. Dick D, 'Circle Sentencing of Aboriginal Offenders: Victims have a say' (2004) 7 *The Judicial Review* 57, 65. See also Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 74–75.
27. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 155.

Aboriginal court at Norseman claimed that the process was more difficult and confronting for the accused because 'Aboriginal people felt a great sense of shame when they were judged by their own community'.[28] In any event, even if an Aboriginal court was to impose a very lenient sentence the prosecution are entitled (as is the defence) to appeal against any perceived sentencing errors.

What Aboriginal courts appear to achieve, through the active involvement of Aboriginal Elders and other community members, is a more meaningful court experience. Offenders are more likely to comply with the order of the court and change their behaviour; while Aboriginal communities are strengthened by the reinforcement of the traditional authority of Elders. These outcomes are in the interests of both Aboriginal communities and the wider community.

The Commission's Proposal for Aboriginal Courts

During the Commission's initial consultations many Aboriginal communities expressed support for Elders to sit with a magistrate in court and the various models of Aboriginal courts which were currently operating. The Commission concluded in its Discussion Paper 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.[29]

The Commission proposed the establishment of Aboriginal courts in both the metropolitan area and in regional locations (subject to consultation with the relevant Aboriginal communities). It was also proposed that Aboriginal courts should be available for both adults and children.[30] The Commission did not consider that legislative change is required to implement this proposal. The *Magistrates Court Act 2004* (WA), *Sentencing Act 1995* (WA) and *Sentencing Regulations 1996* (WA) provide for the establishment of speciality courts and for a separate division of the Magistrates Court to be set up. The Commission's proposal envisaged that after two years of operation there would be an independent evaluation of Aboriginal courts to determine their effectiveness, whether any legislative changes are required and whether any Aboriginal courts should be afforded permanent status.[31]

The Commission recognises and commends the continued efforts of individual magistrates and others in developing Aboriginal courts in Western Australia.[32] However, the Commission does not consider that the long-term sustainability of Aboriginal courts in this state should be left to individual magistrates. Inevitably magistrates are transferred or retire. The Koori Court evaluation report argued that the success of the Koori Court is largely dependent upon the choice of the most appropriate magistrate.[33] Apart from the necessity for Aboriginal courts to be supported by government in terms of resources, a formal government policy will also mean that there will be an obligation on the Western Australian government to ensure the appointment of judicial officers with the appropriate level of training, experience and willingness to successfully engage with Aboriginal communities. The Commission therefore remains of the view that there should be a formal government policy to establish Aboriginal courts in order to ensure long-term sustainability.

Responses to the Commission's Proposal for Aboriginal Courts

The Commission has received overwhelming support for the introduction of Aboriginal courts in Western Australia.[34] While generally supportive of Aboriginal courts, there were a small number of submissions that raised specific concerns about the manner in which Aboriginal courts would be established. Some of these submissions dealt with issues about the selection of

28. Daly K, 'WA's First Aboriginal Court: Bid to stem skyrocketing incarceration rates', *The Kalgoorlie Miner*, 15 February 2006, 3.
29. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 156.
30. Ibid 157, Proposal 19.
31. Ibid.
32. Ibid 146–48. The fact that the current examples of Aboriginal courts have been dependent on the goodwill of individual magistrates was mentioned again to the Commission during the Discussion Paper community consultation – Broome, 7 March 2006.
33. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 34–36.
34. Dr Michael King SM, Perth Drug Court, email (13 February 2006); Chief Magistrate Heath, Submission No. 10 (21 March 2006) 2; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006), 3; Bishop H, AbSolve, Submission No. 26 (28 April 2006) 2; Centre for Aboriginal Studies, Curtin University of Technology, Submission No. 28 (1 May 2006); Department of the Attorney General, Submission No. 34 (11 May 2006) 5; Aboriginal Legal Service, Submission No. 35 (12 May 2006) 5; Law Society of Western Australia, Submission No. 36 (16 May 2006) 4; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 11; LRCWA, Discussion Paper community consultations – Warburton, 27 February 2006; Broome, 7 March 2006; Fitzroy Crossing, 9 March 2006; Bunbury, 17 March 2006.

Elders or respected persons to sit with the magistrate.[35] Other concerns related to the establishment of Aboriginal courts in the metropolitan area.

Aboriginal courts in the metropolitan area

The Chief Magistrate indicated in his submission that it may be difficult to establish an Aboriginal court in the metropolitan area because such a court may not be acceptable to all metropolitan Aboriginal people. He also argued that the Commission did not provide any justification for the establishment of a metropolitan Aboriginal court.[36] When proposing that Aboriginal courts should be set up in the metropolitan area the Commission was strongly influenced by the support expressed by Aboriginal people during its metropolitan consultations.[37] Further, in the Discussion Paper the Commission observed that:

> [I]t is important to recognise that there is a benefit in reconnecting Aboriginal people who are not from remote areas to their cultural values and it is not just Aboriginal people from remote traditional areas who feel alienated from the criminal justice system.[38]

This view was supported by the Centre for Aboriginal Studies at Curtin University of Technology. The Centre was strongly in favour of an Aboriginal court in the metropolitan area and in its submission stated that Aboriginal courts can 'allow for Aboriginal peoples and communities to re-establish the authority of Elders and cultural values'.[39] Recently, in relation to the Murri Court in Queensland, a magistrate has argued that:

> The path to a true reduction in the rate of recidivism for indigenous offenders living in an urban setting may lie in the ability of the indigenous community to reconnect the offender with traditional indigenous values and communal responsibilities.[40]

The Koori Court evaluation report highlighted that the court process is effective even in cases where Aboriginal customary law or traditional culture is not directly relevant to the case. This is because Elders are able to reprimand the offender in a culturally appropriate manner and discuss with the offender their own life experiences.[41]

The Aboriginal Legal Service (ALS) also supports the establishment of Aboriginal courts in the metropolitan area and believes, that with adequate consultation, an acceptable pool of Elders and respected persons can be selected.[42] The ALS did observe, however, that there may be cases in Perth where the offender has committed an offence elsewhere and he or she does not come from the local Aboriginal community. In these types of cases it may not be appropriate for the offender to appear before a metropolitan Aboriginal court.[43] Alternatively, a panel of Elders in the metropolitan area could include Aboriginal people with cultural connections to other parts of the state. As stated by the ALS, this would allow the 'matching' of the offender to an appropriate Elder or respected person.[44] In cases where the offender is from a different area but the offence was committed locally, it may be appropriate for the offender to appear before a metropolitan Aboriginal court. The Shepparton Koori Court officer has observed that:

> If the defendant is from another country, they are told their behaviour is not acceptable in our country and advised that their behaviour most likely would not be tolerated by their community either.[45]

While there may be issues about which Elders or respected persons should sit in relation to a particular offender, the Commission believes that these matters can be addressed through appropriate consultation with Aboriginal people and by the Aboriginal justice officer attached to the court.

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35. See discussion under 'Selection of Elders and respected persons', below p 134 and 'The DPP submission', below p 130.
36. Chief Magistrate Heath, Submission No. 10 (21 March 2006) 2. Also the Commission notes that in its submission the Office of the Director of Public Prosecutions claimed that Aboriginal courts are 'less relevant in respect of offences committed in metropolitan regions by urbanised Aboriginal people': see Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 18.
37. The Commission was informed by Aboriginal people that they supported the various Aboriginal court models and the concept of Aboriginal Elders sitting with magistrates during the consultations at Manguri, Mirrabooka, Armadale, Rockingham and Midland: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 143.
38. LRCWA, ibid 156–57.
39. Centre for Aboriginal Studies, Curtin University of Technology, Submission No. 28 (1 May 2006) 2.
40. Hennessy A, 'Reconnection to Community as a Sentencing Tool (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 2.
41. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 41–42.
42. Aboriginal Legal Service, consultation (7 April 2006); Tonia Brajcich, Aboriginal Legal Service, email (15 May 2006).
43. It has been observed that 'there may be little point in referring an Aboriginal offender to a circle court where they have no connection to the local community': see Dwyer P, 'Sentencing Aboriginal Offenders: The future of Indigenous justice models' (Paper presented at the 19th International Conference of the International Society for the Reform of Criminal Law, Edinburgh, 26–30 June 2005) 9.
44. Tonia Brajcich, Aboriginal Legal Service, email (15 May 2006).
45. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 28.

The Department of the Attorney General submitted that an Aboriginal court should not be set up in the metropolitan area until such a court has been tested in a regional location. In support of this approach, the Department argued that in other jurisdictions (New South Wales, Victoria and South Australia) the practice has been to develop a pilot in a regional location and then, after the pilot has been evaluated, consider extending the model into other locations. The Department also claimed that an Aboriginal court has not been established in a capital city or major metropolitan area in New South Wales, Victoria or South Australia.[46]

Although often developed in regional areas, Aboriginal courts have been established in metropolitan locations. In Victoria, the Koori Court sits at Broadmeadows and the first Koori Children's Court commenced in Melbourne.[47] In South Australia the first Nunga Court commenced in Port Adelaide. The first Murri Court was established in Brisbane and there is an Aboriginal court in Canberra. The Commission did not suggest in its proposal exactly where an Aboriginal court should sit in the metropolitan area. The location or locations will depend upon various factors including the views of the relevant Aboriginal communities; the availability of suitable Elders and respected persons; the availability of judicial officers; and logistics concerning the layout of the court and other administrative issues.

Submissions opposing the Commission's proposal

The Commission received two submissions opposing its proposal to establish Aboriginal courts. These submissions were from the Office of the Director of Public Prosecutions (DPP) and the Western Australia Police. While the DPP opposed the concept of an Aboriginal court, the Western Australia Police indicated that they do not support the establishment of additional Aboriginal courts without further consultation and until the existing Aboriginal courts in Western Australia have been evaluated. In its submission the Western Australia Police stated that there is a need for further community consultation 'in order to gauge community readiness and address concerns'.[48] The Commission received wide support for Aboriginal courts during its initial consultations with Aboriginal communities and, as stated above, it has received extensive support in submissions and meetings with Aboriginal communities throughout the state. The Commission does not consider that there is any further need to consult to find out if the concept of Aboriginal courts is supported. Of course, as the Commission has made clear, further consultation with the relevant Aboriginal communities is necessary to ensure that each community is willing and to address practical implementation issues before any court is actually set up.[49]

The other concern expressed by the Western Australia Police is that existing Aboriginal courts in Western Australia have not been adequately evaluated.[50] The Western Australia Police argued that existing courts should be evaluated to determine their effectiveness for victims, offenders, communities and the wider community. Further, it was suggested that reductions in recidivism rates is not enough to justify a conclusion that Aboriginal courts are effective. The Western Australia Police did acknowledge that the Yandeyarra Aboriginal court has seen a decrease in recidivism rates and that already, anecdotal reports suggest, that the Norseman court is achieving reductions in offending.[51]

The Commission agrees that Aboriginal courts should be properly evaluated – not just in terms of recidivism but also on qualitative outcomes such as the effect on participants, victims and communities.[52] The suggestion by the Western Australia Police that evaluating Aboriginal courts requires sufficient resources is also correct. However, the existing examples of Aboriginal courts in Western Australia have not been developed with formal government support. As stated above, the current examples of Aboriginal courts have largely been initiated by individual judicial officers and this has been done in the absence of additional funding and support services. The Commission is of the opinion that it would

46. Department of the Attorney General, Submission No. 34 (11 May 2006) 5.
47. The Commission notes that during the consultation phase of the Koori Court pilot project it was determined at the outset by an Aboriginal Justice Forum that the first Koori Court should be in Shepparton and then a metropolitan Koori court should commence in Broadmeadows. The evaluation did not commence until both courts were operating: see Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 17.
48. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 7.
49. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 157.
50. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 7.
51. Ibid.
52. The need for ongoing evaluation and monitoring was also mentioned by the Aboriginal and Torres Strait Islander Social Justice Commissioner: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 11.

be unreasonable for the future of Aboriginal courts in this state to be dependent upon the results of any evaluation of these courts. There has been sufficient positive evaluation of Aboriginal courts in Australia to justify expansion in this state. Once Aboriginal courts are formally supported with resources and staff then evaluations must be undertaken to consider their long term future needs.

The DPP submission

The DPP submission expressed strong opposition to the establishment of Aboriginal courts in Western Australia. Because the submission contains a number of different arguments for this view and because the DPP submission is the only submission that opposes the concept of an Aboriginal court, the Commission considers that the arguments must be separately addressed.

Membership

In its submission the DPP argued that there will not be enough suitable Aboriginal Elders or respected persons to facilitate the establishment of Aboriginal courts.[53] The Commission is not aware of any problem arising from a lack of suitable Elders or respected persons in the development of Aboriginal courts in other Australian jurisdictions. Nevertheless, in some communities in Western Australia there may be a lack of Elders or respected persons who are willing or able to sit on an Aboriginal court. If that is the case then an Aboriginal court will not be able to commence in that location and the existing mainstream court processes will apply.

The DPP has also asserted that there will not be enough suitable Elders in its response to the Commission's recommendation for community justice groups.[54] In both cases the DPP claimed that it is often Aboriginal Elders and leaders who are responsible for sexual and violent offending against Aboriginal women and children.[55] In Chapter One the Commission has separately discussed and strongly rejected the stereotypical view that Aboriginal Elders are primarily responsible for serious offending against Aboriginal women and children.[56]

Ability of Aboriginal courts to deal with offending against non-Aboriginal victims

In its submission the DPP argued that Aboriginal courts may not be effective in addressing offences committed against non-Aboriginal victims.[57] Because an Aboriginal court is subject to the same law and sentencing principles as any other court, Aboriginal courts will deal with offending against non-Aboriginal victims in the same way that other courts deal with non-Aboriginal victims. The Koori Court evaluation report notes that the involvement of victims is not as fundamental to the process as it may be for restorative justice initiatives and the Koori Court process is not substantially different in terms of victim involvement than a general court.[58] Nonetheless, the evaluation report did note positive examples of victim involvement.[59] In comparison, the circle sentencing model does place a greater emphasis on victim participation.[60] The Commission does not consider that Aboriginal courts will be less inclusive of victims than mainstream courts. The Commission is of the view that Aboriginal courts will be more likely to involve the victim and take into account the victim's views because Aboriginal courts take a more holistic approach and take more time to consider each case.

Aboriginal courts may set a precedent for other cultures

The DPP submission contends that establishing Aboriginal courts 'may set a precedent for other cultures seeking tailored criminal justice processes'.[61] In Chapter One the Commission considered in detail the principle of equality before the law and rejected arguments that Aboriginal courts or other special measures contravene this principle. Further, the Commission has outlined why the circumstances of Aboriginal people require different treatment in order to achieve actual equality.[62] Specifically, in relation to Aboriginal courts, it should not be forgotten that there is no other ethnic group that constitutes nearly half of all prisoners in the Western Australian criminal justice system.[63]

53. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 17. In support of this argument the DPP referred to evidence based on material dealing with Canadian initiatives.
54. See discussion under 'Membership criteria', above pp 100–102.
55. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4.
56. See discussion under 'Aboriginal Elders should not be stereotyped as offenders', Chapter One, above pp 22–23.
57. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 17.
58. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 56.
59. Ibid.
60. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 151; Dick D, 'Circle Sentencing of Aboriginal Offenders: Victims have a say' (2004) 7 *The Judicial Review* 57, 62.
61. Ibid.
62. See discussion under 'Non-Discrimination and Equality Before the Law', Chapter One, above pp 8–12.
63. See discussion under 'Over-Representation in the Criminal Justice System', above p 82.

Aboriginal courts will not be effective in dealing with serious intra-Aboriginal offending

The DPP submission asserted that because sexual offences are usually dealt with in the District Court it is not clear how Aboriginal courts would deal with the issue of intra-Aboriginal abuse.[64] Only two offences of a sexual nature can be dealt with by a Magistrates Court: aggravated indecent assault and indecent assault.[65] Sexual offences against children and very serious offences, such as sexual penetration without consent, must be dealt with by the District Court.[66] The Commission does not claim that Aboriginal courts would prevent serious intra-Aboriginal offending or that Aboriginal courts would necessarily deal with these types of offences. Underlying the need for Aboriginal courts in Western Australia is the excessive rate of Aboriginal imprisonment. Aboriginal courts have the potential to reduce the Aboriginal imprisonment rate because they would deal with offences of a less serious nature for which imprisonment may not be necessary or appropriate. In some other jurisdictions there has been reluctance by Aboriginal communities for Aboriginal courts to deal with family violence and sexual abuse.[67] Exactly what offences should be included or excluded from the jurisdiction of an Aboriginal court is a matter that should be determined in consultation with the local Aboriginal community and other stakeholders. It may well vary from one place to another. As indicated in its Discussion Paper, the Commission is of the view that there is no reason why an Aboriginal court could not be set up in the District Court if all relevant parties agreed.[68]

Other initiatives to deal with serious intra-Aboriginal offending

As an alternative to Aboriginal courts the DPP advocated a 'systemic restorative justice approach for all levels of criminal offences'.[69] The DPP also put forward other initiatives to deal with sexual and violent offending by Aboriginal people, such as specialist sexual offences courts and diversionary civil approaches.[70] The DPP did not suggest that any of these initiatives should be Aboriginal-specific.

While not rejecting the potential benefits of these alternative approaches the Commission does not consider that it is appropriate to consider these options in this reference. Given the serious nature of sexual offending the Commission is of the view that more research is needed about the appropriateness of these options across the board. The Commission is also undertaking a separate reference on problem-orientated courts and is of the view that it would be more appropriate to consider the viability of these options within that reference.

The Commission also considers that any alternative approaches that target Aboriginal people in the criminal justice system should not be undertaken without significant consultation with Aboriginal communities. The Commission has not consulted with Aboriginal people about the options referred to in the DPP submission. In its reference on problem-orientated courts the Commission will be providing an opportunity for submissions from interested parties about possible alternatives to the traditional approach used by courts in the criminal justice system.

Furthermore, there is no reason, if any of these options are considered to be appropriate, that they cannot be implemented in addition to Aboriginal courts.[71] Because Aboriginal courts are generally convened in the lower court level they deal with less serious offending and for that reason they are an important criminal justice response to the disproportionate rate of Aboriginal imprisonment.

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64. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 18.
65. *Criminal Code* (WA) ss 323 & 324.
66. *Criminal Code* (WA) Div XXXI.
67. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 122.
68. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005)153. The Commission notes that in May 2006 the *Sentencing Act 1995* (WA) was amended to provide for a new sentencing option: conditional suspended sentence of imprisonment. Part 12 provides that a superior court can order that an offender appear before a speciality court at certain times. Although currently the only speciality court is the Drug Court it may be appropriate that an Aboriginal court is prescribed as a speciality court. This would allow the District or Supreme Courts to impose a conditional suspended sentence on an Aboriginal offender and then order that the offender appear before the Aboriginal court for ongoing monitoring.
69. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 20.
70. Ibid 18.
71. The submission by the DPP referred to restorative justice initiatives in Canada and the Australian Capital Territory: see Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 19–20. Both these locations also have Aboriginal courts: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 152; *Glaude (Aboriginal Persons) Court Ontario Court of Justice,* Fact Sheet, <http://www.aboriginallegal.ca/docs/apc-_factsheet.htm>.

Key Features of Aboriginal Courts

The Commission observed in its Discussion Paper that although the exact procedures for each Aboriginal court differ (because of the diversity of Aboriginal communities) there are a number of common key features.[72] The Commission believes that when considering the establishment of any Aboriginal court in Western Australia the following features should be taken into account.

Changes to the court layout and informal procedures

Aboriginal courts encourage better communication between the judicial officer, the offender and other parties involved in the process. Proceedings are informal and the use of legal jargon is discouraged. This is particularly important given the language barriers and communication issues faced by some Aboriginal people in the legal system.[73]

Most Aboriginal courts adopt a different physical layout than mainstream courts. Some employ a circle layout while others have all parties (including the magistrate and the Elders) sitting at the same level, thus removing the hierarchical and elevated position of the judicial officer.[74] The importance of an appropriate physical layout in addition to the acknowledgment of Aboriginal culture in the courtroom (for example, by displaying local Aboriginal artwork and by having a traditional welcome at the commencement of proceedings) cannot be underestimated.[75] In this regard the Commission encourages the government to consider the suitable layout for Aboriginal courts as an important aspect in the design of new court buildings in Western Australia.

Resources and support services

Because of the greater participation by all parties in the proceedings and the adoption of an holistic approach to the rehabilitation of the offender, the Commission acknowledges that Aboriginal courts are more resource intensive than mainstream courts. For example, the Koori Court evaluation report observed that a Koori Court may deal with between five and 10 matters per day compared to about 50 matters in a general court.[76] The success of any Aboriginal court will also hinge on the availability of appropriate counselling and rehabilitative programs and services for Aboriginal offenders. The Commission notes that the location of the first Koori Court was chosen because there were locally available drug and alcohol treatment programs, an Indigenous women's mentoring program and other culturally appropriate service providers.[77] The Commission considers that if Aboriginal courts are to be developed in various locations there will need to be adequate resources for additional magistrates, court staff (including an Aboriginal justice officer) and community support services.[78]

The Commission is also of the view that the cost effectiveness of Aboriginal courts should be evaluated not only in terms of reduced recidivism but also in terms of any reduction in the level of over-representation of Aboriginal people in the justice system and the positive outcomes for participants and Aboriginal communities. In this regard, a cost benefit analysis prepared for this reference[79] indicated that the introduction of Aboriginal courts would save money for the government. The commissioned study found that for every dollar spent on an Aboriginal court in Western Australia there will be a saving of at least $2.50.[80] This calculation has only taken into account the reduced cost to the state of imprisonment and the reduced costs associated with the criminal justice system. When other savings, such

72. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 152–56.
73. Ibid 153.
74. Ibid.
75. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 153; Dr Brian Steels, consultation (28 April 2006); Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 26.
76. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 32.
77. Ibid 63.
78. The impact of Aboriginal courts on the existing judicial and court administrative resources was mentioned to the Commission by Chief Magistrate Heath and Deputy Chief Magistrate Woods, consultation (17 May 2006). The need for adequate resources for administrative purposes as well as community support services was emphasised by the Aboriginal and Torres Strait Islander Social Justice Commissioner: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 11.
79. The cost benefit analysis was prepared by economist Dr Margaret Giles from the University of Western Australia.
80. See Appendix C. The Commission acknowledges that this research has made necessary assumptions based upon a similar study of the Koori Courts in Victoria.

as reduced costs to households and victims and to the insurance and security industries, are taken into account, there is a very strong case that Aboriginal courts will be extremely cost effective.[81]

Voluntariness

The Commission mentioned in its Discussion Paper that participation in an Aboriginal court must be voluntary.[82] During a meeting in Broome it was emphasised that participation should be voluntary because there may be some matters that offenders would consider too 'shameful' to be dealt with by Aboriginal Elders.[83] Any Aboriginal offender should have the right to be dealt with in a general court and in any event it is unlikely that an Aboriginal court would be effective if the offender was not a willing participant.

In some locations an Aboriginal court may convene on specified days or in a specified courtroom. In these cases there would be no difficulty because the accused could be dealt with in a general court on a different day or in a different courtroom. However, in remote locations the reality is that an Aboriginal court may effectively be the only court sitting. If an offender did not want to be dealt with in this manner then the judicial officer could simply convene for that particular matter without any Elders or respected persons being directly involved in the proceedings.

Aboriginal court workers

The Commission observed that in most jurisdictions Aboriginal courts employ an Aboriginal court worker, project officer or justice officer. This role provides an effective link between the general criminal justice system and the Aboriginal community.[84] The Koori Court evaluation report stressed that 'the Koori Court officer is crucial to the successful operation of the Koori Court'.[85] During the evaluation of the court, Magistrate Auty observed that:

> [I]f you get the right Aboriginal justice officer a lot of stuff falls into place, like the roster for the Elders, the careful consideration of what Elders ought to sit with what Elders, considered views of which matters ought to be proceeding before those particular Elders, which matters particular magistrates might have an understanding of and I think something like, I think working out when you sit women in matters and when you sit men in matters, those sorts of things.[86]

The importance of this position has been further underlined in submissions. For example, Magistrate King stressed that an Aboriginal project officer is 'vital' in assisting the court to decide whether a particular Aboriginal offender can be dealt with by Elders from a different community.[87] The need for Aboriginal staff to be employed by any metropolitan Aboriginal court was also highlighted by the Centre for Aboriginal Studies at Curtin University of Technology.[88]

Aboriginal Elders and respected persons

The role of Elders and respected persons

Elders and respected persons have a vital role in all Aboriginal courts. Some speak directly to the offenders, while in other courts Elders and respected persons provide advice to the magistrate. A magistrate involved in circle sentencing in New South Wales has stated that:

> It is one thing for me as a magistrate to convey the community's concerns; it is another entirely to have those concerns communicated by persons for whom the offender holds a deep-seated respect.[89]

The presence of Elders or respected persons in court can be effective in imparting a positive and constructive notion of shame. Additionally, Elders can provide valuable information to the judicial officer about the offender and relevant cultural matters.[90] During a meeting in Broome the Commission was asked whether

81. Ibid.
82. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 156.
83. Submissions received at LRCWA, Discussion Paper community consultation – Broome, 10 March 2006.
84. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 154.
85. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 38.
86. Ibid 39.
87. Dr Michael King SM, Perth Drug Court, email (14 February 2006). The Commission has also been advised by Magistrate Sharrat that the Aboriginal court worker has a central role in assisting the court to work out any conflict of interest issues and determine who are the most appropriate Elders or respected persons to sit in relation to a particular matter: see Steve Sharrat SM, telephone consultation (17 July 2006).
88. Centre for Aboriginal Studies, Curtin University of Technology, Submission No. 28 (1 May 2006) 2.
89. Dick D, 'Circle Sentencing of Aboriginal Offenders: Victims have a say' (2004) 7 *The Judicial Review* 57, 60.
90. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 154–55.

the success of any Aboriginal court was dependent upon the involvement of Elders or the rehabilitative programs to which offenders were referred.[91] The Commission believes that both are essential to the success of an Aboriginal court.

Conflict of interest

Because an Elder may have kin and family ties with the offender there may be a potential conflict of interest. In reference to community justice groups the DPP argued that 'strong family loyalties' within Aboriginal communities could mean that Elders were not sufficiently impartial and therefore a conflict of interest may arise.[92] Aboriginal courts have developed ways of dealing with conflict of interest issues. In relation to the Koori Court it has been reported that in circumstances where there is a conflict of interest the Elders or respected persons seek to disqualify themselves.[93] Those involved in the Koori Court have suggested that these issues are minimised by having more than one Elder or respected person sitting for each case and by having both a male and female Elder or respected person present.[94] The Aboriginal justice officer also has a role to play in considering the suitability of particular Elders and respected person for specific cases.[95] The fact that the ultimate sentencing authority is retained by the magistrate also provides protection in these circumstances. If a community justice group was established in the relevant Aboriginal community, the requirement for equal representation from all family and other social groupings would provide a suitable pool from which Elders and respected persons could be chosen. At least one Elder or respected person could be chosen from a family or social group to which the offender does not belong.

Selection of Elders and respected persons

Although the practice for selecting Elders and respected persons differs between jurisdictions, the Commission concluded in its Discussion Paper that Aboriginal communities must be directly involved in the selection of Elders and respected persons to sit with the magistrate.[96] Aboriginal people consulted by the Commission were strong in their view that Aboriginal Elders should not be selected by government agencies.[97]

Magistrate King has emphasised the difficultly in selecting or appointing Aboriginal Elders to sit with the magistrate in a location where there may be family feuding or division in the Aboriginal community.[98] The Commission accepts that the selection process may be more difficult or take longer in some communities.[99] Because the Minister for Indigenous Affairs will be required to approve the membership constitution of a community justice group (and this will require equal representation of all family and social groups as well as gender balance),[100] the Commission believes that the members of a community justice group may provide a suitable panel from which to select Elders and respected persons for Aboriginal courts.

It has also been suggested to the Commission that Elders or respected persons who have a criminal record should not be entitled to participate in an Aboriginal court.[101] The Commission agrees that Elders or respected persons involved in an Aboriginal court should not have a serious criminal record.[102] However, a minor record or a record with a significant gap in offending would not always mean that the person was unsuitable. It would be unlikely that the relevant Aboriginal

91. Submissions received at Aboriginal Customary Laws Discussion Paper community meeting, Broome, 10 March 2006.
92. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4.
93. Auty K, Briggs D, Thomson K, Gibson M & Porter G, 'The Koori Court: A positive experience' (2005) 79(5) *Law Institute Journal* 40, 41.The Koori Court evaluation report referred to a 'code of conduct' that applies to Elders and respected persons and this code of conduct requires them to disqualify themselves if there is a conflict of interest: see Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 45.
94. Auty et al, ibid 42.
95. See discussion under 'Aboriginal court workers', above p 133.
96. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 155.
97. Ibid.
98. Dr Michael King SM, Perth Drug Court, email (13 February 2006). Dr King also mentioned that an Aboriginal project officer is necessary in order to overcome these types of issues. When establishing the Geraldton Alternative Sentencing Regime the court did consider having Aboriginal Elders sit with the magistrate but because there was no Aboriginal project officer it was difficult to know which Aboriginal Elders could be considered to sit with the Magistrate. In a meeting with Magistrate Steve Sharrat it was stressed that where there is family feuding in the community the role of an Aboriginal coordinator to 'match' Elders with offenders becomes of paramount importance: see Steve Sharratt SM, Geraldton, consultation (3 April 2006). In comparison, the Commission was advised by Dr Kate Auty SM that the Aboriginal community in Norseman did not experience any problems in selecting Elders and respected persons for the Aboriginal court: see LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006.
99. Despite the potential difficulty, the Commission understands that 13 Elders and respected persons have been nominated by the Aboriginal community for the Kalgoorlie Community Court, see Bradley Mitchell, Project Manager Kalgoorlie Magistrates Court, email (13 September 2006).
100. See discussion under 'Membership criteria', above p 100.
101. Submissions received at LRCWA, Discussion Paper community consultation – Geraldton, 3 April 2006;
102. In this regard the Commission notes that members of a community justice group will need a Working with Children Check in order to be approved see Recommendation 17, above pp 112–13.

Aboriginal communities must be directly involved in the selection of Elders and respected persons to sit with the magistrate.

community would select or nominate a person known to have a serious criminal record. But the existence of a criminal record will not always be known. Therefore it would be appropriate for the Department of the Attorney General to require any Elder or respected person nominated or selected by the Aboriginal community to undergo a criminal record check. The Department should have the discretion in consultation with the relevant judicial officer to consider whether a person with a record of convictions is suitable.[103]

Payment

A further issue is whether Elders and respected persons who sit with the magistrate in an Aboriginal court should be paid. In Victoria, at the time of the Koori Court evaluation report, the Elders and respected persons were paid a sitting fee of $150 per day.[104] The Commission concluded in its Discussion Paper that Elders should be paid for any service provided within the criminal justice system.[105] Elders and respected persons are involved in Aboriginal courts because of their cultural experience and expertise and they should be appropriately renumerated.

Training

The Commission acknowledges that some Elders and respected persons will need training in order to effectively undertake their role in an Aboriginal court. As the ALS mentioned in its submission, some Elders may not be familiar with the workings of the criminal justice system and some will not speak English as their first language.[106] The Koori Court evaluation report explained that, in Victoria, Elders and respected persons participate in a five-day training course about the criminal justice system and court processes.[107] The Commission has made recommendations aimed at improving access to and the availability of Aboriginal interpreters as well as a recommendation that Aboriginal court liaison officers should be employed in all Western Australian courts.[108] These recommendations will assist Elders and respected persons working in Aboriginal courts. However, prior to their appointment, the Department of the Attorney General should ensure that Elders and respected persons selected to work in an Aboriginal court receive suitable training about the criminal justice system.

The need for flexibility

The Department of the Attorney General indicated in its submission that once an Aboriginal court model is agreed upon it can then be 'rolled out to other locations'.[109] Aboriginal people consulted by the Commission had differing views about which models they preferred.[110] The Commission does not agree with a one-size-fits-all approach. In their submissions, the ALS and the Aboriginal and Torres Strait Islander Social Justice Commissioner[111] maintained that it is vital to ensure that each different Aboriginal court is developed in consultation with the relevant Aboriginal community and is reflective of their individual needs and views.

103. See discussion under 'Police clearances and spent convictions', above, pp 102–104.
104. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 45. The Commission understands that the amount may have increased to $300 per day: see Dr Kate Auty SM, telephone consultation (16 March 2006).
105. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 139. The Commission has received support for this conclusion: Dr Kate Auty SM, telephone consultation (16 March 2006); Steve Sharrat SM, telephone consultation (17 July 2006).
106. The Aboriginal Legal Service, Submission No. 35 (12 May 2006) 5.
107. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 43. The Commission understands that the Elders and respected persons who will be involved in the Kalgoorlie Community Court have participated in relevant training sessions, see Bradley Mitchell, Project Manager Kalgoorlie Magistrates Court, email (13 September 2006).
108. See Recommendation 117, below p 337; Recommendation 121, below p 340; Recommendation 127, below p 346.
109. Department of the Attorney General, Submission No. 34 (11 May 2006) 5.
110. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 157.
111. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 11; Dr Brian Steels, consultation (28 April 2006).

Ongoing monitoring and evaluation

In its Discussion Paper the Commission suggested that Aboriginal courts should be independently evaluated and consideration given to whether any legislative changes are required.[112] The need for ongoing evaluation and monitoring has been supported by the Aboriginal and Torres Strait Islander Social Justice Commissioner.[113] The Commission has recommended the establishment of an independent Commissioner for Indigenous Affairs[114] and considers that the evaluation and monitoring of Aboriginal courts should be undertaken by this office.

The Commission's Recommendation

The Commission acknowledges that Aboriginal courts may not be appropriate for all areas and may take longer to establish in some locations than in others. In some areas it may be difficult to quickly reach a decision about who should sit as the Elders or respected persons in the court. In other areas there may not be enough community support services or programs in place to ensure that the participants receive appropriate treatment and assistance. There may also not be enough magistrates available to justify an Aboriginal court in certain places. Therefore, the implementation of the Commission's recommendation for Aboriginal courts will necessarily be incremental.

The Commission remains convinced that Aboriginal courts will significantly improve the criminal justice system in this state for Aboriginal offenders, victims and communities as well as the wider community. Following the Commission's Discussion Paper, the Western Australian Attorney General, Jim McGinty, expressed his support for the Commission's proposal for Aboriginal courts and described it as one of the Commission's 'key recommendations'.[115] He also stated that the Western Australian government will establish Aboriginal courts throughout the state.[116] In order to maximise the success of Aboriginal courts in Western Australia it is vital that the government allocate sufficient resources to implement the Commission's recommendation.

Recommendation 24

Aboriginal courts

1. That the Western Australian government establish as a matter of priority Aboriginal courts for both adults and children in regional locations and in the metropolitan area.
2. That the location, processes and procedures of any Aboriginal court be determined in direct consultation with the relevant Aboriginal communities.
3. That the Western Australian government provide adequate resources for the appointment of additional judicial officers and court staff. In particular, each Aboriginal court should be provided with funding for an Aboriginal justice officer to oversee and coordinate the court.
4. That the Western Australian government provide ongoing resources for Aboriginal-controlled programs and services as well as culturally appropriate government-controlled programs and services to support the operation of Aboriginal courts in each location.
5. That Aboriginal Elders and respected persons should be selected either by or in direct consultation with the local Aboriginal community. Aboriginal Elders and respected persons should be provided with adequate culturally appropriate training about their role and the criminal justice system generally.
6. That Aboriginal Elders should be appropriately reimbursed with a sitting fee.
7. That participation in an Aboriginal court by an accused, victim or any other participant be voluntary.
8. That the Commissioner for Indigenous Affairs evaluate and report on each Aboriginal court after two years of operation and consider whether any legislative or procedural changes are required to improve the operation of Aboriginal courts in Western Australia.

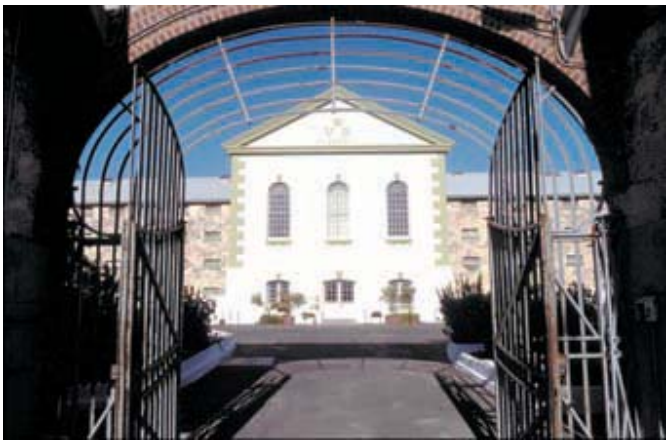
112. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 157.
113. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 11;
114. See Recommendation 3, below p 58.
115. Attorney General of Western Australia, *Push for Aboriginal courts throughout the state*, media statement (28 February 2006).
116. Ibid.

Criminal Responsibility

Under Australian law criminal responsibility, which means that a person is liable to punishment for an offence, is determined by assessing three possible elements:

- the act or omission that constitutes the offence;
- any mental element such as intention or wilfulness; and
- any defence that may be applicable in the circumstances.[1]

There are some aspects of Aboriginal customary law that may be considered unlawful under Australian law.[2] For example, the traditional punishment of spearing may, in some cases, constitute an offence of assault occasioning bodily harm, unlawful wounding or grievous bodily harm. In its Discussion Paper, the Commission considered whether there is any scope to recognise Aboriginal customary law when determining the criminal responsibility for an offence under Australian law.[3] The Commission found that Aboriginal customary law has, on occasions, been considered by Australian courts in the context of criminal responsibility. However, there is currently no defence of general application that absolves a person of criminal responsibility because the conduct was required or justified under Aboriginal customary law. In order for Aboriginal customary law to be taken into account in deciding criminal responsibility, it must be relevant under one of the existing mainstream criminal law defences.[4]



Defences Based on Aboriginal Customary Law

General defence

In its Discussion Paper the Commission considered whether there should be a general defence based on Aboriginal customary law. Such a defence would excuse an Aboriginal person from any criminal conduct if it could be established that the conduct was required or justified under Aboriginal customary law. In examining this issue, the Commission acknowledged the dilemma faced by Aboriginal people who may be obligated under Aboriginal customary law to engage in conduct that is unlawful under Australian law. In either case failure to comply with the relevant law may result in punishment.[5]

During the Commission's consultations Aboriginal people did not generally support any separate system of criminal responsibility. Indeed, it was pointed out that 'two laws may be divisive'.[6] A general Aboriginal customary law defence would create different notions of criminal responsibility. Further, the Commission has rejected a general customary law defence because such a defence may not provide equal protection under Australian law for other Aboriginal people, especially women and children.[7]

1. The term 'defence' is commonly used; however, it is somewhat misleading. For general defences, such as self-defence, provocation, duress, and honest claim of right, the obligation is on the prosecution to prove beyond a reasonable doubt that the defence does not apply. For others, in particular specific defences set out in the legislative provision which creates the offence, the defendant is required to prove (on the balance of probabilities) that the defence has been made out.
2. See discussion under 'Traditional punishments and practices may constitute an offence against Western Australian law', above p 80.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 158–89.
4. Ibid 158.
5. Ibid.
6. LRCWA, *Thematic Summary of Consultations – Wiluna,* 27 August 2003, 21.
7. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 159.

Partial defence to homicide

A difficult issue arises in relation to offences of homicide. Under Western Australian law if a person unlawfully kills another with the intention to kill, that person will be guilty of wilful murder.[8] If a person kills with an intention to cause grievous bodily harm then he or she will be guilty of murder.[9] In both cases there is a mandatory punishment of life imprisonment. Although the court has discretion to determine, within a prescribed range, the minimum amount of time the person must spend in jail before he or she can be considered for release, a sentence of life imprisonment must be imposed regardless of the circumstances of the case.[10] The Commission observed in its Discussion Paper that 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.[11]

The Commission considered the possible option of introducing a partial customary law defence (which would reduce an offence of wilful murder or murder to manslaughter).[12] In order to permit Aboriginal customary law to be taken into account by a court, an alternative would be to remove the mandatory requirement of life imprisonment for wilful murder and murder. The Commission invited submissions as to whether there should be a partial defence of Aboriginal customary law or, alternatively, whether the penalty for wilful murder and murder should be changed to a maximum of life imprisonment.[13] All responses received by the Commission opposed the introduction of a partial defence of Aboriginal customary law for wilful murder and murder.[14] In its submission, the Law Council of Australia emphasised that customary law has never been used as a defence for abusive or violent behaviour.[15] The Office of the Director of Public Prosecutions (DPP) stressed the importance of ensuring that all people are protected by Western Australian law, including Aboriginal people.[16]

The Commission is currently working on a dedicated reference dealing with the law of homicide and has received two submissions commenting on a partial Aboriginal customary law defence in response to its Issues Paper. The Department of Community Development opposed the introduction of a partial defence of customary law.[17] In its submission, the Indigenous Women's Congress expressed support for a partial defence based on Aboriginal customary law, on the proviso that the defence is applied with caution. However, at the same time, the Indigenous Women's Congress also submitted that Aboriginal customary law should not be used as a defence for violent crimes.[18]

In the Commission's view, it is not possible to reconcile the need to ensure equal protection under the law for Aboriginal people (in particular, Aboriginal women and children) with the introduction of a partial Aboriginal customary law defence. As highlighted by the DPP, a partial customary law defence would reduce deliberate violent conduct committed with an intention to kill or to cause grievous bodily harm to an offence of manslaughter.[19] The Commission is of the opinion that any relevant aspects of customary law should be taken into account during sentencing. In its final report on the homicide reference, the Commission will address whether mandatory life imprisonment should be abolished. At this stage, it is noted that if mandatory

8. *Criminal Code* (WA) s 278.
9. *Criminal Code* (WA) s 279.
10. Section 90 of the *Sentencing Act 1995* (WA) provides that for a sentence of life imprisonment for murder, the minimum term must be between seven and 14 years and for wilful murder it must be between 15 and 19 years. Section 91 provides that if the sentence (for wilful murder) is strict security life imprisonment, the minimum term is to be between 20 and 30 years. This means that after the offender has served the minimum term he or she is eligible to be considered for release. The Parole Board must first recommend to the Attorney General that the offender is suitable for release. If the Attorney General recommends to the Governor that the offender should be released then the Governor has the final word. See *Sentencing Administration Act 2003* (WA) ss 25 & 26. In some other jurisdictions the punishment for murder is a maximum term of life imprisonment, and therefore the court could take into account the circumstances of the offence and in particular whether the person was acting in pursuance of Aboriginal customary law: see for example *Crimes Act 1958* (Vic) s 3.
11. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 160.
12. The ALRC recommended that there should be a partial defence of Aboriginal customary law: see ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No. 31 (1986) [453].
13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 160, Invitation to Submit 4.
14. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 9; Law Council of Australia, Submission No. 41 (29 May 2006) 19–21; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.
15. Law Council of Australia, Submission No. 41 (29 May 2006) 19. The Law Council also submitted that mandatory life imprisonment for wilful murder and murder should be abolished.
16. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 9.
17. LRCWA, *A Review of the Law of Homicide*, Project No. 97, Department of Community Development, Submission No. 42 (7 July 2006) 11.
18. LRCWA, *A Review of the Law of Homicide*, Project No. 97, Indigenous Women's Congress, Submission No. 41 (12 July 2006) 3. In its submission for the Aboriginal customary laws reference, the Indigenous Women's Congress did not discuss a partial defence of customary law but it was similarly stated that customary law should not be used as a defence to any violent crime: see Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1.
19. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 9.

Underlying the Commission's approach to the recognition of Aboriginal customary law is the aim to encourage greater recognition of non-violent aspects of Aboriginal law and culture.

life imprisonment is abolished for wilful murder or murder, sentencing courts will have a greater scope for considering relevant aspects of Aboriginal customary law.

Specific defences

Although the Commission does not support a general customary law defence, or a partial customary law defence for wilful murder or murder, there may be circumstances where a specific defence is appropriate. A specific defence is a defence that applies to a particular offence and is therefore limited in its application. In its Discussion Paper, the Commission concluded that 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.[20] The Commission has identified two areas where a specific defence is appropriate. First, 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.[21] Second, the Commission has recommended that there should be a customary law defence applicable to the offence of trespass under the *Aboriginal Communities Act 1979* (WA).[22]

Consent

As mentioned above, Aboriginal people who inflict physical traditional punishment may be guilty of an offence under Western Australian law. Further, certain traditional initiation practices may also constitute an offence. Depending upon the nature of the punishment (or practice) and the degree of any physical injury, the person may be charged with assault, assault occasioning bodily harm, unlawful wounding, grievous bodily harm or homicide. Under Western Australian law, for violent offences that require proof of an assault, the consent of the 'victim' may mean that the accused is not held to be criminally responsible. For these offences *lack of consent* must be proved by the prosecution beyond a reasonable doubt. However, consent is irrelevant for unlawful wounding and grievous bodily harm. The distinction between those 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 such as spearing. The current status of the law with respect to consent in Western Australia does not solely affect Aboriginal people: the arbitrary distinction between assault occasioning bodily harm and unlawful wounding has the potential to affect any Western Australian.

In considering this issue, the Commission emphasises that physical traditional punishments are not the most important aspect of Aboriginal customary law and there are many forms of non-violent customary law punishments. Underlying the Commission's approach to the recognition of Aboriginal customary law in the criminal justice system is the aim to encourage greater recognition of non-violent aspects of Aboriginal law and culture. Nevertheless, traditional physical punishments continue today and are an important part of tradition to many Aboriginal people in this state.[23]

In its Discussion Paper, the Commission examined the interaction of Western Australian law with traditional physical punishments under customary law.[24] As background, the Commission considered the position at common law and found that the position in relation to consent to violence in Western Australia is quite different to the position at common law. At common law a person can only consent to common assault. Anything more serious (such as bodily harm, wounding or grievous bodily harm) is generally unlawful,

20. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 161–62.
21. See 'Expanding the current customary harvesting exemption for fauna and flora', Chapter Eight, below pp 306–307.
22. See discussion under 'Trespass', above pp 106–109.
23. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 167. The importance of traditional punishment was again mentioned to the Commission during community meetings following its Discussion Paper: see LRCWA, Discussion Paper community consultation – Broome, 10 March 2006; Indigenous Women's Congress, consultation (28 March 2006).
24. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 163–72.

irrespective of whether or not the 'victim' consented.[25] However, there are a number of exceptions at common law—such as ritual male circumcision, tattooing, ear-piercing and violent sports including boxing—which have been considered justifiable in the public interest. [26]

The Commission has also taken into account relevant international human rights standards. It has been suggested that spearing or other forms of physical traditional punishment may contravene the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* and the *International Covenant of Civil and Political Rights,* both of which prohibit torture and other acts of cruel, inhuman or degrading treatment or punishment. However, the Commission observed that what is regarded as cruel, inhuman or degrading may depend upon the 'cultural perspective' of the participants.[27] It has been argued that 'an action alleged to breach the prohibition of torture and cruel, inhuman and degrading treatment must be intended to inflict a degree of cruelty and humiliation on the victim'.[28] For many Aboriginal people imprisonment is considered 'cruel and unusual' punishment.[29] The Commission believes that consensual participation in traditional physical punishments and practices may not necessarily contravene human rights standards. The Commission has recommended that the recognition of Aboriginal customary law must be consistent with international human rights standards.[30]

The Criminal Code (WA)

In Western Australia, for any offence where assault is an element, the prosecution must prove beyond a reasonable doubt that the application of force was without the consent of the victim.[31] Such an offence is assault occasioning bodily harm which requires proof of an assault and bodily harm.[32] Section 301 of the *Criminal Code* (WA) provides that any person who unlawfully wounds another is guilty of a crime.[33] Because 'assault' is not an element of the offence of unlawful wounding the issue of consent is irrelevant.[34] A person who unlawfully inflicts grievous bodily harm is guilty of an offence under s 297 of the *Criminal Code.*[35] Similarly, because the term assault does not appear in s 297, consent is not an element of grievous bodily harm.[36]

Although it has been suggested that a person cannot legally consent to an assault occasioning bodily harm, the Commission concluded in its Discussion Paper that under the *Criminal Code* consent is relevant to bodily harm but not to unlawful wounding.[37] When determining if a person consented to bodily harm, it is necessary for the prosecution to prove that the victim consented to the actual degree of force used.[38] In other words, it is for the jury to decide whether the 'degree of violence used in the assault exceeded that to which the consent had been given'.[39] Each case must consider the relevant facts 'existing at the time the consent is expressly given or is to be inferred from the circumstances'.[40]

The Commission has carefully examined whether there is any justification for the distinction between unlawful wounding and assault occasioning bodily harm. Although at first glance it may be assumed that the offence of unlawful wounding is more serious than assault occasioning bodily harm, the maximum penalties for

25. Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a reappraisal' (1994) 68 *Australian Law Journal* 363.
26. *R v Brown* [1993] 2 All ER 75, 79 (Lord Templeman).
27. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 170.
28. NTLRC, *International Law, Human Rights and Aboriginal Customary Law*, Background Paper No. 4 (2003) 23.
29. Garkawe S, 'The Impact of the Doctrine of Cultural Relativism on the Australian Legal System' (1995) 2(1) *Murdoch University Electronic Journal of Law* 11. This was also observed by the ALRC: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [184]. See also LRCWA, *Thematic Summary of Consultations – Wuggubun,* 9–10 September 2003, 36.
30. See Recommendation 5, above p 69.
31. See s 222 of the *Criminal Code* (WA) for the definition of assault.
32. *Criminal Code* (WA) s 317. Bodily harm is defined in s 1 of the *Criminal Code* as any bodily injury which interferes with health or comfort.
33. The Commission notes that there are other offences that involve wounding but also include additional elements such an intention to maim or disfigure or cause grievous bodily harm. The discussion which follows about the arbitrary distinction between unlawful wounding and assault occasioning bodily harm does not necessarily extend to these other offences.
34. A wound is not defined in the *Criminal Code* but has been judicially interpreted as requiring the breaking of the skin and penetration below the epidermis (the outer layer of the skin): see *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) [130-1055]. Usually a wound will be caused by an instrument but it may also be caused by a fist – a split lip could be categorised as a wound: see *R v Shepard* [2003] NSWCCA 351.
35. Grievous bodily harm is defined in s 1 of the *Criminal Code* as 'any bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health'.
36. In contrast, s 317A of the *Criminal Code* provides an offence for assaulting a person with intent to cause grievous bodily harm and therefore because assault is an element of this offence consent would appear to be applicable.
37. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 165. See, in particular, *Lergesner v Carroll* [1991] 1 Qd R 206.
38. *Lergesner v Carroll,* ibid 217–18 (Cooper J).
39. Ibid 212 (Shepherdson J).
40. Ibid 218 (Cooper J). In *Horan v Ferguson* [1995] 2 Qd R 490, 495, McPherson JA stated that consent includes consent that is tacit or implied: 'Just as the absence of consent may be inferred from the circumstances, so too equally its presence may be inferred'.

The Commission has recommended that the recognition of Aboriginal customary law must be consistent with international human rights standards.

both offences are the same.[41] This indicates that Parliament, when setting the maximum penalties, considered the offences to be equally serious.

In practical terms, a specific example of unlawful wounding may be either more or less serious than an assault occasioning bodily harm. For instance, a small cut would amount to a wound while a broken nose could be categorised as bodily harm. In a review of the *Criminal Code* in 1983 the anomaly between assault occasioning bodily harm and wounding was acknowledged.[42] It was argued that unlawful wounding covers a wide range of harm from serious to trivial and that it is an

> unsatisfactory concept because it involves any full thickness penetration of the skin, whether that be by a pin prick or a shot gun blast.[43]

The discrepancy is further evidenced in relation to ear-piercing, body-piercing and, possibly, tattooing. A person who pierces the ear or any other body part of another with consent could, under the present law, be guilty of unlawful wounding. Nonetheless, the *Health (Skin Penetration Procedure) Regulations 1998* (WA) establish controls over 'skin penetration procedures', which include procedures where the skin is cut, punctured or torn. The regulation of these activities demonstrates that there are some circumstances where Parliament considers that consent to wounding is acceptable.[44]

Traditional Aboriginal punishments

Traditional physical punishments under Aboriginal customary law may involve spearing, beatings, and sometimes both.[45] The Commission's consultations with Aboriginal people indicated that spearing is still practised by, and considered important in, many Aboriginal communities.[46] In Warburton it was emphasised that spearing is not the only punishment available but it does have 'major symbolic and cultural significance'.[47] The fact that spearing still regularly occurs is evidenced by the number of cases which come before the courts where the issue of spearing is raised in mitigation of sentence.[48] However, it is not practised in all communities[49] and is not used in every possible situation.[50] Nevertheless, it has been explained that in some circumstances there is no alternative under customary law to spearing.[51]

Depending upon the type of traditional punishment an offence of common assault, assault occasioning bodily harm, unlawful wounding or grievous bodily harm may be committed. Some traditional punishments could potentially cause death. In practice, traditional punishment that consists of beating with sticks or other

41. The maximum penalty for assault occasioning bodily harm and unlawful wounding is five years' imprisonment. If the victim of either of these offences is of or over the age of 60 years the maximum penalty is seven years' imprisonment: see *Criminal Code* (WA) ss 317, 310 respectively.
42. Murray M, *The Criminal Code: A general review* (1983) 202. The Commission notes that Murray J is still of the same view that unlawful wounding is an unsatisfactory concept and should be repealed: see His Honour Justice Murray, letter (9 June 2006).
43. Murray M, *The Criminal Code: A general review* (1983) 202. It has also been noted that a wound may involve a minor injury that may not even amount to bodily harm because there may be no interference with health or comfort: see Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a reappraisal' (1994) 68 *Australian Law Journal* 363, 372. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) Ch 5, 123.
44. In its Discussion Paper the Commission observed that the *Criminal Code* also distinguishes between unlawful wounding and assault occasioning bodily harm in regard to the availability of the defence of provocation: see *Criminal Code* (WA) ss 245 & 246. A person may be excused for assault occasioning bodily harm if there was provocation for the assault, but provocation cannot constitute a defence to unlawful wounding. There does not appear to be any justification for distinguishing between assault occasioning bodily harm and unlawful wounding in relation to the availability of the defence of provocation.
45. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 90.
46. The Commission observed, however, that the circumstances in which spearings occur today differ from the past. Because of diabetes, high blood pressure and other medical complaints it is recognised by Aboriginal people that some members of their community cannot be given the same level of punishment as others: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 167.
47. LRCWA, *Thematic Summary of Consultations– Warburton,* 3–4 March 2003, 5.
48. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 212.
49. LRCWA, *Thematic Summary of Consultations – Meekatharra,* 28 August 2003, 29.
50. LRCWA, *Thematic Summary of Consultations – Mowanjun*, 4 March 2004, 49.
51. LRCWA, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 5. For further discussion about the nature of traditional physical punishments, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 167–68.

instruments would probably result in a charge of assault occasioning bodily harm. On the other hand (in the absence of any grievous bodily harm), spearing would probably result in a charge of unlawful wounding.[52] Even if the person punished in the first case was bruised and swollen all over, unless the prosecution could establish a lack of consent, the person who inflicted the punishment would not be criminally responsible. In the second case, even if the wound was minor, the consent of the person punished would be irrelevant. The Commission concluded that the distinction between assault occasioning bodily harm and unlawful wounding appears arbitrary in the context of traditional punishment.[53]

The Commission found that it is uncommon for an Aboriginal person to be charged with a criminal offence for inflicting traditional punishment; however, this is not because physical traditional punishments do not occur. The scarcity of cases where an Aboriginal person has been charged may evidence an 'unofficial policy' by the police to acquiesce in such punishments where the person receiving the punishment consents.[54] Therefore, the decision to prosecute an Aboriginal person in these circumstances is at the discretion of the police: a situation which does not provide Aboriginal people with any certainty of their legal position. Another explanation may be that many spearings are inflicted in secret, which may in fact be more dangerous because there will be no police or medical staff present. Further, incidents of traditional punishment may not come to the attention of police because the person who receives the punishment consents and, therefore, makes no complaint about the matter.

Consent and traditional punishments

In its Discussion Paper, the Commission acknowledged that perhaps the most difficult issue is how to determine whether an Aboriginal person consents to the infliction of traditional physical punishment.[55] It is questionable whether Aboriginal people living in communities that still practise traditional punishments, such as spearing, have a free and voluntarily choice to participate. One view is that because of the possibility that family members will be punished if the offender fails to accept traditional punishment, there can be no true consent because the offender is 'forced' to agree to the punishment. The Commission is mindful of the numerous reports from Aboriginal people that where a person who had offended against Aboriginal customary law was not available for punishment, members of his or her family would be punished instead.[56] In addition, the consequences of not consenting to punishment may extend to being ostracised from community and culture. On the other hand, there will be situations where Aboriginal people agree to undergo traditional punishment without any external pressure.[57]

The Commission explained that the western law concept of consent (which focuses on individual freedom of choice) may be difficult to transpose to Aboriginal people because of the concepts of mutual obligations and collective responsibilities and rights under customary law.[58] It has been stated that:

> Indigenous people have a greater sense of community in terms of both rights and responsibilities and thus place greater importance on collective rights over individual rights.[59]

The age at which a person can legally consent to violence further complicates the issue. A child under the age of 13 years cannot consent to offences of a sexual nature,[60] but there is nothing in the *Criminal Code* to prevent a child consenting to an application of force. In *R v Judson,*[61] the victim was 14 years old and all the accused were acquitted of assault occasioning bodily harm because the prosecution could not prove beyond a reasonable doubt that the 'victim'

52. The Commission concluded in its Discussion Paper that a spearing may result in grievous bodily harm but it may also result in a less serious injury such as a wound: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 167–68. See discussion of the relevant cases: *The Police v Z* (Unreported, Supreme Court of Western Australia, No. 34/2002, McClure J, 30 April 2002); *R v Rictor* (Unreported, Supreme Court of Western Australia, No. 34/2002, McClure J, 30 April 2002); *R v Judson* (Unreported, District Court of Western Australia, No. POR 26/1995, O'Sullivan J & Jury, 26 April 1996). In *R v Minor* (1992) 2 NTLR 183, 195–96, Mildren J also expressed the view that spearing in the thigh would not necessarily amount to grievous bodily harm. The Commission noted that whether a spearing would cause grievous bodily harm or a wound will depend upon where the spear penetrates, how deep the wound is and how many times the person was speared.
53. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 168.
54. See discussion under 'Police and Aboriginal Customary Law ', below pp 192–94.
55. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 168–69.
56. See LRCWA, *Thematic Summary of Consultations – Fitzroy Crossing,* 3 March 2004, 41–42; *Pilbara,* 6–11 April 2003, 8; *Geraldton,* 26–27 May 2003, 11; *Wiluna,* 27 August 2003, 22.
57. See LRCWA, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 5; *Pilbara*, 6–11 April 2003, 9; *Geraldton*, 26–27 May 2003, 13–14.
58. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 168–69.
59. Gerber P, 'Black Rights/White Curriculum: Human rights education for Indigenous peoples' [2004] *Deakin Law Review* 3, 85.
60. *Criminal Code* (WA) s 319(2).
61. (Unreported, District Court of Western Australia, No. POR 26/1995, O'Sullivan J & Jury, 26 April 1996).

had not consented. There are situations where consent to the application of force is appropriate for children, such as in some sports. However, for other situations, such as traditional punishment, it is arguable that children should be protected because they are not necessarily in an equal position to be able to refuse.

Due to the diversity of Aboriginal people in Western Australia and the difficulty of determining the exact nature of customary law in any particular community, the Commission believes that in some cases Aboriginal people may consent to being speared because they fear that someone close will be punished instead. In other cases, they may agree to undergo punishment because they do not wish to be rejected by their community or because they truly wish to undergo the traditional punishment process.

Traditional initiation practices

The Commission acknowledges that aspects of traditional initiation ceremonies may also constitute an offence under Western Australian law. The Commission did not explicitly deal with initiation practices in its Discussion Paper – it was not a matter which was discussed during the Commission's consultations with Aboriginal people. However, following its Discussion Paper the Commission has received some submissions about traditional male initiation practices. As in the case of traditional physical punishments, whether such practices amount to a breach of Australian law will largely depend upon the issue of consent and the nature of any injury received.

The nature of initiation under Aboriginal customary law

Both Aboriginal men and women participate in their own initiation ceremonies. Initiation ceremonies involve Elders and other initiated people passing knowledge of customary law to younger people.[62] Anthropological studies have found that initiation ceremonies, which varied from one place to another, usually included physical practices such as male circumcision.[63] For females, initiation generally takes place at puberty and involves instruction about women's law business. It may also involve 'body-cleansing, body-painting and ornamentation, and perhaps body scarification'.[64] Similarly, males will receive instruction about the rights and responsibilities of adulthood and aspects of sacred law. Male initiation rites include 'tests of worthiness and courage' and may also include 'tooth evulsion, circumcision, nose piercing, sleep deprivation, and/or the cutting of ceremonial markings upon skin'.[65] Berndt and Berndt reported that initiation may also involve blood-letting, removal of body hair, scarring, and subincision.[66] The age at which males have undergone initiation varies. Berndt and Berndt observed that the age at initiation has varied from between six and 16.[67] The Queensland Law Reform Commission has noted that the age may vary from eight up to 17 years of age.[68]

It appears that in some cases young males participate voluntarily in initiation ceremonies while in others participation is not consensual. Kathryn Trees explained, in reference to initiation ceremonies in Roebourne, that young men are choosing to go through the law.[69] Berndt and Berndt found that young men did not usually know what was in store for them; they participated because they had no choice.[70] The consequences for failing to participate in initiation are substantial and include the loss of status in the community, the inability to fully participate in traditional ceremonies, and reduced marriage prospects.[71] John Cawte has observed that:

> Many educated Aborigines who have grown up without undergoing the circumcision ceremony, because of Mission affiliations at the time, express an uncomfortable sense of incomplete tribal responsibility and status. They are asking for the operation, even at a mature age.[72]

62. Ibid.
63. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 170–77.
64. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [2.6.1].
65. Ibid.
66. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 170–77.
67. Ibid 166.
68. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (December 1993) 8–9.
69. Trees K, 'Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A case study' in LRCWA, *Aboriginal Customary Law: Background Papers*, Project No. 94 (January 2006) 213, 221.
70. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 166–67.
71. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (December 1993) 8–9.
72. Cawte J, 'Social Medicine in Central Australia: The opportunities of Pitjantjara Aborigines' (1977) *Medical Journal of Australia,* 221, 227 as cited in Queensland Law Reform Commission, ibid 8.

The Commission is not aware (in any detailed way) of the nature of different initiation rites practised in Western Australian Aboriginal communities today. However, it is clear that initiation practices continue to take place and that, in some places, male circumcision and other physical procedures are performed. The Commission was informed during a community meeting that blood-letting still occurs and boys as young as 12 years of age have been taken to Royal Perth Hospital for treatment following these procedures. A confidential submission indicated that Aboriginal boys have been seriously injured following initiation ceremonies. This submission emphasised that in some cases initiation practices take place without the consent of the boy or his or her family.[73]

The relevant Western Australian law

As stated above, in Western Australia any application of force without consent will constitute an offence. Depending upon the nature of any injury sustained during initiation there may be an offence of assault occasioning bodily harm, unlawful wounding or grievous bodily harm. Therefore, the same discrepancy as discussed above arises: if a person is charged with unlawful wounding as a result of performing a circumcision or similar practice, it will be irrelevant that the person undergoing the procedure consented. On the other hand, if the person was charged with assault occasioning bodily harm consent could relieve criminal responsibility.

Routine male circumcision

In order to determine its response to Aboriginal initiation practices, the Commission has considered the arguments for and against routine infant male circumcision. It is noted that in Australia and in many other countries female genital mutilation is a criminal offence.[74] The relevant legislative provisions in Australia provide that consent to the procedure is irrelevant.[75] However, male circumcision has not been criminalised. The practice of routine infant male circumcision in Australia has significantly declined since the 1960s.[76] Opinion is divided as to whether routine male circumcision should be criminalised.[77] It has been argued that routine male circumcision breaches international law, in particular the *Convention on the Rights of the Child*.[78]

When discussing the routine circumcision of infants, it has been observed that consent can only be given by the parents if it is in the best interest of the child.[79] Routine infant circumcision is obviously different to Aboriginal initiation practices because the procedure is generally performed by a medical practitioner and the infant is unable to consent. The Queensland Law Reform Commission found, in relation to circumcision generally, that if circumcision is performed without the consent of the child's parents or without consent of the child (if he or she is mature enough to understand) then those performing the procedure will be guilty of a criminal offence.[80] It has been observed that there is no set age at which a child is capable of consenting to medical or surgical treatments. Instead it will depend upon the nature of the treatment and the maturity of the child.[81]

Of particular relevance to this discussion are the comments that have been made about the cultural importance of routine circumcision for particular groups. The Queensland Law Reform Commission concluded in its research paper on the circumcision of male infants that:

> Although male circumcision is not now generally encouraged for medical reasons in the light of modern medical and scientific knowledge, there is an argument

73. Confidential Submission No. 28 (1 March 2004) 1.
74. Female genital mutilation is a criminal offence in all Australian states and territories: see *Crimes Act 1900* (ACT) ss 73–77; *Crimes Act 1900* (NSW) s 45; *Criminal Code* (NT) Schedule I ss 186A–186D; *Criminal Code* (Qld) ss 323A & 323B; *Criminal Law Consolidation Act 1935* (SA) ss 33–33B and *Children's Protection Act 1993* (SA) s 26 B; *Criminal Code* (Tas) Schedule, ss 178A–178C; *Crimes Act 1958* (Vic) ss 15, 32–34A; *Criminal Code* (WA) s 306.
75. The Commission notes that under the Victorian legislation an adult can consent to particular procedures.
76. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (December 1993) 10.
77. Queensland Law Reform Commission, ibid 2; Harberfield L, 'The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues' (1997) 23 *Monash University Law Review* 92, 104; Richards D, 'Male Circumcision: Medical or Ritual?' (1996) 3 *Journal of Law and Medicine* 371, 373–374; Boyle GJ, Svoboda JS, Price CP & Turner JN, 'Circumcision of Healthy Boys: Criminal Assault?' (2000) 7 *Journal of Law and Medicine* 301, 309. Medical opinion is also divided on whether there is any medical justification for routine male circumcisions, although generally today it appears that the medical profession does not consider that there is any medical justification for the practice: see Queensland Law Reform Commission, ibid 18; Richards D, 'Male Circumcision: Medical or Ritual?' (1996) 3 *Journal of Law and Medicine* 371, 371; Boyle *et al*, ibid 306–307.
78. Boyle *et al*, ibid 304. Boyle further argued that the criminalisation of female genital mutilation in the absence of the criminalisation of male circumcision amounts to a breach of international law that requires equal protection under the law without discrimination on the basis of sex (or otherwise).
79. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (Dec 1993) 13 & 39.
80. Ibid 13.
81. Fairall P & Yeo S, *Criminal Defences in Australia* (Australia: LexisNexis, 2005) 95. See also Harberfield L, 'The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues' (1997) 23 *Monash University Law Review* 92, 106.

> that it should not be made unlawful because the harm to the child involved ... may be outweighed by the benefits to the child of being accepted into his cultural group or religious group.[82]

Similarly, it has been argued that a 'child who is not circumcised may feel psychologically and spiritually cut off from his religion and culture'.[83] The Commission acknowledges that initiation practices (including circumcision) are extremely important in some Aboriginal communities. However, unlike routine infant circumcision, the practice occurs at an older age and therefore the child may be capable of giving free and informed consent for the procedure.

Conclusion

Kathryn Trees stressed in her background paper that for Aboriginal communities in Roebourne initiation ceremonies were an important time for the resolution of customary law issues and a significant social and family occasion.[84] It has been suggested by some Aboriginal people that instead of blood-letting practices, initiation ceremonies should be restricted to instruction about songs, languages and important sites.[85] The Commission was also told by Aboriginal people, during community meetings in Broome and in Geraldton, that the age for initiation should be raised because young males today do not have the maturity to understand the responsibility that initiation entails.[86]

One submission emphasised that in some cases initiation practices take place without the consent of the boy or his family; that the contemporary use of surgical blades (rather than the traditional sharp stone) is potentially more dangerous; that Aboriginal law practitioners who perform the procedures may sometimes be intoxicated; and that medical staff working in Aboriginal communities are placed in a difficult position.[87] It was suggested to the Commission that regulation of Aboriginal law practitioners, including training by registered medical practitioners, is one solution.[88] The Queensland Law Reform Commission has suggested that 'it might be reasonable to require that all circumcisions be performed by medical practitioners or other experienced and skilled people in circumstances which reduce to a minimum any adverse consequences'.[89] More generally, it has been argued that if the aim is to discourage circumcision, it is more effective to do this through education than to criminalise the practice, especially when the procedure is performed for cultural or religious reasons.[90]

The Commission strongly encourages Aboriginal people to ensure that participation in any physical initiation procedure is based upon free and informed consent. Failure to do so may result in criminal prosecution. The Commission has recommended that the Western Australian government develop educative initiatives to, among other things, inform Aboriginal people about practices under customary law that may breach the criminal law or human rights standards. These educative strategies should specifically include education and information for Aboriginal people about initiation practices under customary law. Further, Aboriginal communities should be encouraged and supported to ensure that, where initiation practices are not unlawful, they are carried out in a manner which will minimise the risk to the health and safety of the participants.

Options for reform

The Commission does not support any reform of the law which would result in *all* Aboriginal traditional punishments and practices being lawful. It has been argued that there should be 'cultural defence' for Aboriginal people who carry out traditional punishments.[91] However, the Commission is of the view that to do so, regardless of the individual circumstances (such as whether the person being punished or initiated consents, the age of the person and the nature of the traditional punishment or practice) would breach international human rights standards. It would also be

82. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (December 1993) 40.
83. Harberfield L, 'The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues' (1997) 23 *Monash University Law Review* 92, 108.
84. Trees K, 'Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A case study' in LRCWA, *Aboriginal Customary Law: Background Papers*, Project No. 94 (January 2006) 213, 221.
85. LRCWA, Discussion Paper community consultation – Geraldton, 3 April 2006.
86. LRCWA, Discussion Paper community consultations – Broome, 10 March 2006; Geraldton, 3 April 2006.
87. Confidential Submission No. 28 (1 March 2004) 1.
88. Ibid 2.
89. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (December 1993) 41. The Commission notes that Sweden enacted the *Circumcision Act 2001* in order to regulate the practice of male circumcision. This Act provides that circumcisions can only be undertaken under an anaesthetic and must be performed by a registered doctor or nurse, except for a circumcision which is performed during the first two months of age. In these circumstances the procedure can be performed by a licensed person. South Africa has also passed the *Traditional Health Practitioners Act 2004* which requires traditional healers to be licensed to perform certain traditional practices.
90. Harberfield L, 'The Law and Male Circumcision in Australia: Medical, legal and cultural issues' (1997) 23 *Monash University Law Review* 92, 120.
91. Bielefeld S, 'The Culture of Consent and Traditional Punishments under Customary Law' (2003) 7 *Southern Cross University Law Review* 142, 143.

contrary to the state's obligation to protect individuals from harm. Any reform must, at the very least, ensure that each case can be determined depending upon the individual circumstances: a court would have to decide based upon the evidence before it, whether there was in fact genuine consent.

In its Discussion Paper, the Commission grappled with the complex issues in this area and recognised that any accommodation of physical punishment may be seen to encourage violence. Nonetheless, the Commission was of the view that to ignore the issue would fail to address the unjustifiable inconsistency between the offences of assault occasioning bodily harm and unlawful wounding.[92] Importantly, these inconsistencies not only affect Aboriginal people but all Western Australians.

The Commission identified three possible options for legislative change. The first was to amend the *Criminal Code* to introduce an element of consent into the offence of unlawful wounding. The second option was to repeal the offence of unlawful wounding. In this regard, the Commission observed that the 1983 Murray report recommended that the offence of unlawful wounding should be abolished.[93] The third approach was to reconsider the current classification of harms resulting from violence in a similar manner as set out in the draft Model Criminal Code (which distinguishes between harm and serious harm).[94]

The Commission identified some of the potential benefits of reforming the law in this area, namely:

- That properly sanctioned and consensual spearing that is not likely to cause permanent injury to health or death could take place without the person who inflicted the punishment being liable to a criminal sanction.
- That reform may provide more guidance to assist police officers in their approach to traditional punishment. As discussed separately, police officers are faced with a dilemma of whether to facilitate traditional punishment because it potentially breaches the criminal law. If police officers are satisfied that the person to be punished genuinely consents then they can, with the agreement of the community, be present during the punishment. The Commission also recognises that nurses and doctors may be placed in a difficult position with respect to unlawful traditional punishments and initiation practices.[95]
- That reform may provide more flexibility for courts when dealing with bail applications and in sentencing decisions. Evidence might be led to satisfy the court that an accused genuinely consents to a spearing and that the proposed punishment falls within the level of harm that can legally be consented to. A court would not then be precluded from releasing a person from custody for the purpose of traditional punishment. In this regard, the Commission highlights that free and informed consent would necessarily require that the person to be punished had prior knowledge of the nature of the proposed punishment.
- That reform would remove the unnecessary distinction between assault occasioning bodily harm and unlawful wounding. This has other implications; for example, for people involved in ear or body piercing or tattooing.

However, in the absence of specific submissions about the possible options for reform from Aboriginal people and from the wider community, the Commission was unable to reach a conclusion. Therefore, the Commission invited submissions as to whether the *Criminal Code* should be amended to remove the distinction between assault occasioning bodily harm and unlawful wounding and, if so, which of the three options is preferable.[96]

The Commission has only received a few submissions in response to its invitation. The Aboriginal Legal Service (ALS) submitted that the offence of unlawful wounding should be repealed. Therefore, traditional punishment (undertaken with the consent of the person being punished) that does not cause grievous bodily harm would be lawful. But any traditional punishment inflicted without consent would remain unlawful. The ALS explained that the usual process under traditional punishment is for the 'victim' to consent.[97]

92. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 171.
93. Murray M, *The Criminal Code: A general review* (1983) 202.
94. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) Ch 5, [5.1.2].
95. The problem for nursing staff was referred to in two submissions: one in relation to traditional punishment. See Bill Marchant, Submission No. 1 (10 February 2006) 1; and one in the context of initiation: see Confidential Submission No. 28 (1 March 2004).
96. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 172, Invitation to Submit 5.
97. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 14.

The Western Australia Police submitted that there should be further consideration before any changes are made that would facilitate traditional physical punishments.[98] They also stated that the *Criminal Code* 'adequately distinguishes between types and severity of offence and injury'.[99] Similarly, the DPP submitted that there is no need to amend the law because the current distinction between assault occasioning bodily harm and unlawful wounding is appropriate. The DPP explained that an offence of assault occasioning bodily harm is generally charged where the injury is inflicted as a consequence of a 'physical altercation involving fists' or from a 'blunt instrument'.[100] An offence of unlawful wounding is usually charged when the injury results from a cut inflicted from a sharp object such as a 'knife, screwdriver or broken glass'.[101] These examples demonstrate that the practical distinction between the two offences is based on the manner by which the injury is inflicted and not because one type of injury is necessarily more serious than the other. The Model Criminal Code Officers Committee argued that it was fundamentally wrong for offences of violence to be structured primarily on the basis of the manner by which the harm was done rather than on the extent of the harm caused.[102]

Out of the three possible options put forward in its Discussion Paper, the Commission prefers the option of repealing the offence of unlawful wounding. The Commission does not consider the offence of unlawful wounding is necessary. If unlawful wounding is repealed then the relevant offences will generally either be assault occasioning bodily harm or grievous bodily harm. In some cases a wound will constitute bodily harm. But in many cases a wound will be more serious and a charge of grievous bodily harm will be applicable. The Commission is not in favour of introducing the element of consent into the offence of unlawful wounding because this would mean that a person could lawfully consent to harm which, on the one hand could be very minor but, on the other, could be very serious and potentially life threatening. The Commission believes that woundings, that is penetration of the skin, should be classified as either bodily harm or grievous bodily harm.

The Law Council of Australia did not indicate a firm view as to whether the law in Western Australia should be reformed. Nevertheless, the Law Council recognised the importance of traditional punishment for Aboriginal communities and that if traditional punishment was lawful in some instances, this would allow police and medical personnel to be present and thus minimise the risk of serious harm.[103] At the same time, the Law Council stated that it has 'serious concerns about the risks involved in sanctioning violent behaviour'.[104] The Commission shares these concerns; however, as observed in its Discussion Paper, Australian law currently sanctions violent behaviour, such as boxing and other violent sports.[105] In this regard, it has been argued that there is a clear social benefit to be derived from Aboriginal traditional punishment (harmony within Aboriginal communities) whereas the social benefits of legitimate forms of violence, such as boxing, are less obvious.[106]

The Law Council stated that it may be very difficult for courts to determine whether an Aboriginal person has consented to traditional punishment because the person may have 'consented' due to fear that a family member will be punished instead or because of pressure from his or her community. The Law Council suggested that if the law is reformed consent should be defined in the legislation.[107] Consent is defined in s 319(2) of

98. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14.
99. Ibid.
100. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 11.
101. Ibid.
102. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter Five, Non Fatal Offences Against the Person Report* (September 1998) 4.
103. Law Council of Australia, Submission No. 41 (29 May 2006) 24.
104. Ibid.
105. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 168.
106. Bielefeld S, 'The Culture of Consent and Traditional Punishments under Customary Law' (2003) 7 *Southern Cross University Law Review* 142, 146.
107. Law Council of Australia, Submission No. 41 (29 May 2006) 24.

the Western Australian *Criminal Code* but only for the purposes of sexual offences. However, as the Commission noted in its Discussion Paper, this definition has been applied for offences of violence.[108] The essence of the definition of consent is that it must be freely and voluntarily given.

The Commission agrees that the question of consent is difficult but it would be inappropriate to specify separate or different requirements for consent for Aboriginal people. Where a person is prosecuted for inflicting traditional punishment the court will need to carefully examine the possible reasons for any apparent consent to determine if that consent was free and voluntary. In this regard, the Commission notes that an accused person under Western Australian law may be relieved of criminal responsibility if he or she honestly and reasonably believed that the person consented.[109] An Aboriginal person may appear to consent but in truth only agrees to undergo punishment because of fear or intimidation. From the perspective of an accused person, the question is whether criminal responsibility should attach in circumstances where the accused honestly and reasonably believed that the 'victim' was a willing participant. Overall, the Commission is of the view that Aboriginal people, when charged with a violent offence, should have the same right as any other Western Australian to rely on the fact that the 'victim' consented.

It was also stated that the Commission's suggestions to 'legitimise' traditional punishment should be limited to Aboriginal people living in communities that follow traditional Aboriginal laws.[110] But the Commission does not agree that its suggestions for reform do in fact legitimise traditional punishment. In examining the law that may be applicable to traditional physical punishments, the Commission has found an anomaly in the law that applies to all Western Australians. The Commission fully acknowledges that reforming the law may mean that certain examples of traditional physical punishment (which were previously unlawful) will no longer be unlawful. But currently certain forms of traditional physical punishments are lawful (such as where the 'victim' consents to bodily harm.) The Commission is not advocating that traditional punishments should be undertaken or that Aboriginal people should expect that they will not be prosecuted when violent punishment has taken place. The Commission's recommendation for educational strategies to inform Aboriginal people about the criminal law and, in particular, any criminal laws that potentially conflict with customary practices will assist in this regard.[111]

The Commission has concluded that it is appropriate to recommend that the offence of unlawful wounding in s 301(1) of the *Criminal Code* be repealed.[112] In making this recommendation, the Commission has been strongly influenced by the fact that the removal of unlawful wounding does not lead to any expansion to the level of violent harm to which a person can legally consent.[113] Currently, the most serious form of physical harm that a person in Western Australia can lawfully consent to is bodily harm. Under the Commission's recommendation the most serious form of physical harm to which a person can lawfully consent will still be bodily harm.

Recommendation 25

Repeal the offence of unlawful wounding

That the *Criminal Code* (WA) be amended to remove the offence of unlawful wounding in s 301(1).

Ignorance of the Law

The law in Western Australia reflects the common law position that ignorance of the law does not generally provide an excuse for criminal behaviour.[114] Although Western Australia is a code state, not all criminal offences are contained in the *Criminal Code*, or even in legislation that deals with a particular subject matter.[115] Some offences (regulatory offences) are contained in

108. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 169.
109. *Criminal Code* (WA) s 24.
110. Law Council of Australia, Submission No. 41 (29 May 2006) 24.
111. See Recommendation 26, below p 150.
112. The Commission notes that s 301(2) of the *Criminal Code* (WA) deals with administering any poison or other noxious thing. The phrase 'unlawfully wounds' also appears in s 294 of the *Criminal Code*. This section primarily deals with acts done with an intention to cause grievous bodily harm. It may be necessary for this section to also be amended to remove the reference to unlawful wounding.
113. The Commission notes that the repeal of the offence of unlawful wounding was recommended by the 1983 Murray Review of the Criminal Code: see Murray M, *The Criminal Code: A general review* (1983) 202.
114. *Criminal Code* (WA) s 22. There is a limited exception to this general rule (known as an honest claim of right) which applies only to offences relating to property. For a detailed discussion of the interaction of Aboriginal customary law with this defence, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 175–78.
115. For example, *Misuse of Drugs Act 1981* (WA) and *Road Traffic Act 1974* (WA).

Many Aboriginal people in Western Australia were concerned about their lack of knowledge of Australian law and sought improved education about Australian law and the legal system.

complex legislation and these types of offences may only be known to those people who are directly involved in the activities or industry that is subject to the regulation. The Commission observed in its Discussion Paper, that the rule that ignorance of the law does not provide an excuse has the potential to operate unjustly in circumstances where a person honestly believed that his or her conduct was lawful and the nature of the legal prohibition was not one that the person should be expected to know.[116]

Changes to the criminal law are published in the government gazette. The Commission does not consider that the publication of criminal laws in the government gazette is an effective way of advising Aboriginal people (and others) about the content of those laws. For Aboriginal people with language and communication barriers the difficultly of knowing all matters that are proscribed by the criminal law will be more pronounced. In addition, Aboriginal people whose lives are primarily controlled by customary law may engage in conduct that is acceptable or required by customary law without knowing that this conduct is unlawful under Australian law. For example, Aboriginal people may take rare flora for the purposes of customary harvesting without realising that they may be committing an offence.[117] For traditional Aboriginal people, the need to consider and understand Australian written law may not be readily apparent given that Aboriginal customary law is based on oral tradition.

The Commission examined the possible options for reform to deal with the potential for injustice arising from the rule that ignorance of the law is not an excuse. One possible option would be provide that ignorance of the law does provide a defence for Aboriginal people. After taking into account the relevant arguments, the Commission concluded that ignorance of the law should not provide a defence. To allow Aboriginal people to be excused from criminal behaviour because they did not know they were committing an offence does not provide adequate protection for other people, including other Aboriginal people. For example, in the highly publicised Northern Territory case *R v GJ,*[118] the accused (who was a traditional Aboriginal man) was sentenced for having sexual relations with a child. The sentencing judge took into account in mitigation the fact that the accused did not know that he was committing an offence and that he believed that his actions were justified under customary law. If ignorance of the law was a defence then this accused may well have been acquitted. The Commission is of the opinion that for Aboriginal people to be protected by Australian law they must also be bound by it. Of course, ignorance of the law may be a matter that can properly be taken into account in mitigation of sentence.[119]

The Commission's consultations indicated that many Aboriginal people in Western Australia were concerned about their lack of knowledge of Australian law and sought improved education about Australian law and the legal system.[120] The Commission concluded in its Discussion Paper that improved education about Australian law is the best way to reduce the potential for injustice for Aboriginal people. It was proposed that relevant government departments should provide culturally appropriate information about changes to the criminal law that may significantly affect Aboriginal people.[121] The Commission suggested that government

116. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 173. See for example *Ostrowski v Palmer* (2004) 206 ALR 422 where the High Court held that although a fisherman had been given erroneous advice by a fisheries office about the areas where fishing was prohibited this did not provide a defence because the fisherman had been acting in ignorance of the law.
117. This issue is discussed by the Commission in its Discussion Paper: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 177–78 & 372.
118. (Unreported, Supreme Court of Northern Territory, SCC 20418849, Martin CJ, 11 August 2005) 6, <http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2005/08/gj_20050811.html>.
119. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 173–74.
120. LRCWA, *Thematic Summary of* Consultations – *Cosmo Newberry,* 6 March 2003, 20; *Kalgoorlie,* 25 March 2003, 25; *Pilbara,* 6–11 April 2003, 11; *Wiluna,* 27 August 2003, 22; *Albany,* 18 November 2993, 14; *Wuggubun* 9–10 September 2003, 35.
121. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 175, Proposal 20. The Commission has also recommended specific educative measures to improve understanding about particular Western Australian laws (for example, hunting and foraging, 'promised' child marriages, discipline of children and traffic matters).

departments should consider engaging Aboriginal organisations and groups to assist with the design and delivery of any legal education program.

The Commission received extensive support for this proposal.[122] The Aboriginal Education and Training Council explained that Aboriginal people frequently complain about the lack of appropriate and accessible information with respect to legislative changes.[123] Overall, it was emphasised that educative strategies about the criminal law must be designed and delivered by Aboriginal communities and organisations, and these initiatives must be locally based.[124]

It was also submitted that the scope of the Commission's proposal should be extended to include information about existing criminal laws. The Aboriginal and Torres Strait Islander Social Justice Commissioner stated that there is a

> critical need for community education programmes to be developed with the full participation of Indigenous peoples to inform Indigenous communities about conflicts between customary law, human rights and the general application of the criminal law.[125]

The ALS suggested that the Commission's proposal should also include culturally appropriate information about court processes and procedures, as well as information about services available for Aboriginal people.[126] In Chapter Seven the Commission has recommended that the Western Australian government provide educative strategies in relation to the legal rights of and services available for Aboriginal women and children in the context of family violence and sexual abuse.[127] The Commission agrees that its original proposal should be expanded to include information about existing criminal laws, court procedures, and services available for Aboriginal people in the criminal justice system.

Recommendation 26

Education about the criminal law and the criminal justice system

1. That the Western Australian government provide resources for the development of educative initiatives to inform Aboriginal people about Western Australian criminal laws, court procedures, and services available in the criminal justice system.
2. That in developing these initiatives, particular attention be given to providing information about any criminal laws and international human rights standards that may potentially conflict with Aboriginal customary laws.
3. That these initiatives be developed in conjunction with Aboriginal communities and organisations.
4. That these initiatives be locally based and, where possible, be presented by Aboriginal people and delivered in local Aboriginal languages.

Duress

In its Discussion Paper the Commission examined the defence of duress and its potential interaction with Aboriginal customary law.[128] The defence of duress relieves a person from criminal responsibility where the offence was compelled by threats. The rationale for the defence is to excuse criminal liability where a person has been faced with a choice between two evils: a choice of either committing the offence or suffering the harm that has been threatened.[129] The Commission recognised that some Aboriginal people may engage

122. Aboriginal Education and Training Council, Department of Educations Services, Submission No. 20 (26 April 2006) 3; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Hon Norm Marlborough MLA, Acting Minister for Education & Training, Submission No. 27 (1 May 2006) 3; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 11; Department of the Attorney General, Submission No. 34 (11 May 2006) 5; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4; Pilbara Development Commission, Submission No. 39 (19 May 2006) 2; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 8; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.
123. Aboriginal Education and Training Council, Department of Educations Services, Submission No. 20 (26 April 2006) 3.
124. The Pilbara Development Commission suggested that educative strategies should make use of Indigenous media: Pilbara Development Commission, Submission No. 39 (19 May 2006) 2. The Aboriginal Education and Training Council suggested that local language centres should be involved: Aboriginal Education and Training Council, Department of Educations Services, Submission No. 20 (26 April 2006) 3.
125. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 8.
126. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4. The ALS stated that it would be willing to be involved in educational programs with respect to court processes and procedures.
127. See Recommendation 90, below p 286.
128. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 180–83.
129. *R v Howe* [1987] AC 417, 433 (Hailsham LJ).

in conduct which is unlawful under Australian law because of threats or fear that they will be punished under traditional Aboriginal law.

The requirements of the defence of duress in Western Australia

In Western Australia the defence is contained in s 31(4) of the *Criminal Code*.[130] To satisfy the requirements of the defence:

- the accused must have done the act or made the omission in order to save himself or herself from immediate death or grievous bodily harm;
- death or grievous bodily harm must have been threatened by someone actually present and in a position to execute the threats; and
- the accused must have believed that he or she was otherwise unable to escape death or grievous bodily harm.

The Commission observed in its Discussion Paper that the specific requirements of the defence differ between jurisdictions and the defence in Western Australia is more restrictive than in most other Australian jurisdictions.[131] The requirement that the threat must be of *immediate* death or grievous bodily harm has been interpreted to mean a 'very short time after doing the relevant act'.[132] In common law jurisdictions it has been held that the threat must be present, continuing and imminent,[133] although not necessarily immediate.[134]

Also there is no requirement for the threat to be of *immediate* harm in Queensland,[135] the Northern Territory,[136] the Australian Capital Territory,[137] or under Commonwealth legislation.[138] The nature of the threat is also more limited in Western Australia because there must be a threat to cause either *death* or *grievous bodily harm*.[139] In Western Australia the threat must be directed to the accused and no other, whereas in most other jurisdictions a threat to harm another person may suffice.[140]

On the other hand, unlike Western Australia, the defence of duress in most other Australian jurisdictions includes an objective standard.[141] In Western Australia the defence is wholly subjective: it is sufficient if the accused believed that he or she was otherwise unable to escape the threat of immediate death or grievous bodily harm. The Commission is of the view that the inclusion of an objective test of reasonableness balances the broader scope of the defences in other jurisdictions.

Aboriginal customary law and the defence of duress

The principal behaviour under Aboriginal customary law that may involve a breach of Australian law is the infliction of traditional physical punishments. The Commission considered the possible reasons why Aboriginal people would impose traditional physical punishment on others. In some circumstances it may be because they fear being subject to traditional punishment themselves.[142]

130. The defence is not available for wilful murder, murder, grievous bodily harm or an offence that includes an intention to do grievous bodily harm. It is also not available when the accused has made himself or herself liable to such threats because of an unlawful association or conspiracy.
131. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 180. The Commission notes that the defence in Tasmania is similar to Western Australia because it requires a threat of immediate death or grievous bodily harm: see *Criminal Code* (Tas) s 20.
132. *R v Pickard* [1959] QdR 457, 476 (Stanley J; Townley and Stable JJ concurring) as cited in *P (A Child) v The Queen* (Unreported, Supreme Court of Western Australia; Library No. 950469S, No. 222 of 1994, Kennedy J, 7 September 1995).
133. *R v Hurley* [1967] VR 526, 543 (Smith J).
134. A threat to cause harm at some future time was alluded to in *R v Abusafiah* (1991) 24 NSWLR 531, 538 (Hunt J). See also Leader-Elliot I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 360 where it was stated that in South Australia there does not have to be a threat of immediate harm.
135. *Criminal Code* (Qld) s 31(d) which provides that there must be a threat by some person in a position to carry out the threat. The Commission notes that the defence in Queensland was originally the same as in Western Australia. It was amended in October 2000.
136. *Criminal Code* (NT) s 40 which requires that the accused believed that the person making the threat was in a position to execute the threat.
137. *Criminal Code 2002* (ACT) s 40 which provides that there must be a threat that will be carried out unless the offence in committed; that there is no reasonable way to make the threat ineffective; and that the conduct is a reasonable response to the threat.
138. *Criminal Code 1995* (Cth) s 10.2. The defence under the Commonwealth legislation is the same as in Australian Capital Territory.
139. *Criminal Code 2002* (ACT) s 40 and *Criminal Code 1995* (Cth) s 10.2 refer only to a threat; *Criminal Code* (NT) s 40 only refers to a threat; *Criminal Code* (Qld) s 31(d) refers to a threat to cause serious harm or detriment to a person or property.
140. *Criminal Code* 1995 (Cth) s 10.2; *Criminal Code 2002* (ACT) s 40; *Criminal Code* (NT) s 40; *Criminal Code* (Qld) s 31(d); *Crimes Act 1958* (Vic) s 9AG.
141. Ibid.
142. For example, the ALRC referred to *R v Isobel Phillips* (Unreported, Northern Territory Court of Summary Jurisdiction, 19 September 1983). In this case the accused was required by customary law to fight any woman who was involved with her husband. Failure to do so would result in death or serious injury and while she remained in her community she would be unable to avoid these consequences. The magistrate acquitted the accused on the basis of the defence of duress. See ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No. 31 (1986) [430]. Elizabeth Eggleston argued that the defence of duress might be appropriate in some cases if an Aboriginal person was forced through fear of traditional punishment to commit an offence against Australian law: see Eggelston E, *Fear, Favour or Affection: Aborigines and the criminal law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976) 297–98. Anthropological accounts indicate that kinship obligations may require an Aboriginal person to punish another regardless of his or her personal feelings and therefore in some cases there is a duty to inflict traditional punishment: see ALRC, 'Traditional Aboriginal Society and its Law' in Edwards WH (ed.), *Traditional Aboriginal Society* (Melbourne: MacMillan Education Australia Pty Ltd, 2nd ed., 1998) 217.

In *R v Warren, Coombes and Tucker* [143] the defence of duress was argued by three Aboriginal men who had been charged with serious offences of violence. They claimed that they were required to inflict the injuries on the victim as traditional punishment for the victim's breach of customary law. The defendants stated that if they had not imposed the traditional punishment they would have received the same punishment themselves. The trial judge held that the defence of duress was not available; however, on appeal it was accepted by the majority that an obligation under Aboriginal customary law could provide a basis for the defence of duress. In this case the court held that duress was not applicable because the explanation given by the defendants was not believed. The trial judge had found that the motivation for the assault was for a 'show of strength'.[144]

The ALRC found that traditionally orientated Aboriginal people generally follow their customary laws 'not just because of fear of punishment, but because of belief in their legitimacy'.[145] The ALRC concluded that in some situations Aboriginal people follow customary law voluntarily while in other cases they may do so under duress. The Commission's consultations revealed mixed views as to whether compliance with Aboriginal customary law is the result of the exercise of choice, is achieved because of the fear of repercussions, or is a consequence of a belief in the validity of the law.[146] In its Discussion Paper, the Commission concluded that the reasons an Aboriginal person would comply with Aboriginal customary law would depend upon the individual circumstances of the case.[147]

The main problems with the defence of duress in Western Australia

There must be a threat made by a person actually present

In Western Australia, for the defence of duress to be available a threat must have been made, by a person actually present, against the accused. In the context of Aboriginal customary law, duress would have no application unless a particular person (who was present) threatened the accused with traditional punishment amounting to death or grievous bodily harm if he or she failed to comply with customary law.[148] An Aboriginal person may be compelled to commit an offence, not because a specific individual made a threat, but because of knowledge of the repercussions that would flow from a failure to comply with Aboriginal customary law.[149] In its Discussion Paper the Commission concluded that it would not be appropriate to remove the requirement that there must actually be a threat. The removal of this requirement would unjustifiably extend the scope of the defence. It 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 does not consider that it should be a prerequisite for the defence of duress, that the person making the threat is actually present.[150]

143. (1996) 88 A Crim R 78.
144. Ibid 81 (Doyle CJ; Cox J concurring).
145. ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No. 31 (1986) [430].
146. LRCWA, *Thematic Summary of Consultations – Broome,* 17–19 August 2003, 23 where it was stated that traditional law is not a choice because it is a 'part of who you are'. Some communities expressed the view that there was no choice to comply because of repercussions that may follow to family members. This was in the context of the failure of a person who was liable for traditional punishment presenting himself or herself for that punishment: see LRCWA, *Thematic Summary of Consultations – Fitzroy Crossing,* 3 March 2004, 41–42; *Geraldton,* 26–27 May 2003, 13–14; *Pilbara,* 6-11 April 2003, 8–9; *Wiluna,* 27 August 2003, 22. Other Aboriginal people said that there was a choice as to whether a person would be subject to Aboriginal customary law: see LRCWA, *Thematic Summary of Consultations – Warburton,* 3–4 March 2003, 22–23; *Geraldton,* 26–27 May 2003, 14.
147. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 182.
148. In *R v Warren, Coombes and Tucker* (1996) 88 A Crim R 78, 81–82 Doyle CJ was not convinced that at common law there had to be a threat from an 'external source'; however, it was not necessary for him to decide the issue.
149. Leader-Elliot I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 361.
150. It has been reported that the requirement that the person making the threat is actually present (coupled with the requirement for immediacy) under the *Criminal Code* (Canada) is unduly restrictive: see Law Reform Commission of Ireland, *Duress and Necessity,* Consultation Paper 39 (April 2006) 40.

The threat must be made against the accused

The current formulation of the defence in Western Australia requires that the threat is made against the accused. Therefore, an accused person would not be able to rely on a threat to harm a family member or close relative. Because of strong kinship obligations under customary law, this is potentially relevant for an Aboriginal person who may be compelled to commit an offence in order to protect another person. The Commission is of the opinion that the defence of duress should be available for all Western Australians, where the threat is to harm another person.[151] It has been suggested that 'a parent who acts out of love for a child is perhaps the most obvious case where duress might be put forward as an excuse to murder'.[152] The question of whether duress should be available as a defence to murder will be considered in the Commission reference on homicide. Nonetheless, this example demonstrates that the moral culpability of a person who engages in criminal behaviour in order to save another may well be less than a person who commits an offence to save himself.

The threat must be of immediate death or grievous bodily harm

The necessity for a threat of *immediate* death or grievous bodily harm would appear to preclude any reliance upon duress where the actions were taken in carrying out Aboriginal customary law. The Commission is unaware of any example where traditional punishment has followed immediately after an Aboriginal person has refused to comply with an obligation under customary law. Traditional punishment usually occurs some time after a violation of customary law and therefore it would be difficult for an Aboriginal person to argue that he or she feared immediate harm.[153]

It has been observed that the requirement for a threat of immediate harm is not necessarily justified because the 'pressure that is brought to bear on an accused could be just as great' where the harm may take place at a later time.[154] The requirement that the accused feared immediate harm is one aspect of the defence that is potentially gender biased. Women who are the victims of serious domestic or family violence may be compelled to commit an offence under a threat of being harmed in the future. While the threat may not be of immediate harm, because of the history of violence, the execution of the threat may nevertheless be imminent or inevitable.

The Commission also notes that grievous bodily harm is defined in s 1 of the *Criminal Code* (WA) as 'any *bodily injury* of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health'. The requirement for the threat to cause actual 'bodily injury' may preclude reliance on the defence of duress where the accused was threatened with serious non-physical harm such as sexual assault or deprivation of liberty. The incorporation of a requirement that the conduct of the accused must be a reasonable response to the threat, in the Commission's opinion, operates as a safeguard against any abuse of an extended defence.

Proposal for reform of duress in Western Australia

The Commission concluded in its Discussion Paper that the defence of duress is unduly restrictive in Western Australia. In reaching this conclusion the Commission took into account the difficulties for all Western Australians. The Commission emphasised that an extension of the defence of duress would not imply that all Aboriginal people follow their customary law because of the fear of repercussions. Instead, it would recognise that some Aboriginal people may be forced to inflict traditional punishment or engage in other conduct under customary law because they were compelled by threats.

After reviewing the defence in other jurisdictions the Commission proposed that for all Western Australians the defence of duress should be based upon the defence in the Australian Capital Territory and the Commonwealth.[155] The Commission is also aware that

151. The Law Reform Commission of Ireland has recently proposed that the defence of duress should be available where there is a threat of death or serious harm directed towards any person. In reaching this conclusion it took into account that in Ireland, England and in most Australian jurisdictions the threat may be directed to someone other than the accused. See Law Reform Commission of Ireland, ibid 18–21.
152. Fairall P & Yeo S, *Criminal Defences in Australia* (Australia: LexisNexis, 2005) 155.
153. For example, it is stated by Berndt and Berndt that 'settlement by duel' was not held immediately following an offence at customary law, but after there was time for anger to cool: see Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 350.
154. Law Reform Commission of Ireland, *Duress and Necessity,* Consultation Paper 39 (April 2006) 40.
155. See *Criminal Code* 1995 (Cth) s 10.2 and *Criminal Code 2002* (ACT) s 40. Note that both provisions restrict the operation of the defence to persons who voluntarily associate with others who engage in criminal conduct thereby making themselves liable to such threats. The defence of duress in these jurisdictions can apply to any offence including murder.

in November 2005 the *Crimes Act 1958* (Vic) was amended to provide for a defence of duress (in similar terms as the defence in the Australian Capital Territory and the Commonwealth) applicable to offences of murder, manslaughter and defensive homicide.[156] In these jurisdictions, in order to rely on the defence, it is necessary that the accused reasonably believes that:

- a threat has been made that will be carried out unless the offence is committed;[157]
- there is no reasonable way to make the threat ineffective;[158] and
- the conduct is a reasonable response to the threat.

The Commission has received four submissions which have responded to this proposal. The Western Australia Police supported the Commission's proposal noting that currently there is very limited use of the defence of duress in Western Australia.[159] The Law Council of Australia and the Criminal Lawyers Association also expressed support for the proposal.[160] On the other hand, the DPP opposed the proposal because it considers that it is not appropriate to remove the requirement for a threat of 'immediate death or grievous bodily harm' or to extend the defence to circumstances where the threat is made to harm another person.[161] The DPP stated that the defence should remain within 'strictly confined circumstances'.[162]

In response to the Commission's Issues Paper prepared for its reference on homicide, a number of submissions referring to the general scope of duress have been received. Most of these submissions did not support any change to the current defence of duress under s 31(4) of the *Criminal Code*.[163] However, the Department of Community Development submitted that duress should be reformed to incorporate an objective standard of reasonableness along similar lines to the Commission's proposal in its Discussion Paper on Aboriginal customary laws.[164]

The Commission considers that any argument that its proposal will significantly extend the scope of the defence is flawed. The Commission acknowledges that its proposal broadens the scope of the defence by removing restrictions as to the nature of the threat. But the incorporation of an objective standard inevitably makes the ambit of defence narrower. For example, a person would only be able to rely upon duress under the Commission's proposal if there was no other reasonable way to render the threat ineffective.[165] Similarly, if the response to the threat is not a reasonable response then the defence will fail. The law in Western Australia, as it currently stands, allows the defence of duress to apply in circumstances where the accused believed that he or she was otherwise unable to escape the threat (of death or grievous bodily harm) even

156. *Crimes (Homicide) Act 2005* (Vic) came into operation on 23 November 2005 and inserted s 9 AG into the *Crimes Act 1958* (Vic). This section (unlike the Australian Capital Territory and the Commonwealth) restricts the application of the defence of duress to murder only if the threat was a threat to cause death or really serious injury.
157. Therefore, the threat can be made to harm the accused or some other person.
158. This element incorporates the requirement to escape contained in s 31(4) of the *Criminal Code* (WA) as well as under the common law. It has been held that the defence of duress at common law was available for a woman who committed social security fraud because of her fear of violence by her abusive husband. The fact that she had not sought help from the police was not fatal to her defence as it was held that she was not expected to leave her marital relationship: see Leader-Elliot I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 362. This reasoning could also apply to Aboriginal people who, due to their strong ties to the community, should not necessarily be expected to leave. In the same way that courts have received expert evidence in relation to 'battered women's syndrome', it may be necessary for evidence about Aboriginal customary law to be presented to the jury in order for the jury to assess the reasonableness of the accused person's conduct.
159. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 7.
160. Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.
161. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 2.
162. Ibid 3.
163. LRCWA, *A Review of the Law of Homicide*, Project No. 97, Miller J, Submission No. 3 (22 May 2006) 6; Law Society, Submission No. 37 (4 July 2006); Criminal Lawyers Association, Submission No. 40 (14 July 2006) 10. The Law Society suggested that the Commission consider the position with respect to duress in the United States, United Kingdom and Canada. The Commission notes that in the United Kingdom the defence of duress incorporates an objective standard, although it is limited to a threat of death or serious injury. However, the threat may be against a third person and the threat does not have to be immediate: see *R v Hansan* [2005] 2 AC 467 [489]–[492]. Section 17 of the *Criminal Code* (Canada) provides that there must a threat of immediate death or *bodily harm* by a person present and the accused must believe that the threats will be carried out. There are a number of offences for which this defence is not available. It has been reported that while a threat of death or serious injury is generally required in the United States, in some jurisdictions courts have looked at the seriousness of the offence and in some circumstances a less serious threat may be sufficient: see Law Reform Commission of Ireland, *Duress and Necessity,* Consultation Paper 39 (April 2006) 16.
164. LRCWA, *A Review of the Law of Homicide*, Project No. 97, Department of Community Development, Submission No. 42 (7 July 2006) 10.
165. The Western Australian Court of Appeal has recently considered the defence of duress under s 10.2 of the *Criminal Code 1995* (Cth) in *Morris v R* [2006] WASCA 142 [106]. The accused was charged with importing prohibited drugs contrary to the *Customs Act 1901* (Cth). The accused argued that he only committed the offence because of threats made to harm his family by a person in England. The accused brought the drugs from England to Perth and was arrested at the Perth airport. The prosecution contended that the accused could not avail himself of the defence of duress because he had numerous opportunities (from the time he left England and was arrested at Perth) to report the matter to the police or customs authorities. At [112] Roberts-Smith J stated that the 'requirement that an accused believe that there is no reasonable way the threat can be rendered ineffective is not one to be met to readily. There are clear considerations of public policy dictating that people under threat should take opportunities to render such threats ineffective by reporting their circumstances to police or other appropriate authorities, rather than commit serious criminal offences, when presented with realistic opportunities to do so. Likewise, it could not be accepted as objectively reasonable in the circumstances of this case that the law enforcement authorities could not have acted to safeguard the appellant and his parents against the threats made'. The Commission notes that the question of whether the accused reported the matter to police is expressly included in the defence in the Northern Territory see *Criminal Code* (NT) s 40.

where that belief is not objectively reasonable. The Commission remains of the view that the defence of duress in Western Australia should be amended. Because the Commission is separately reviewing the law of homicide, the question whether the amended defence of duress should be available for homicide offences will be considered in that reference.

Recommendation 27

Duress

1. That s 31(4) of the *Criminal Code* (WA) be repealed and the *Criminal Code* (WA) be amended to provide that a person is not criminally responsible for an offence[166] if he or she reasonably believes that:
   (a) a threat has been made that will be carried out unless the offence is committed;
   (b) there is no reasonable way to make the threat ineffective; and
   (c) the conduct is a reasonable response to the threat.

2. That the *Criminal Code* (WA) provide that the defence of duress does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

Provocation

The defence of provocation recognises that a person may be less morally blameworthy if he or she commits a crime as a consequence of a sudden loss of self-control, usually the result of anger. In Western Australia the existence of provocation may reduce wilful murder or murder to manslaughter and may also operate as a complete defence to offences of assault. In its Discussion Paper the Commission considered the defence of provocation and, in particular, whether the defence in Western Australia adequately allows Aboriginal customary law and other cultural issues to be taken into account.[167]

One aspect of the defence of provocation is the 'ordinary person test'. This test has two stages:

- the first stage is an assessment of the gravity or seriousness of the provocation; and
- the second stage requires an assessment of whether an ordinary person would have been deprived of the power of self-control in the same circumstances.

In relation to the first stage, the law allows individual characteristics of the accused (including the person's culture) to be taken into account when determining the seriousness of the provocation. Therefore, matters associated with Aboriginal customary law can be considered. For example, the utterance of a deceased person's name would not cause difficulty for a non-Aboriginal person, but such conduct could be extremely offensive and upsetting for an Aboriginal person. The second stage, determining the power of self-control of an ordinary person, is more complicated. Whether an ordinary person should be a person of the same cultural background for this purpose is subject to conflicting views. It has been argued that the second stage of the ordinary person test is discriminatory because various ethnic groups may have different standards of self-control. On the other hand, others have argued that there is no justification for taking into account cultural differences when assessing the capacity to lose self-control.[168] In this regard, the Commission agrees with the view that any suggestion that Aboriginal people have a lesser capacity for self-control is offensive.[169]

The Commission acknowledged in its Discussion Paper that the relevance of provocation as a defence is increasingly being questioned. Because the law with respect to provocation was being examined in detail in its homicide reference, the Commission invited submissions as to whether an ordinary person should be a person of the same cultural background as the accused for the purpose of assessing both the gravity of the provocation and whether an ordinary person could have lost self-control.[170] The submissions received in response to this question did not support the incorporation of cultural characteristics into the test for an ordinary person's capacity for self-control. The DPP submitted that the defence of provocation should

166. In Project No. 97 the Commission will examine whether there are any offences which should be excluded from the operation of this defence.
167. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 183–87.
168. For a detailed discussion of the relevant arguments, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 185–86.
169. Yeo S, 'Sex, Ethnicity, Power of Self Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 316.
170. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 187, Invitation to Submit 6.

be abolished but, if it is retained, it should remain in its current form because cultural characteristics can be taken into account when deciding the seriousness of the relevant provocative conduct.[171] The Law Society suggested that in the absence of any evidence to suggest that there are 'innate differences in cultural or ethnic capacity for self-control' there does not appear to be any justification for changing the second limb of the provocation test.[172] The Commission will consider whether there is any need to reform the law in relation to provocation in its reference on homicide.[173]

Discipline of Children

The Commission's consultations indicated that many Aboriginal people were concerned about the discipline of their children. Many believed that welfare agencies have interfered with their right to discipline their children.[174] For example, some Aboriginal people were concerned when young people threatened families with 'white man's law' if they attempted to impose any type of physical discipline.[175] However, under Western Australian law (s 257 of the *Criminal Code*), reasonable physical discipline is permitted as long as it is for the purpose of correcting the child's behaviour and not for retribution.[176] Courts have held that the reasonableness of any physical discipline must be judged according to current community standards[177]: what was acceptable many years ago in mainstream Australia would no longer be considered acceptable today. It is also necessary to take into account the age, physique and mental development of the child.[178]

In its Discussion Paper, the Commission considered whether there is any conflict between Western Australian law and Aboriginal customary law with respect to the discipline of children.[179] The Commission found that physical discipline of children in traditional Aboriginal societies was rare.[180] In contemporary Aboriginal communities it appears that excessive physical discipline of children is met with disapproval. In this context the Commission emphasises that the abuse of children is not considered acceptable under Aboriginal law and culture.[181] The Commission concluded that Australian law concerning childhood discipline does not appear to conflict with legitimate Aboriginal customary law practices.

The Commission has observed that many Aboriginal people appear to be under a misapprehension that they are not allowed to smack their children under Australian law.[182] For example, in June 2005 it was reported that the Federal Health Minister, Tony Abbott, was told by Aboriginal Elders in Alice Springs that they were unable to do anything in response to uncontrollable behaviour by some young people because if they were to smack them the authorities would intervene. Mr Abbot assured this group that parents who acted with 'caution and restraint' would not have a problem with Australian law and indicated with surprise the 'cultural confusion' that existed about this issue.[183] Similarly, the Commission has been told by Aboriginal people that Australian law prevented them from using physical punishment on their children.[184] The Commission concluded in its Discussion Paper that Aboriginal people in Western Australia should be made

171. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 12; The Western Australia Police also indicated that there is no need for any reform of the defence of provocation: see Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14. The Criminal Lawyers Association also suggested that the current test adequately incorporates cultural characteristics: see Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.
172. Law Society of Western Australia, Submission No. 36 (16 May 2006) 4. The Law Council of Australia supported the comments made by the Law Society: see Law Council of Australia, Submission No. 41 (29 May 2006) 26.
173. LRCWA, *Review of the Law of Homicide*, Project 97.
174. Wohlan C, 'Aboriginal Women's Interests in Customary Law Recognition' in LRCWA, *Aboriginal Customary Laws: Background Paper*s, Project No. 94 (January 2006) 507, 529.
175. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 20. See also LRCWA, *Thematic Summary of Consultations – Geraldton,* 26–27 May 2003, 12.
176. *Higgs v Booth* (Unreported, Supreme Court of Western Australia, Library No. 6420, 29 August 1986) as cited in *Cramer v R* (Unreported, Supreme Court of Western Australia, Court of Criminal Appeal, Library No. 980620, White J, 28 October 1998) 4.
177. Ibid.
178. *R v Terry* [1955] VLR 114, 116–17 (Scholl J). The Commission observed in its Discussion Paper that although research has shown that the majority of Australian parents smack their children and consider that physical punishment of children is acceptable, there is a growing trend of opinion that physical punishment is ineffective and undesirable. See, for example, Tasmanian Law Reform Institute, *Physical Punishment of Children,* Final Report No. 4 (2003) 26 & 47; Department of Community Development, *Keeping Our Kids Safe*, <http://www.community.wa.gov.au/NR/rdonlyres/D3E85AFF-0AE0-4246-978F-EEE297946D65/0/DCDGUIKeepingOurKidsSafe.pdf>. The Commission noted that physical correction such as smacking may be lawful in Western Australia but more serious instances where a child receives injuries or is punished with an instrument may be viewed differently in the current climate: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 188.
179. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 187–89.
180. Ibid 187. The Commission recognised that in traditional Aboriginal societies, childhood usually ended at puberty or initiation.
181. See 'Customary Law Does Not Condone Family Violence or Sexual Abuse', Chapter One, above pp 19–22.
182. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005)189.
183. Price M, 'Abbott Dances Around a Punishing Question', *The Australian,* 30 June 2005, 1.
184. During a community meeting following the Commission's Discussion Paper, the Commission was advised by Aboriginal women that some young people report adults to the Police and the Department of Corrective Services if they are physically disciplined: Indigenous Women's Congress, consultation (28 March 2006).

aware that they currently have the same right as any other Australian to discipline their children in a reasonable way, bearing in mind the child's individual characteristics. While it remains lawful to discipline a child physically, Aboriginal families (as well as other Australians) should be informed about what are the appropriate limits.[185]

The Commission proposed that the Western Australian government, in conjunction with Aboriginal people, introduce strategies to educate Aboriginal communities about effective methods of discipline and inform them about their rights in relation to the discipline of children under Australian law.[186] The Commission noted that the Department of Community Development is already involved in parenting education programs for Aboriginal people. However, it was acknowledged that some Aboriginal people may be reluctant to participate in programs organised by the Department of Community Development because of the negative history of its involvement in the removal of Aboriginal children from their families. Therefore, the Commission invited submissions as to which government agency should coordinate (in conjunction with Aboriginal people) the proposed educational strategies.[187]

The response to this proposal has overall been very positive.[188] The Department of Indigenous Affairs emphasised that the design and delivery of these educational programs must be undertaken in 'real partnership with Aboriginal communities and organisations'.[189] The ALS agreed that Aboriginal people should be educated about their rights and responsibilities under Western Australian law with respect to the discipline of children. However, the ALS stated that its Executive Committee opposed the Commission's proposal.[190] This Committee (which is made up of Aboriginal people) was concerned that the Commission's proposal would mean that government agencies could 'dictate' how Aboriginal people should look after and discipline their children.[191] This was never the Commission's intention. The purpose of this recommendation is to assist and inform Aboriginal people and not to impose western ideas with respect to child rearing practices. The Commission believes it is essential that any education program with respect to the parenting and discipline of children by Aboriginal families should be designed and delivered by Aboriginal people. First, and foremost, the programs should inform Aboriginal people about what Western Australian law requires: that physical discipline of children must be reasonable in all the circumstances. Second, the programs should contain information for Aboriginal families about other possible strategies for the discipline of children.

The Commission believes that it is necessary for a particular government agency to be responsible for the implementation of this recommendation in order to ensure that resources are effectively allocated, and that there is adequate coordination between relevant government departments and Aboriginal community organisations. The Department of Community Development submitted that it should be responsible for the coordination of these programs, in partnership with the Department of Heath and the Department of Education and Training.[192] However, it was emphasised by the ALS that Aboriginal people remain extremely wary of the Department of Community Development and it was also asserted that the

185. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 189.
186. Ibid, Proposal 22.
187. Ibid, Invitation to Submit 7.
188. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 11; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Department of Community Development, Submission No. 51 (27 June 2006) 2; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.
189. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 11.
190. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7. The ALS also suggested that there should be more community workers to assist families with other matters such as budgeting and household maintenance.
191. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7.
192. Department of Community Development, Submission No. 51 (27 June 2006) 2

Department does not access local knowledge or try to get to know Aboriginal families properly.[193]

Nonetheless, as stated by the Department of Indigenous Affairs, the Department of Community Development has the statutory responsibility for the welfare of children.[194] Because of this responsibility and its provision of existing parenting programs, the Commission believes that the Department of Community Development should be one agency involved in the implementation of this recommendation. But it should not be the lead agency because the history of a negative relationship with Aboriginal people could significantly impact upon the effectiveness of these educational programs. Further, in its submission, the Department of Community Development discussed the importance of partnerships between government agencies. However, in the Commission's opinion the focus should be on partnerships between relevant government agencies and Aboriginal people. The Commission believes that the Department of Indigenous Affairs should be primarily responsible for the coordination of the development of these educational programs. The Department of Indigenous Affairs demonstrated the need for direct Aboriginal involvement in the development and implementation of these educational programs. For example, the Department suggested that Aboriginal medical services may be usefully employed in the provision of education programs with respect to parenting.[195]

In conclusion, the Commission wishes to stress that its recommendation is not designed to be prescriptive. Instead, the aim is to provide Aboriginal people with culturally appropriate educational programs with respect to their rights and responsibilities under Western Australian law and to inform and assist Aboriginal people. It is not suggested that participation in these programs should be compulsory.[196]

Recommendation 28

Education about parenting and discipline of children under Australian law

1. That the Western Australian government develop strategies to inform Aboriginal communities about their rights and responsibilities under Australian law in relation to the discipline of children, in particular to inform Aboriginal communities of their right to use physical correction that is reasonable in the circumstances.
2. That these educative strategies provide information to Aboriginal communities about effective alternative methods of discipline.
3. That these strategies be developed and presented by Aboriginal communities and organisations. In particular, Elders and other respected members, including members of a community justice group, should be involved in the design and delivery of any educational programs.
4. That the Western Australian government provide resources to the Department of Indigenous Affairs so that it can coordinate—in partnership with the Department of Community Development, Department of Health and the Department of Education and Training—the development of these programs.
5. That participation by Aboriginal people in these educational programs be voluntary.

193. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7. The Department of Community Development itself recognised its negative history with Aboriginal people: see Department of Community Development, Submission No. 51 (27 June 2006) 2
194. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 11.
195. Ibid.
196. The Parental Support and Responsibility Bill 2005 (WA) was referred to the Standing Committee on Legislation on 30 November 2005. This Bill provides, among other things, that a court can make a responsible parenting order and that this order will require the parent to attend particular courses or counselling. In response to a previous version of this bill, Tonia Brajcich of the Aboriginal Legal Service, has argued that it is preferable that the government provides the opportunity for Aboriginal families to improve parenting skills on a voluntary basis and in a culturally appropriate manner: see Brajcich T, 'The WA Proposed Parental Responsibility Contracts and Orders: An analysis of their impact on Indigenous families', (2004) *Indigenous Law Bulletin* 5(30) 11, 12.

Bail

When a person is charged with a criminal offence under Australian law a decision is made whether he or she will be released into the community on bail or remanded in custody until the charge is finalised. This decision can be made, prior to the first appearance in court, by an authorised officer.[1] The factors which are relevant to the decision as to whether an accused should be released on bail are set out in the *Bail Act 1982* (WA).[2] The main purposes of bail are to ensure that accused people attend court and that they do not commit further offences. However, these factors are balanced with the need to ensure that accused people (who are presumed innocent) are not deprived of their liberty without good reason.[3] If an accused is released on bail he or she must enter into a bail undertaking, which is a promise to appear in a particular court on a specified day and time. Conditions may be imposed upon accused people while they are subject to bail to make sure they attend court and refrain from offending.[4]

The Problems in Relation to Bail for Aboriginal people

It has been recognised for some time that Aboriginal people encounter problems with respect to bail. Statistics indicate that Aboriginal people are more likely to be refused bail and if bail is granted they are more likely to be unable to meet the conditions that have been imposed.[5] The Commission observed in its Discussion Paper that the level of over-representation of Aboriginal people in prison, regardless of whether they are sentenced or on remand, is unacceptable.[6] The Commission has considered alternative bail options for Aboriginal people and endeavoured to remove some of the disadvantages experienced by Aboriginal people with respect to bail.

Sureties

In some cases an accused can only be released on bail if he or she can find a person to act as a surety. A surety is a person who enters into an undertaking (promise) to forfeit a specified sum of money if the accused does not appear in court at the required time. It has been widely acknowledged that many Aboriginal people are unable to obtain surety bail because family members and friends often do not have sufficient assets.[7]

Responsible person as an alternative to surety bail

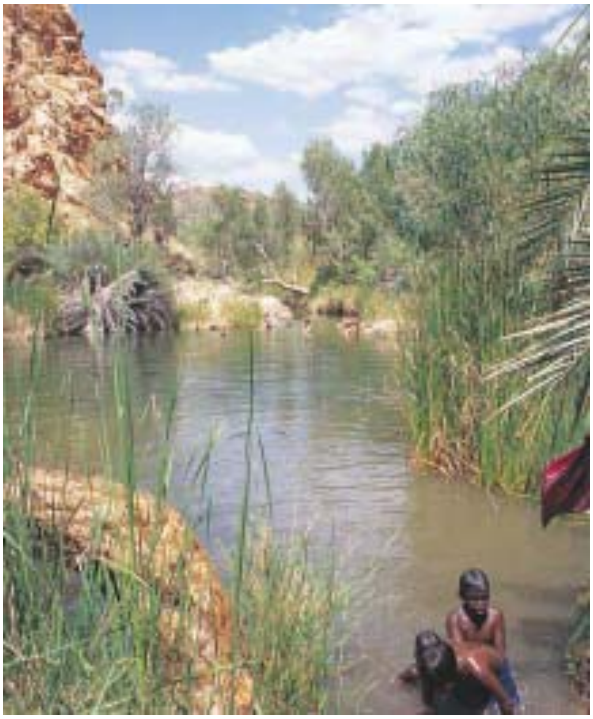
In its Discussion Paper the Commission argued that the disproportionate impact of surety conditions upon the ability of Aboriginal people to be released on bail needs to be addressed.[8] When considering possible alternatives the Commission noted reasons underlying the failure of some Aboriginal people to attend court. These included: lack of transport; poor literacy skills and language barriers which prevent some Aboriginal people from fully understanding their obligations concerning bail; and a general sense of alienation from the criminal justice system.[9]

The Commission proposed, as a viable alternative to surety bail for adults, that an accused can be released on bail if a responsible person enters into an undertaking promising to ensure that the accused attends court as

1. Under the *Bail Act 1982* (WA), an authorised officer is a police officer, justice of the peace or, in the case of a child, an authorised community services officer. An authorised community services officer may be the Chief Executive Officer (Justice) or his or her delegate, a registrar of the Children's Court or the superintendent of a detention centre. See *Bail Act 1982* (WA) s 3 and Sch 1, Pt A, cl 1.
2. For a discussion of the criteria for determining release on bail in Western Australia, see *Bail Act 1982* (WA) Sch 1; LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 190.
3. Victorian Law Reform Commission (VLRC), *Review of the Bail Act: Consultation Paper* (November 2005) 10.
4. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 190.
5. Ibid 191.
6. Ibid.
7. LRCWA, Project No. 94, *Thematic Summary of Consultations – Manguri,* 4 November 2002, 5; Auditor-General of Western Australia, *Waiting for Justice: Bail and Prisoners on Remand: Performance Examination,* Report No. 6 (October 1997) 31; LRCWA, *Bail,* Final Report (March 1979) 5; Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 48; Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [16.16].
8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 191.
9. Ibid 192.

required.[10] The benefit of this option for Aboriginal adults is that it would allow a respected member of the accused's community to provide an assurance to the court that he or she would support the accused while on bail and provide assistance in attending court. For example, assume that an Aboriginal person has previously failed to attend court because of a lack of available transport. In such a case, a promise by a respected member of the person's community that he or she would personally drive the accused to court may be sufficient to satisfy the decision-maker that bail should be granted.

In its Discussion Paper the Commission acknowledged that, in contrast to a surety, there would be no financial incentive for the responsible person to ensure the accused person's attendance.[11] The Western Australia Police argued in its submission that further consideration of this proposal is required because of the absence of any financial penalty for a responsible person if he or she fails to ensure that the accused attends court.[12] However, the Commission explained in its Discussion Paper that Aboriginal Elders and other respected persons would be likely to perform this role effectively because of social and cultural duty.[13] Further, the Commission concluded that the effectiveness of this proposal could be strengthened by providing that the judicial officer or authorised officer should determine the suitability of any proposed responsible person. The person deciding the suitability of the responsible person would need to be satisfied that the proposed person had sufficient connection with and influence over the accused.[14] The Commission maintains its view that appropriate Aboriginal Elders and other respected persons would undertake this role in a reliable manner. On the other hand, it needs to be stressed that the Commission is not suggesting that the responsible person option would be appropriate for all cases where a surety would otherwise be required. Some offences are too serious to warrant anything less than a significant surety. But there are cases where an accused may be required to find a surety (such as where an accused has previously breached bail on a number of occasions) and the alternative of a responsible person may be sufficient. This is especially relevant for Aboriginal people who often breach bail for reasons other than a deliberate attempt to avoid responsibility for the offence. If the decision-maker is satisfied that the proposed responsible person is in a position to positively influence the accused or assist the accused to attend court then the option of a responsible person (in lieu of a surety) is entirely appropriate.



The Commission has recommended the establishment of community justice groups[15] and suggested that one potential role for community justice groups could be to supervise and support Aboriginal people while they are on bail.[16] A member of a community justice group could act as the responsible person where appropriate. Other conditions could also be imposed that would allow an accused to undergo programs that have been developed by the community justice group, including programs that aim to strengthen Aboriginal customary law such as cultural or bush trips or family healing centres.[17]

10. Ibid 193, Proposal 23. The Commission also noted that a responsible person who signs an undertaking should have the same powers and responsibilities as a surety. In particular, a responsible person should have the power to apprehend the accused or notify police when there are reasonable grounds for believing that the accused has breached a condition of bail or is unlikely to comply with bail.
11. Ibid 192.
12. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 7–8.
13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 192.
14. Ibid 193, Proposal 23.
15. See Recommendation 17, above pp 112–13.
16. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 193.
17. Under cl 2(1), Pt D, Sch 1 of the *Bail Act 1982* (WA) the authorised officer or judicial officer can impose conditions on the accused as to his or her conduct while on bail or in relation to where the accused lives in order to ensure that he or she attends court and does not commit any offence or endanger any person or property. In Geraldton the Commission was told that magistrates in the region used the *Bail Act 1982* (WA) to 'send Aboriginal people on bush programs for alcohol related problems'. See LRCWA, Project No. 94, *Thematic Summary of Consultations – Geraldton,* 26–27 May 2003, 14.

The Department of Corrective Services argued that the effectiveness of the Commission's proposal for bail to a responsible person will be *dependent* upon the establishment of community justice groups.[18] The Commission is of the view that community justice groups will add to the effectiveness of this proposal (because there will be a recognised group of Aboriginal Elders and respected persons in a particular community) but the proposal is not dependent upon the existence of a community justice group. It is a matter for the decision-maker to determine in each case whether the suggested responsible person is suitable. The Department suggested that the viability of this proposal is also dependent upon the availability of appropriate people to undertake the role of a responsible person.[19] Therefore, some people will be disadvantaged if there is no suitable responsible person. Of course, an accused will be disadvantaged if he or she cannot find a suitable responsible person, but accused people are currently disadvantaged if they cannot find a suitable surety and for Aboriginal people this is often the case. The Commission's aim is to provide a broader range of bail options for Aboriginal people.

Importantly, the Department of Corrective Services observed in its submission that there is a risk of net-widening with this proposal.[20] In other words, if courts and police impose a condition that a responsible person is required—in circumstances where, under the current law, personal bail would have been imposed—then there may be more accused people in custody because they cannot locate a suitable responsible person. The Commission agrees that net-widening is a risk if the underlying purpose of the proposal is misinterpreted. Accordingly, the Commission has included in its final recommendation that the *Bail Act* must provide that the responsible person condition cannot be used where a personal undertaking would be appropriate. The option of a responsible person should be understood as an alternative to surety bail and not an alternative to a personal bail undertaking.

The Commission concluded in its Discussion Paper that there is no reason to limit the responsible person option to Aboriginal people. There are other people who may not be in a position to obtain a surety.[21] The Commission has received submissions supporting this proposal[22] and recommends that the *Bail Act* provide for the option of bail to be granted for adults on condition that a responsible person enters into an undertaking.

Recommendation 29

Responsible person bail for adults

1. That Clause 1(2) of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to include, as a possible condition of bail, that a responsible person undertakes in writing in the prescribed form to ensure that the accused complies with any requirement of his or her bail undertaking.

2. That Clause 1(2) of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to provide that the authorised officer or judicial officer must be satisfied that the proposed responsible person is suitable.

3. That Clause 1(2) of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to provide that the condition of bail to a responsible person can only be used in circumstances that would, in the absence of the responsible person option, require a surety.

The financial position of the surety

The rationale behind a surety undertaking is that when a surety is liable to lose a significant amount of money if the accused does not appear in court, then the surety will do everything possible to make certain that the accused attends court when required. The Commission concluded in its Discussion Paper that the amount which a surety is liable to lose, relative to his or her financial means, is therefore relevant and should be taken into account.[23] In Western Australia, a judicial officer, a police officer, or other authorised officer has discretion in setting the amount of a surety. Taking into account

18. Department of Corrective Services (WA), Submission No. 31 (May 2006) 7.
19. Ibid.
20. Ibid.
21. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 193. In its submission the Office of the Director of Public Prosecutions expressed support for Proposal 23 and noted that it would be of assistance to all people: see Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3.
22. Department of Corrective Services (WA), Submission No. 31 (May 2006) 6; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.
23. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 193.

that many Aboriginal families do not have extensive assets, the Commission proposed in its Discussion Paper that when exercising his or her discretion, the judicial officer or other authorised officer should consider the financial means of any proposed surety.[24] Again the Commission did not limit this proposal to Aboriginal people because there are obviously other people whose family and friends may have limited financial means. The Commission has received widespread support for this proposal.[25] The Law Society expressed its support on the grounds of 'fairness and equity'.[26] The Aboriginal Legal Service (ALS) affirmed in its submission that sureties are often set far too high for Aboriginal accused bearing in mind that many Aboriginal people only receive social security.[27] Similarly, the Department of Corrective Services agreed that Aboriginal people often find it difficult to find a surety because their family and friends have limited financial means.[28]

The Chief Magistrate stated in his submission that he had two concerns with the Commission's proposal. First, he submitted that the surety amount is generally determined without reference to any proposed surety and that when a surety is being approved (administratively) it would not be appropriate for the court officer to change the amount set by the court.[29] The Commission is not recommending that the surety amount should be altered via administrative procedures. The Commission agrees that the discretion as to the amount of the surety must remain with the judicial officer, police officer or other authorised officer who is responsible for deciding the bail terms. Certainly, if an accused does not put forward a possible surety or indicate to the court the financial means of any likely surety, it will be impossible for the decision-maker to take into account the financial means of any proposed surety. But there may be cases where a family member or friend of an accused has indicated a willingness to undertake the role of a surety and therefore, in these cases, the financial means of that person can be considered.

The second concern stated by the Chief Magistrate was that the surety amount is currently determined 'on the basis of the amount that is considered necessary to ensure the accused appears'.[30] The Chief Magistrate suggested that an accused person who has been charged with selling drugs would normally require a surety amount of $50,000. He argued that reducing this amount to say $1,000 would be inappropriate and that the seriousness of the offence and the likelihood of failing to appear must be the most important considerations. The Commission agrees that these two factors are extremely important. However, the Commission's proposal enables the decision-maker to weigh up all relevant factors when setting the amount of the surety. The financial means of any proposed surety is just one of many factors to be considered. The Commission still considers that the amount necessary to ensure that the accused appears in court may differ according to the means of the surety. A surety amount of $1,000 for a person with limited financial means may be a sufficient incentive for the surety to do everything possible to ensure that the accused attends court when required. However, the same amount for a millionaire may not be sufficient to ensure that the surety complies with his or her obligations. The Commission agrees—as submitted by the Office of the Director of Public Prosecutions (DPP)—that the surety amount must remain at a level that is adequate to provide an incentive for the surety to ensure the accused attends court.[31]

Recommendation 30

Financial circumstances of the surety

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.

24. Ibid, Proposal 24. Since the completion of the Commission's Discussion Paper, VLRC has published a consultation paper in relation to bail. It was submitted to the VLRC that the process for setting a surety is discriminatory because the financial means of the surety are not taken into account: see VLRC, *Review of the Bail Act: Consultation Paper* (November 2005) 96.
25. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 7; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 6; Law Society of Western Australia, Submission No. 36 (16 May 2006) 5; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.
26. Law Society of Western Australia, Submission No. 36 (16 May 2006) 5.
27. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 6.
28. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 7.
29. Chief Magistrate Heath, Magistrates Court, Submission No. 10 (21 March 2006) 2.
30. Ibid.
31. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3. It has been submitted to the VLRC that if the decision-maker modified the surety amount to reflect the financial means of the surety then the incentive for the surety to ensure that the accused attends court may be the same even though the actual amount of the surety is less than it would otherwise be for someone else with more significant assets or income: see VLRC, *Review of the Bail Act: Consultation Paper* (November 2005) 96.

Bail considerations for children

In its Discussion Paper the Commission examined the situation with respect to children and bail.[32] Although children have a greater right to bail than adults, in practice this is not always the case. The *Bail Act* provides that a child under the age of 17 years can only be released on bail if a responsible person signs an undertaking.[33] It has been observed that this requirement can discriminate against children because if a child cannot find a responsible person they will be remanded in custody.[34] This is even the case where the offence is only of a minor nature. Aboriginal children may not be able to meet the requirement for a responsible person to sign bail when they are arrested some distance from their home or when family members are unable to attend the place of arrest due to socio-economic problems such as lack of transport. In its Discussion Paper the Commission emphasised that one way of alleviating this problem is for police officers to make greater use of notices to attend court instead of arrest and the subsequent need to release on bail.[35] The Commission understands that the Department of the Attorney General is in the process of preparing amendments to the *Bail Act* that will allow a judicial officer to dispense with the need for an accused to enter into a bail undertaking for minor offences.[36] The Commission is of the view that this option will be very useful for children who are charged with minor offending and there is no demonstrated need for a responsible person.

Telephone applications

Aboriginal children from regional and remote areas are particularly disadvantaged if they are not released on bail. Any child who is detained in custody must be brought to Perth because currently there are no juvenile detention facilities outside the metropolitan area.[37] If bail is initially refused by a police officer, a Justice of the Peace or authorised community services officer (or conditions are set which cannot be met), the child will be remanded to Perth until the next available Children's Court date. Also it is important to highlight that adults from remote locations are also disadvantaged by a decision to refuse bail: they will be taken from their community to the nearest custodial facility. In its Discussion Paper the Commission 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. It was proposed that this application can only be made if the accused could not otherwise be brought before a court by 4.00 pm the following day.[38] The Commission observed that this proposal would be of particular benefit to Aboriginal people from remote and rural locations and would reduce the number of children being transported long distances to Perth in police custody.[39]

The Commission is aware that the Department of the Attorney General is considering amending the *Bail Act* to provide that when an accused is required to be brought before a judicial officer for the purpose of bail to be considered, he or she may attend via video or audio link.[40] These changes will be likely to alleviate, in many cases, the need for a telephone application (as proposed by the Commission). Nevertheless, there will still be some accused persons who cannot be brought before a judicial officer (either in person or by video or audio link) by 4.00 pm the day following their arrest, without being transported in custody to another location. This is particularly important for children in regional areas because they will have to be transported to Perth.

32. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 194.
33. *Bail Act 1982* (WA) Sch 1, Pt C, cl 2(2). It is possible for a 17-year-old to be released on his or her own personal undertaking provided that he or she is of sufficient maturity to live independently.
34. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 43.
35. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 194. See discussion under 'Police – Attending court without arrest', below pp 201–202.
36. Bail Amendment Bill 2006 (WA).
37. The Commission notes that the Western Australian government has committed to building juvenile remand institutions at Geraldton and Kalgoorlie. Even when these facilities are built there will still be a significant number of juveniles who will be taken long distances from their families and communities.
38. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 194, Proposal 25. A review of the *Bail Act* in 2001 similarly recommended that when an accused is dissatisfied with a bail decision he or she should be entitled to apply by telephone to a magistrate: see Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 32, 44. The Commission notes that telephone applications are available in South Australia and the Northern Territory: see VLRC, *Review of the Bail Act: Consultation Paper* (November 2005) 52.
39. It would also benefit accused people who are refused bail or unable to meet the conditions set in metropolitan areas when the accused has been arrested over a weekend. The DPP and the Department of Corrective Services both agreed, in their submissions, that this proposal would be particularly beneficial for children from remote and regional areas: see Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 8.
40. Bail Amendment Bill 2006 (WA).

The Department of Corrective Services, the DPP, the Law Council of Australia, and the Criminal Lawyers Association supported the Commission's proposal for telephone applications.[41] In the absence of any submissions opposing this proposal the Commission has concluded that it is appropriate to make a final recommendation. The Commission suggests that any administrative and procedural requirements to facilitate the implementation of this recommendation should be determined in consultation with the Department of the Attorney General and the Western Australia Police.[42]

Recommendation 31

Telephone applications for bail

That the *Bail Act 1982* (WA) be amended to provide that where an adult or child has been refused bail by an authorised police officer, justice of the peace or authorised community services officer or the accused 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 (either in person or by video or audio link) by 4.00 pm the following day.

Supervised bail facilities

The supervised bail program run by the Department of Corrective Services is designed to alleviate, where possible, injustice for those children who are unable to locate a responsible person. Where no responsible person can be located a supervised bail coordinator can act as the responsible person and the juvenile will reside at an approved location, usually a hostel.[43] In regional and remote locations the supervised bail program has operated in conjunction with at least four Aboriginal communities. According to the Department of Corrective Services, the programs in the Pilbara and the Kimberley are no longer operating and are currently under review.[44] There is presently one program operating in the Goldfields.[45] In its submission the Department of Corrective Services stated that it is 'currently working to identify and develop bail options for juveniles in regional areas'.[46] The Commission observed in its Discussion Paper that local non-custodial bail initiatives have the potential to prevent young Aboriginal people from cultural and community dislocation. Aboriginal people consulted by the Commission during this project indicated support for community-based bail facilities for children.[47]

In its Discussion Paper the Commission proposed that the Department of Corrective Services should continue to develop non-custodial bail facilities in rural and remote areas. The Commission further proposed that the Department should work in conjunction with any local community justice group when developing non-custodial bail facilities.[48] The Commission acknowledged that the Department would need to be satisfied that any community bail programs provide adequate and safe supervision of children. The Commission also observed that community justice groups will require sufficient resources and assistance from appropriate government departments to build capacity to provide programs for young people that address any safety issues.

The Western Australia Police strongly supported the Commission's proposal and emphasised that there are significant resource implications when a child is remanded

41. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 8; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.
42. The Commission notes that there is already a precedent for telephone applications (under the *Restraining Orders Act 1997* (WA). For example, s 17 of the *Restraining Orders Act 1997* provides that there must be at least one magistrate available at all times for telephone applications and ss 19 & 21 provide that telephone applications can be made and heard by telephone, fax, radio, video conference, electronic mail or other similar methods.
43. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 293.
44. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 9. Chief Magistrate Heath advised the Commission in his submission that the program at Yandeyarra community has ceased operation and he thought that it was no longer departmental policy to develop these types of facilities, see Chief Magistrate Heath, Magistrates Court, Submission No. 10 (21 March 2006) 2. The Banana Well program outside Broome and the Bell Springs program at Kununurra were withdrawn in 2004. In their background paper, Neil Morgan and Joanne Motteram stated that the Bell Springs program was closed 'due to on-going concerns regarding the level of supervision'. See Morgan & Motteram, ibid 293.
45. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 9.
46. Ibid.
47. LRCWA, Project No. 94, *Thematic Summary of Consultations –Warburton,* 3–4 March 2003, 6 & 10; *Pilbara,* 6–11 April 2003, 15; *Geraldton*, 26–27 May 2003, 14.
48. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 194–95, Proposal 26. The Mahoney Inquiry also recommended that 'specific attention be given to supporting the Supervised Bail program in regional areas': see Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [11.46].

Aboriginal people consulted by the Commission during this project indicated support for community-based bail facilities for children.

in custody because police are required to escort the young person to Perth.[49] The proposal was also supported by the Catholic Social Justice Council, the Department of Corrective Services, the DPP, the Law Council of Australia and the Criminal Lawyers Association.[50] The DPP did, however, submit that the proposal should be applicable to all children in remote and rural locations.[51] In response, the Commission highlights that its proposal is directed to the development of non-custodial bail facilities for Aboriginal children in conjunction with *Aboriginal* communities. If there is a demonstrated need for non-custodial bail facilities to be developed in other communities then this will need to be separately considered by the Department of Corrective Services. In this regard, the Commission emphasises that during the last financial year Aboriginal juveniles constituted 90 per cent of all children from regional areas who were remanded in custody.[52]

Recommendation 32

Non-custodial bail facilities for children in remote and regional locations

That the Department of Corrective Services 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 Corrective Services should work in conjunction with a local community justice group.

Aboriginal Customary Law and Bail

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.[53] In its Discussion Paper the Commission observed that these criteria (many of which focus on western concepts) have the potential to disadvantage Aboriginal people applying for bail.[54] 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.[55] For Aboriginal people assessment of their family, kin and community ties would be more appropriate. In some other Australian jurisdictions bail legislation specifically refers to aspects of Aboriginal culture.[56]

The *Bail Act* allows a judicial officer or an authorised officer to take into account any matters which he or she considers are relevant when deciding if an accused person should be released on bail.[57] Although the *Bail Act* is silent on Aboriginal customary law and other cultural issues, there is no reason why these matters could not be taken into account if relevant to the question of bail. However, the Commission expressed concern in its Discussion Paper that unless judicial

49. Office of Commissioner of Police, Submission No. 46 (7 June 2006) 8.
50. The Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 9; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 4; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.
51. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 4
52. Mikila Barry, Acting Executive Officer, Juvenile Custodial Services, the Department of Corrective Services, email (25 July 2006).
53. *Bail Act 1982* (WA) Sch 1, Pt C, cl 3(b).
54. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 196.
55. Ibid.
56. Ibid 196. For example, s 32(1)(a)(ia) of the *Bail Act 1978* (NSW) provides that when assessing the background and community ties of Aboriginal and Torres Strait Islander people, regard should be had to the person's connections to 'extended family and kinship and other traditional ties to place'. Also s 16(2)(e) of the *Bail Act 1980* (Qld) provides that when considering bail the court or the police officer shall have regard to, if the defendant is an Aboriginal person or a Torres Strait Islander, any submissions made by a representative of the community justice group in the defendant's community, including information about the defendant's relationship to his or her community, any cultural consideration or any considerations relating to programs and services for offenders in which the community justice group participates.
57. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1.

officers and authorised officers are directed to consider these issues, practices will remain varied and likely to disadvantage many Aboriginal people.[58] Injustice may occur if individual police, judicial officers or legal representatives are not fully aware of relevant Aboriginal customary law and cultural issues. Therefore, the Commission proposed that the *Bail Act* should be amended to provide that any relevant Aboriginal customary law or other cultural issues are to be taken into account when determining bail. For example, customary law or cultural factors may explain more fully an Aboriginal person's ties to his or her community. It may also provide a reason why an accused previously failed to attend court.[59] Aboriginal customary law processes may impact upon the choice of appropriate bail conditions.[60] In order to ensure that the decision-maker is reliably informed about customary law and cultural issues the Commission also proposed that a judicial officer or an authorised officer must take into account any submissions made by a member of a community justice group from the accused person's community.[61]

The response to the Commission's proposal

The Commission received conflicting responses to this proposal. The ALS and the Law Council of Australia fully supported the proposal.[62] The Law Society stated that it was concerned that the Commission's proposal did not specifically exclude unlawful customary law punishments.[63] The Commission does not consider that it is necessary to expressly exclude unlawful punishments because (as the Commission explains below) the current law in this state does not allow a judicial officer (or an authorised officer) to facilitate unlawful punishment. In other words, the decision-maker is not permitted to release an accused on bail for the purpose of undergoing unlawful traditional punishment.[64]

The manner of presenting information about customary law and culture

The Department of Corrective Services expressed in principle support for the Commission's proposal. At the same time it raised a number of specific concerns.[65] The Department questioned the ability of a court to access appropriate information about any relevant customary law or cultural matters, especially when the court is not sitting at the relevant Aboriginal community. The Commission is of the view that its recommendation for community justice groups will, once implemented, provide a suitable pool of Aboriginal people who can provide relevant evidence or information to a court about customary law or cultural issues. In addition, the Commission has recommended the appointment of Aboriginal liaison officers at all courts in Western Australia.[66] Aboriginal liaison officers would be able to assist a court in deciding who would be an appropriate person to present information in a particular case. Similarly, if an Aboriginal court has been established in a particular location, the Aboriginal justice officer could assist in this regard.[67]

The Commission does acknowledge, however, that in some cases it may be difficult to promptly determine who to call upon to provide the relevant information. From a practical perspective, if the circumstances of a case indicate that bail would be granted irrespective of any customary law factors it is highly unlikely that the accused would seek to present that information to the court (especially, if to do so would require an adjournment). On the other hand, if relevant customary law or other cultural information is likely to be the decisive factor (and therefore result in the court granting bail) it would be in the accused person's interest to have the matter adjourned until the appropriate person or persons could present the information.[68]

58. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 196.
59. See discussion under 'Funeral Attendance', below p 169.
60. In its submission the ALS provided an example. It was stated that bail conditions may sometimes stipulate that the accused must not be in a particular location. In some circumstances this would mean that the accused would be required to leave that location immediately. Because customary law prevents certain people from speaking to one another or being in each other's presence, it may not be possible for an accused to leave the community in the first available transport (for example, because the other person is also present in the vehicle): see Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7.
61. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 196–97, Proposal 27.
62. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7; Law Council of Australia, Submission No. 41 (29 May 2006) 13. The Criminal Lawyers Association also indicated its support for this proposal: see Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.
63. Law Society of Western Australia, Submission No. 36 (16 May 2006) 5.
64. See discussion under 'Traditional Punishment and bail', below, p 170.
65. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 9. One issue raised by the Department of Corrective Services was that Aboriginal people providing advice or information should be paid. The Commission stated in its Discussion Paper that Aboriginal Elders and other respected person who provide services within the criminal justice system or provide cultural advice to courts should be paid: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 139. See also Recommendation 17, above pp 112–13.
66. See Recommendation 127, below p 347.
67. See Recommendation 24, above p 136.
68. Pursuant to s 22 of the *Bail Act* a judicial officer or authorised officer may receive and consider information in whatever manner he or she see fit.

Conflict of interest

The Department of Corrective Services raised the issue of any potential conflicts of interest in circumstances where the person providing advice or information to the court is connected to the offender (or the victim). This issue has been raised in respect to community justice groups and other proposals that allow Aboriginal people to provide advice to criminal justice agencies.[69] The Commission agrees that it is important for any decision-maker to be aware of the relationship of the person providing information or advice to the offender and/or the victim. Therefore, the Commission has included in all relevant recommendations that an Elder, respected person or member of a community justice group must inform the decision-maker of his or her relationship with the accused and/or the victim. The Commission points out, however, that the presence of a potential conflict of interest should not preclude the information being presented or the decision-maker from relying upon it. The decision-maker will have to decide in the particular circumstances of each case what weight will be given to the relevant information.

Delays

The Chief Magistrate suggested in his submission that the Commission's proposal would cause delays in court. When discussing the Commission's proposal for customary law to be taken into account during sentencing proceedings, he argued that the requirement that the court *must* consider any relevant customary issues would create a positive obligation on the court to conduct its own investigations.[70] When formulating these proposals, the Commission did not intend that a judicial officer would be obliged in every case involving an Aboriginal accused to make its own inquiries about the possible relevance of customary law. In order to make this clear the Commission has recommended that the decision-maker must consider any *known* relevant Aboriginal customary law issues. Accordingly, before such issues can be taken into account it will need to be apparent on the facts presented or alternatively the accused, the prosecution or a member of a community justice group will need to present any relevant information. Importantly, it should be remembered that the Commission's recommendation does not remove the decision-maker's discretion with respect to the appropriate weight that should be given to any known customary law issues.

Cultural background

The DPP argued in its submission that the Commission's proposal should apply to all Western Australian cultural groups.[71] The Commission is of the view that there is some merit in this argument. Cultural factors for other groups in the community may well be relevant to bail. Therefore, the Commission has recommended that the *Bail Act* be amended to provide that the cultural background of any accused is a relevant factor.[72]

Recommendation 33

Cultural background as a relevant factor for bail

That Clause 3(b) Part C of Schedule 1 to the *Bail Act 1982* (WA) be amended to provide that the judicial officer or authorised officer shall have regard to the following matters, as well as to any others which he considers relevant,

(b) the character, previous convictions, antecedents, associations, home environment, family, social and cultural background, place of residence, and financial position of the accused.

Notwithstanding this new recommendation, the Commission considers that its original proposal is still necessary because it goes further than providing that the cultural background of an accused is a relevant factor for bail. The proposal included the role of community justice groups in providing information about customary law. Further, as stated above, the Commission is of the view that it is necessary to specifically recommend that Aboriginal customary law should be taken into account in order to ensure that relevant customary law issues are not overlooked and to ensure that these issues are presented in a reliable manner.

Therefore, it is possible for information about customary law to be presented in a variety of ways. In some cases it may be appropriate for information to be received in writing and in others it may be necessary for oral evidence to be presented.

69. See discussion under headings 'Evidence of Aboriginal customary law in sentencing', below p 183; 'Parole and Aboriginal customary law', below pp 221–22.
70. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 3.
71. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 4.
72. The Commission took a similar approach in its Discussion Paper with respect to sentencing: see Proposal 29.

Victim issues

The victim of an offence may be particularly concerned about the prospect of an accused being released in the community. This is especially relevant for sexual and violent offences.[73] The Victorian Law Reform Commission has recently commented that it is important that the interests and concerns of victims are taken into account during bail proceedings but, at the same time, it is necessary to recognise that an accused is presumed innocent.[74] Following the recent public debate about family violence and sexual abuse in Aboriginal communities, the Council of Australian Governments (COAG) has asked the Standing Committee of Attorneys-General (SCAG) to report 'on the extent to which bail provisions and enforcement take particular account of potential impacts on victims and witnesses in remote communities and to recommend any changes required'.[75]

The *Bail Act* provides that a judicial officer or authorised officer must consider, when deciding whether to release an accused on bail, the likelihood that the accused would endanger the safety of any person or interfere with any witnesses.[76] During bail proceedings it is also necessary for the decision-maker to ensure that any concerns or views of the victim can be taken into account when deciding whether to release the offender from custody.[77] For Aboriginal victims of violence and sexual abuse it may be difficult for them to provide information to a judicial officer or police officer about their concerns.[78] Where the accused and the victim both reside in a remote community the decision as to whether the accused should be released from custody may be further complicated. In this context it is important to acknowledge that any bail condition that prevents an accused from living in his or her home community may be problematic.[79] If an accused is required to leave his or her family, community and support structures this may have negative consequences on the wider community. At the same time the need to protect victims is of paramount importance. It is necessary therefore to balance all relevant factors. The Commission believes that its recommendation to allow members of a community justice group to provide submissions to a judicial officer or other authorised officer who is deciding the question of bail has the potential to assist the decision-maker in this regard. Therefore, the Commission has included in its recommendation that the judicial officer or authorised officer must take into account any submissions from a member of a community justice group in the victim's community.

Recommendation 34

The relevance of Aboriginal customary law and other cultural factors during bail proceedings

1. 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, where the accused is an Aboriginal person, to any known Aboriginal customary law or other cultural issues that are relevant to bail.[80]
2. That Clause 3 of Part C in Schedule 1 of the *Bail Act 1982* (WA) provide that, without limiting the manner by which information about Aboriginal customary law or other cultural 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[81] in the victim's community and/or the accused person's community.

73. VLRC, *Review of the Bail Act: Consultation Paper* (November 2005) 27.
74. Ibid.
75. Council of Australian Governments, Communiqué of meeting on 14 July 2006.
76. *Bail Act 1982* (WA) Sch 1, Part C, Cl 1(a).
77. *Victims of Crimes Act 1994* (WA) Sch 1, Guideline 10. Section 3 of this Act provides that public officers and bodies should apply the guidelines where relevant and s 2 provides that a public officer includes a judicial officer or a police officer. Guideline 6 also provides that a victim who has so requested should be kept informed about any bail applications.
78. For a detailed discussion about the reasons why Aboriginal women may be reluctant to report or discuss incidents of sexual abuse and violence: see discussion under 'Under-reporting of family violence and sexual abuse', Chapter Seven, below pp 282–86.
79. In *Clumpoint v Director of Public Prosecutions* [2005] QCA 43 (2 March 2005) the accused was required to leave his community as part of the bail conditions. During an application to vary that condition the Queensland Court of Appeal observed at [2] that this condition was particularly onerous because it 'deprives him of the companionship and support of his wife, his ability to be a father to his children, his employment and financial independence and the right to live in this own home'.
80. The *Bail Act 1982* (WA) should also be amended to insert a definition of an Aboriginal person to include a Torres Strait Islander person: see also Recommendation 4, above p 63.
81. A community justice group is defined as a community justice group as established under the *Aboriginal Communities Act 1979* (WA).

Given the importance of Aboriginal customary law to many Aboriginal people, cultural and customary law obligations may take precedence for them over the requirement to attend court.

Funeral attendance

In Western Australia it is an offence to fail to attend court, without reasonable cause, at the time and place specified. If an accused has been unable to attend court and fails to notify the court of the reason for non-attendance and subsequently fails to attend court as soon as practicable, he or she will also commit an offence.[82] During its consultations with Aboriginal people the Commission heard numerous comments about the importance of funeral attendance.[83] Given the importance of Aboriginal customary law to many Aboriginal people, cultural and customary law obligations may take precedence for them over the requirement to attend court.

The Commission observed in its Discussion Paper that Aboriginal people may be charged with an offence of breaching bail (when they miss court due to a funeral) because they do not tell the court the reason why they cannot attend and they do not later appear at court once the funeral ceremony is over.[84] The Commission concluded that this issue needs to be addressed through improved communication when Aboriginal people enter into their bail undertaking. The Commission therefore proposed that bail forms and notices be amended to include culturally appropriate educational material in relation to the obligations of bail including what accused people can do if they are unable to attend court.[85] It was also suggested by the Commission that members of community justice groups could support Aboriginal people who are on bail by providing assistance in notifying the court when an accused person is unable to attend court due to a funeral or other associated cultural ceremonies.

The Commission received considerable support for its proposal.[86] The ALS submitted that this proposal should also take into account the variety of Aboriginal languages spoken.[87] The Commission has included in its recommendation that, where possible, information should be provided in Aboriginal languages. The ALS also suggested that relevant information should be provided in oral as well as written form. The Commission's recommendations for the establishment of community justice groups and for the appointment of Aboriginal liaison officers in each court will assist in this regard. During a community meeting in Geraldton the Commission was told that Aboriginal people who enter into a surety undertaking also require additional information about their responsibilities and the consequences for them if the accused does not attend court.[88] The Commission agrees and has included sureties in its recommendation.

The Department of the Attorney General has advised the Commission that bail forms are currently being redeveloped as part of the drafting of the Bail Amendment Bill 2006.[89] The Department submitted that bail forms should be standard but that the Commission's objectives could be achieved by including additional pamphlets prepared by the Legal Aid

82. *Bail Act 1982* (WA) ss 51(1) & (2). The penalty for this offence is a fine up to $10,000 or up to three years imprisonment. The Commission understands that the Department of the Attorney General plans to amend ss 28 & 51 of the *Bail Act* and if these amendments are passed it will be an offence to fail to appear at the required time and place and it will be an offence to fail to subsequently appear as soon as practicable if the accused did not appear at the required time and place: Bail Amendment Bill 2006 (WA).
83. The importance of funerals in traditional Aboriginal societies was discussed in the Commission Discussion Paper: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 310. See also LRCWA, Project No. 94, *Thematic Summary of Consultations – Carnarvon,* 30–31 July 2003, 5; *Pilbara,* 6–11 April 2003, 13.
84. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 198.
85. Ibid 197–98, Proposal 28. In its Discussion Paper the Commission acknowledged that individual staff at the ALS endeavour to advise their clients of their obligations under bail. However, not all Aboriginal accused are represented by the ALS and some are not represented at all. The Commission also noted that the Mahoney Inquiry observed that many accused do not understand the bail system: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [16.23].
86. Marian Lester, Submission No. 18 (27 April 2006) 1; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 9; Department of the Attorney General, Submission No. 34 (11 May 2006) 6; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 4; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.
87. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7.
88. Submission received at LRCWA, Discussion Paper community consultation – Geraldton (3 April 2006).
89. Department of the Attorney General, Submission No. 34 (11 May 2006) 6.

Commission and the ALS or other appropriate bodies.[90] The Commission understands that it may be problematic for bail forms to be specifically tailored to different cultural groups and therefore, it has altered its recommendation to reflect this. On a similar note, the DPP argued that more effective information should be provided to other cultural groups that may also lack understanding of their obligations with respect to bail.[91] The Commission agrees and strongly encourages the Department of the Attorney General to provide resources for relevant organisations to develop culturally appropriate information for other ethnic groups in the community.

Recommendation 35

Improved bail and surety forms and notices

1. That bail and surety forms and notices (including the bail renewal notice handed to an accused after each court appearance) be provided in plain English and clearly set out the relevant obligations of the accused or the surety.
2. That the Department of the Attorney General provide resources to suitable Aboriginal organisations to prepare culturally appropriate educational material in relation to the obligations of an accused on bail and the obligations of a surety. This material should include what an accused person can do if he or she is unable to attend court.
3. That the culturally appropriate educational material include, where possible, information provided in Aboriginal languages.

Traditional punishment and bail

Concern was expressed during the Commission's consultations that when an Aboriginal person was charged with an offence under Australian law (and had also breached Aboriginal customary law) the person was taken away by police before there was an opportunity for traditional punishment to take place. As a consequence there may be disharmony in the Aboriginal community and family members may instead be liable to face punishment.[92] The preferable position according to many Aboriginal people is for the offender to face traditional punishment prior to being arrested and dealt with by Australian law.[93] The question of whether a police officer can or should allow traditional punishment to take place before an accused is arrested is discussed in the section on police.[94]

In the context of bail, the Commission has considered whether an accused person's wish to undergo traditional punishment can be legitimately taken into account after the accused has been arrested. The Commission examined the relevant law in Western Australia, including the provision in the *Bail Act* which states that when deciding whether an accused is to be released on bail it is necessary to consider if the accused needs to be held in custody for his or her own protection.[95] Case law indicates that although a court can recognise that traditional physical punishment may take place, it cannot release an accused on bail for the purpose of traditional punishment where that punishment would constitute an offence against Australian law. The Commission is of the view that if all relevant criteria under the *Bail Act* are met, a court should release an accused even when it is aware that traditional physical punishment may take place, provided that the proposed punishment is not unlawful under Australian law.[96]

It was also observed by the Commission in its Discussion Paper that where the proposed punishment under Aboriginal customary law is not unlawful under Australian law (such as community shaming or compensation) there is no reason why a court could not release the accused for the purpose of participating in that punishment or any other customary law process. In fact, the Commission's recommendation outlined above (the legislative direction for courts determining bail to consider Aboriginal customary law and other cultural issues) will encourage this to happen.[97]

90. Ibid.
91. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 4.
92. LRCWA, Project No. 94, *Thematic Summary of Consultations – Warburton,* 3–4 March 2003, 3–4; *Cosmo Newbery,* 6 March 2003, 19; *Pilbara,* 6–11 April 2003, 8 & 12; *Geraldton,* 26–27 May 2003, 14; *Wiluna,* 27 August 2003, 22; *Wuggubun,* 9–10 September 2003, 36; *Albany,* 18 November 2003, 16.
93. LRCWA, Project No. 94, *Thematic Summary of Consultations – Warburton,* 3-4 March 2003, 3–4*; Pilbara,* 6–11 April 2003, 8, 12; *Casuarina Prison,* 23 July 2003, 3; *Carnarvon,* 30–31 July 2003, 4; *Wuggubun,* 9–10 September 2003, 36.
94. See discussion under 'Police and Aboriginal Customary Law', below pp 192–94.
95. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1(b).
96. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 199.
97. The Commission also concluded in its Discussion Paper that it is not appropriate to impose conditions upon the nature of the customary law punishment where that punishment is otherwise lawful: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 201.

Sentencing

Sentencing is the stage of the criminal justice process where a court determines the appropriate penalty for an offence. A judicial officer, when deciding what penalty to impose, is required by law to take into account the statutory penalty for the offence, various sentencing principles and any other relevant factor. Each case is decided on an individual basis because the circumstances of each offence and each offender are different.[1] The main objectives of sentencing are punishment, deterrence, incapacitation, denouncement and rehabilitation.[2] Underlying these objectives are the overall aims to reduce crime and protect the community.[3] Sentencing principles require that any penalty should be proportionate to the seriousness of the offence, which is determined by taking into account the harm caused and the culpability of the offender.[4] In Western Australia, a number of sentencing principles are included in the *Sentencing Act 1995* (WA). For children relevant principles are contained in the *Young Offenders Act 1994* (WA).

The Cultural Background of the Offender

Sentencing principles apply equally irrespective of the cultural background of the offender. In other words, an Aboriginal person cannot be sentenced more leniently or more harshly just because he or she is Aboriginal.[5] This general proposition does not mean that the individual characteristics of a particular offender (including matters associated with his or her cultural background) cannot be taken into account by a court when determining the appropriate sentence for an offence. In *Neal v The Queen*[6] Brennan J stated that a sentencing court is required to consider 'all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group'.[7]

In some Australian jurisdictions sentencing legislation includes, as a relevant sentencing factor, the cultural background of the offender (both for adults and children).[8] In Western Australia, in relation to adults, the *Sentencing Act* is silent on the relevance of cultural factors. In comparison, s 46(2)(c) of the *Young Offenders Act* provides that when sentencing a young person the court is to take into account the cultural background of the offender.[9]

The relevance of Aboriginality to sentencing

In its Discussion Paper the Commission examined the manner in which courts have considered relevant facts associated with an offender's Aboriginal background.[10] Cases reveal that courts have taken into account various factors, such as social and economic disadvantages; alcohol and substance abuse (where that abuse is related to the environment in which the offender has

1. For further discussion about the importance of 'individualised justice', see discussion under 'General sentencing principles', Chapter One, above p 14.
2. For a more detailed discussion of these objectives and general sentencing principles, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 202–203.
3. New South Wales Law Reform Commission (NSWLRC), *Sentencing: Aboriginal Offenders,* Report No. 96 (2000) 29.
4. Ibid 29–30.
5. If an Aboriginal person was sentenced more leniently than a non-Aboriginal person merely because he or she was Aboriginal then this could arguably contravene the *Racial Discrimination Act 1975* (Cth): see *Rogers v Murray* (1989) 44 A Crim R 301. The NSWLRC stated that 'Aboriginality does not of itself mean that an offender will automatically receive special or lenient treatment, since it may have no bearing on the commission of the offence': see NSWLRC, *Sentencing: Aboriginal Offenders,* Report No. 96 (2000) 28.
6. (1982) 42 ALR 609.
7. Ibid 626. Martin Flynn has observed that this principle is an illustration of the 'substantive equality principle': Flynn M, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15. In Chapter One the Commission explains in detail what is meant by substantive equality. The Commission has concluded that the consideration of the cultural background of an offender (including relevant aspects of Aboriginal customary law) during sentencing proceedings is consistent with the substantive equality principle: see discussion under 'The relevance of Aboriginal customary law and culture', Chapter One, above pp 14–15.
8. *Crimes Act 1914* (Cth) s 16 (2)(m); *Crimes Act 1900* (ACT) s 342(i); *Penalties and Sentences Act 1992* (Qld) s 9(2)(o). Also in New Zealand s 8(i) of the *Sentencing Act 1992* (NZ) provides that a court must take into account the cultural background of the offender.
9. See also ss 6 (f) and 7(l) of the *Young Offenders Act 1994* (WA) which provide that courts are to ensure young people are dealt with in a manner that is culturally appropriate and that courts are to generally take into account the cultural background of a young person.
10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 203–208. See also Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', LRCWA, *Aboriginal Customary Laws: Background* Papers, Project No. 94 (January 2006) 1, 62–75.

grown up); the hardship of imprisonment for Aboriginal people who face the loss of connection to land, culture, family and community; the effects of past government policies that removed Aboriginal people from their families; and the views of the offender's Aboriginal community. The Commission found that most cases have focused on historical and socio-economic factors. However, there are a limited number of cases that have acknowledged the disadvantages experienced by Aboriginal people within the criminal justice system.[11]

In May 2005 the Western Australian Court of Criminal Appeal in *WO (A Child) v The State of Western Australia*[12] made important observations about the inadequacy of programs and services for Aboriginal children in regional areas. In addition the court took into account systemic bias within the justice system. The court considered whether 'all reasonable steps towards the rehabilitation of these children had been taken'.[13] In this regard, it was noted that there were fewer programs and services available for this purpose in regional areas. The court also took into account that the rate of referral to diversionary juvenile justice options is far less for Aboriginal children and, as a result, Aboriginal children come into contact with the formal criminal justice system at a much faster rate. Therefore, when making decisions based in part upon the offender's criminal record, it was held that a court must be careful to ensure that the cumulative effect of previous decisions is taken into account and that details of any past offending are closely examined.[14]

The Commission concluded that, although there is sufficient case law authority to allow matters associated with an offender's Aboriginal background to be taken into account during sentencing, the cases are not consistent in approach. Notwithstanding that some cases have taken a broader view of the types of factors that relate to an offender's Aboriginal background, the Commission was concerned that this approach may not be adopted by all courts, especially the lower courts that deal with Aboriginal people on a daily basis. For the purposes of consistency and to ensure that important issues associated with the Aboriginality of an offender are not overlooked, the Commission considered that there should be a legislative provision requiring courts to have regard to the cultural background of the offender. The Commission was also of the view that there is no reason to limit this provision only to Aboriginal people because matters associated with the cultural background of other groups in the community may also be relevant to sentencing.[15]

In its Discussion Paper the Commission noted that, unlike Western Australia, sentencing legislation in most other Australian jurisdictions includes comprehensive sentencing principles and an extensive list of relevant sentencing factors.[16] In 2000 the New South Wales Law Reform Commission (NSWLRC) observed that there had been a recent trend to include, for the purpose of guidance, the factors that should be taken into account in sentencing. Western Australia was noted as an exception to this general trend.[17] Recently, the Australian Law Reform Commission (ALRC) concluded that it is appropriate for federal sentencing legislation to provide for a wide-ranging (but not exhaustive) list of relevant sentencing factors.[18] The Commission noted that given the current structure of the *Sentencing Act*, the proposal that courts should take into account the cultural background of the offender, may appear out of place.[19] Where a similar provision appears in legislation in other jurisdictions it is contained in the list of other relevant sentencing factors. The Commission therefore recommends that the *Sentencing Act* should be amended to include a list of factors that are generally considered relevant to sentencing. This list should be for the purpose of guidance on the relevant principles, but it should not constitute an exhaustive list because flexibility is required in sentencing.

The Commission has received submissions supporting its proposal to include the cultural background of the

11. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 207. See for example, *Russell v The Queen* (1995) 84 A Crim R 386; *R v Scobie* [2003] SASC 85.
12. [2005] WASCA 94.
13. Ibid [57].
14. Ibid [65].
15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 208, Proposal 29.
16. Ibid 203. See *Crimes Act 1914* (Cth) s 16A; *Crimes Act 1900* (ACT) ss 341, 342; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A, 5; *Sentencing Act 1995* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) ss 10, 11; *Sentencing Act 1991* (Vic) s 5.
17. NSWLRC, *Sentencing: Aboriginal Offenders,* Report No. 96 (2000) 35.
18. ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [6.11]–[6.12].
19. The Law Society, in its submission, suggested that the Commission's proposal should be extended to the 'economic, social and cultural background of the offender': see Law Society of Western Australia, Submission No. 36 (16 May 2006) 5. The Commission agrees that other aspects of an offender's background may be relevant to sentencing; however, the Commission does not consider that it is appropriate to recommend in this project specific amendments with respect to other relevant sentencing factors.

The Commission firmly rejects the argument that permitting courts to take into account the cultural background of an offender is contrary to the principle of equality before the law.

offender as a relevant sentencing factor.[20] There have been no submissions opposing this proposal. However, the Commission is aware that in response to the recent debate about family violence and sexual abuse in Aboriginal communities, the federal government is considering removing the reference to the cultural background of an offender in s 16A of the *Crimes Act 1914* (Cth).[21] This approach is contrary to the recommendations contained in the recently published ALRC report which deals with the sentencing of federal offenders.[22] In this report, the ALRC emphasised that the consideration of factors relating to the background and circumstances of the offender are necessary to ensure that the principle of individualised justice is maintained.[23] The Law Council of Australia has argued that prohibiting courts from considering the cultural background of an offender will 'unnecessarily restrict the discretion of the court to consider matters which may be relevant, either to mitigate or aggravate, the seriousness of the offence'.[24]

In Chapter One, the Commission firmly rejects the argument that permitting courts to take into account the cultural background of an offender is contrary to the principle of equality before the law.[25] All accused, whether Aboriginal or not, are entitled to present relevant facts concerning their social, religious and family background and beliefs. The Law Council has asserted that the federal government's approach, rather than resulting in one-law-for-all, will in fact discriminate against Aboriginal people and other cultural groups.[26] The Commission considers it essential that all courts in Western Australia are directed to take into account any relevant matters connected with an offender's cultural background. Of course, the cultural background of an offender is just one of many relevant sentencing factors and courts will retain discretion as to the weight to be attached to any relevant matter in each case.

Recommendation 36

Cultural background of the offender as a relevant sentencing factor

1. That the *Sentencing Act 1995* (WA) include as a relevant sentencing factor the cultural background of the offender.
2. That the cultural background of the offender be included in a list of other relevant sentencing factors.

Imprisonment – A Sentence of Last Resort

Over-representation of Aboriginal people in custody

Despite the practice of sentencing courts taking into account relevant factors associated with the Aboriginality of an offender, 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 its Discussion Paper, the Commission observed that Western Australia has a 'long-established and continuing tradition of high rates of imprisonment'.[27]

20. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 10; Department of the Attorney General, Submission No. 34 (11 May 2006) 7; Law Society of Western Australia, Submission No. 36 (16 May 2006) 5; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.
21. Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities, *Safer Kids, Safer Communities* (26 June 2006), <http://www.atsia.gov.au/media/media06/4606_attach.aspx>.
22. ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [29.45].
23. Ibid [6.88].
24. The Law Council of Australia, *Recognition of Cultural Factors in Sentencing*, Submission to Council of Australian Governments (10 July 2006) 3.
25. See discussion under 'The relevance of Aboriginal customary law and culture', Chapter One, above pp 14–15.
26. The Law Council of Australia, *Recognition of Cultural Factors in Sentencing*, Submission to Council of Australian Governments (10 July 2006) 3.
27. Harding R, 'The Excessive Scale of Imprisonment in Western Australia: The systemic causes and some proposed solutions' (1992) 22 *University of Western Australia Law Review* 72, 73. The former Department of Justice stated that Western Australia 'has a justice system characterised by over use of imprisonment': see Department of Justice *Reform of Adult Justice in Western Australia* (2002) 6.

In addition, Western Australia has the highest rate of Aboriginal imprisonment in the nation.[28] Aboriginal people consulted by the Commission acknowledged that imprisonment is required for some offenders; however, many considered 'the current levels of mass incarceration as destructive of Aboriginal culture and law'.[29] The Commission has concluded that the issue of over-representation must be addressed both for the general welfare of Aboriginal people and to ensure that the criminal justice system does not further contribute to the destruction of Aboriginal culture and law.[30]

The Commission considered, in its Discussion Paper, the reasons for the high level of over-representation of Aboriginal people in custody.[31] The Commission recognises that there are a number of underlying factors that contribute to the over-representation of Aboriginal people in the criminal justice system. However, it is now widely acknowledged that part of the reason for the high levels of Aboriginal people in custody is the cumulative effect of what has been described as 'structural racism' and bias within the justice system.[32]

Principle that imprisonment should only be used as a last resort

In response to the disproportionate rate of Aboriginal imprisonment, the RCIADIC recommended that 'governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort'.[33] The principle that imprisonment should only be used as a last resort is reflected in the provisions of the *Sentencing Act* and the *Young Offenders Act*.[34] It has been observed that the principle that imprisonment should only be used as a last resort has particular relevance to Aboriginal people but it has not yet resulted in any significant reduction in the rate of Aboriginal imprisonment.[35]

The need for sentencing reform

The Commission acknowledges that sentencing reform of itself will not significantly reduce Aboriginal offending rates or the alienation felt by Aboriginal people from the criminal justice system.[36] As stated earlier in this chapter, any significant reduction in the high rates of Aboriginal imprisonment and detention will only be achieved through a comprehensive reform agenda: to address underlying factors that contribute to offending rates; to improve the way in which the criminal justice system operates for Aboriginal people; and to recognise and strengthen Aboriginal law and culture.[37]

In addition to recognising Aboriginal law and culture, many of the Commission's recommendations are aimed at reducing the rate of imprisonment of Aboriginal people in Western Australia. However, the Commission acknowledges that many of its recommendations will take time to implement and longer to have any significant impact on the rate of Aboriginal imprisonment. For example, the Commission considers that its recommendation for the establishment of community justice groups has the potential to reduce imprisonment rates in the long-term through the use of diversionary options and support for Aboriginal-controlled crime prevention and justice mechanisms. Many of the Commission's recommendations will remove disadvantages experienced by Aboriginal people in the criminal justice system and improve the way in which the system deals with Aboriginal people. Nevertheless, the Commission still considered that sentencing reform was necessary in order to ensure that courts would actively consider the situation of Aboriginal imprisonment in this state.

28. See discussion under 'Over-Representation in the Criminal Justice System', above pp 82–83.
29. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery', LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 241.
30. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 209.
31. Ibid 97–99.
32. Ibid 98–99. See Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No. 30 (November 2005) 5–6. According to the Mahoney Inquiry, the former Department of Justice acknowledged that systemic discrimination is one cause of the high rates of Indigenous over-representation: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.24].
33. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Recommendation 92.
34. *Sentencing Act 1995* (WA) ss 6(5), 35(1) & 39; *Young Offenders Act 1994* (WA) s 7(h). The Commission notes that most Australian jurisdictions contain legislative provisions to the effect that imprisonment must not be used by a court unless all other sentencing options are considered inappropriate: see *Crimes Act 1914* (Cth) s 17A; *Crimes Act 1900* (ACT) s 345; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 1997* (Tas) s 12; *Sentencing Act 1991* (Vic) s 5(4). Section 9(2) of the *Penalties and Sentences Act 1992* (Qld) provides that a court must have regard to, among other things, the principles that a 'sentence of imprisonment should only be imposed as a last resort' and that a 'sentence that allows the offender to stay in the community is preferable'.
35. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 210.
36. Haslio S, 'Aboriginal Sentencing Reform in Canada – Prospects for Success: Standing tall with both feet planted firmly in the air' (2000) 7(1) *Murdoch University Electronic Journal of Law* [7].
37. See discussion under 'Over-Representation in the Criminal Justice System' above, pp 82–83.

In its Discussion Paper, the Commission examined an approach adopted in Canada to deal with the over-representation of Indigenous people within the Canadian criminal justice system.[38] The *Criminal Code 1985* (Canada) was amended in 1996 to include the following principle:

> All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders*.[39]

The Supreme Court of Canada considered this section in *R v Glaude*[40] and held that it was introduced for the purpose of reducing the tragic over-representation of Aboriginal people in Canadian prisons. The court held that the section directs sentencing courts to undertake the sentencing process for Aboriginal offenders differently, 'in order to endeavour to achieve a truly fit and proper sentence in the particular case'.[41] Further, the court stated that the phrase 'particular attention to the circumstances of Aboriginal offenders' does not mean that judges are to pay 'more' attention when sentencing Aboriginal offenders.[42] Rather, the court held that judges should 'pay particular attention to the circumstances' of Aboriginal offenders 'because those circumstances are unique, and different' from the circumstances of non-Aboriginal offenders.[43]

The court also noted that imprisonment may be less appropriate or a less useful sanction for Aboriginal offenders.[44] Importantly, the court observed that the Canadian government's objective when enacting the section was directed at reducing the use of prison; increasing the use of restorative justice principles in sentencing; and utilising, where possible, Aboriginal community justice initiatives when sentencing Aboriginal offenders.[45] The court emphasised that this approach did not mean that Aboriginal people would escape prison for serious or violent offences.[46]

In its Discussion Paper the Commission considered whether to introduce a legislative provision in similar terms to the Canadian statute. The Commission took into account that the principle that imprisonment should only be used as a last resort is already reflected in legislation and that common law sentencing principles allow for issues connected with an offender's Aboriginality to be considered. The Commission examined the arguments for and against the introduction of a similar provision in Western Australia.[47] The Commission noted the lack of judicial decisions acknowledging the detrimental effect of practices within the criminal justice system upon the rate of imprisonment of Aboriginal people. It was concluded that this fact justified the introduction of a legislative provision which directs courts to consider the particular circumstances of Aboriginal people when deciding whether to impose a custodial sentence.[48]

The Commission emphasised that general sentencing principles would still apply and where an offence is particularly serious imprisonment would still be required. The objective of the Commission's proposal was to encourage courts to adopt an approach to the sentencing of Aboriginal people consistent with the approach by the Western Australian Court of Appeal in *WO (A Child) v The State of Western Australia.*[49] In this case the court considered research that indicated Aboriginal children were diverted from the formal criminal justice system less often than non-Aboriginal children. The court observed that:

> [T]he dramatic over-representation of Aboriginal youth in the criminal justice system, and particularly in detention, may be a consequence of a sequence of decisions, each of which appears relatively inconsequential at the time, but which compound and become serious retrospectively. Young Aborigines then quickly develop a 'profile' of characteristics which identify them as habitual offenders and quickly exhaust whatever diversionary alternatives exist.[50]

38. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 210–11.
39. *Criminal Code 1985* (Canada) s 718.2(e) (emphasis added).
40. [1999] 171 DLR (4th) 385.
41. Ibid [33] (Cory & Iacobucci JJ).
42. Ibid [37].
43. Ibid. Richard Edney argued that an 'examination of the life stories that make up RCIADIC and upon which the RCIADIC Recommendations are built, would reveal that the Indigenous experience of the criminal justice system is *unique* and *different*': see Edney R, 'The Retreat from Fernando and the Erasure of Indigenous Identity in Sentencing' (2006) 6(17) *Indigenous Law Bulletin* 8, 10.
44. Ibid.
45. Ibid [47]. At the same time as the introduction of s 718.2(e), other principles were included in the *Criminal Code,* such as the objective to 'provide reparations for harm done to victims or to the community and 'to promote a sense of responsibility in offenders': see *Criminal Code 1985* (Canada) ss 718 (e)–(f).
46. Ibid [80].
47. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 210–12.
48. Ibid 212, Proposal 30.
49. [2005] WASCA 94. For a discussion of the case, see 'The relevance of Aboriginality to sentencing', above pp 171–73.
50. Ibid [60].

The Court stated that as a consequence of these past decisions, children appearing before a court may incorrectly be assumed to be the more serious offenders and therefore the court held that it 'is critical that, at each stage of that process, the Court should examine, by reference to the detailed circumstances of the prior offences, whether those assumptions are justified'[51].

The Department of the Attorney General indicated in its submission that the Commission's proposal may be perceived as discriminatory but noted that affirmative action is permitted under the *Racial Discrimination Act 1975* (Cth).[52] In its Discussion Paper, the Commission referred to the potential argument that this proposal could be seen as discriminatory. The Commission concluded that a provision directing courts when considering imprisonment to take into account the particular circumstances of Aboriginal people would fall within the meaning of a special measure under s 8 of the *Racial Discrimination Act 1975* (Cth).[53] The Commission discusses in Chapter One that affirmative action or special measures are permitted in order to achieve substantive equality.[54]

The Commission received support for its proposal from the Department of Corrective Services, the Aboriginal Legal Service (ALS), the Law Council of Australia, and the Criminal Lawyers Association.[55] The Chief Magistrate responded to the Commission's proposal by stating that all sentencing courts currently have regard to the particular circumstances of Aboriginal people. As explained above, the Commission found that courts generally take into account socio-economic disadvantages experienced by Aboriginal people during sentencing decisions, but what is required is a consideration of the particular factors Aboriginal people face within the criminal justice system. The Chief Magistrate further submitted that it would be preferable to ensure that there are effective sentencing alternatives, in particular for Aboriginal people in remote areas.[56] The Commission agrees that there is currently a lack of effective sentencing and diversionary options for Aboriginal people and believes that some of its recommendations will address this issue.

The Law Society suggested an alternative recommendation that the relevant sentencing legislation should provide:

> When considering whether a term of imprisonment is appropriate for an Aboriginal offender, the court is to have regard to the particular circumstances of that offender, including his or her economic, social and cultural characteristics. In respect of offences other than serious offences against the person, consideration shall be given to methods of punishment other than confinement to prison.[57]

In the Commission's opinion the first part of the Law Society's suggestion essentially duplicates the Commission's recommendation that the cultural background of the offender is a relevant sentencing factor. This recommendation does not include the 'economic' or 'social' characteristics but, as noted above, the Commission recommends that the sentencing legislation in Western Australia should contain a list of all relevant sentencing factors for all offenders (which would necessarily include other aspects of an offender's background).

The second part of the Law Society's suggestion emphasises that imprisonment is usually required for serious offences against the person.[58] Similarly, the Chief Magistrate submitted that for repeat serious offenders there is no alternative to imprisonment.[59] The Commission agrees that imprisonment is generally

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51. Ibid [62]. These observations were repeated by Wheeler JA in *TL (A Child) v Western Australia* [2005] WASCA 173 [35]–[37]. See also discussion under 'Police – Diversion', below pp 197–205.
52. Department of the Attorney General, Submission No. 34 (11 May 2006) 7. The Department did not specify whether it supported or opposed the Commission's proposal.
53. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 211.
54. See discussion under 'Non-Discrimination and Equality Before the Law, Chapter One, above pp 8–12. Haslip mentioned, when discussing the Canadian provision, the argument that the provision could be seen as creating a 'two-tiered' justice system. She observed that when taking into account the gross overrepresentation of Aboriginal people in custody in Canada there may already be two systems of justice: see Haslip S, 'Aboriginal Sentencing Reform in Canada – Prospects for Success: Standing tall with both feet planted firmly in the air' (2000) 7(1) *Murdoch University Electronic Journal of Law* [42].
55. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 10; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 14–15; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.
56. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 3.
57. The Law Society of Western Australia, Submission No. 36 (16 May 2006) 5–6.
58. In its submission the Law Society referred to the International Labour Organisation *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169). The Law Society noted that article 10 provides that when imposing general law penalties upon Indigenous people 'account shall be taken of their economic, social and cultural characteristics'. The Law Society also noted that article 10 provides that 'preference shall be given to methods of punishment other than confinement in prison'. The Commission's believes that its recommendation takes into account this principle. The ILO Convention 169 is not binding upon Australia but it has been referred to by Australian judges: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 69–70.
59. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 3.

The Commission strongly encourages courts in Western Australia to consider more effective and appropriate options for Aboriginal offenders.

required for serious repeat offenders, especially with respect to violent and sexual offending. The Commission's recommendation—that when considering imprisonment courts should have regard to the particular circumstances of Aboriginal people—may be considered more relevant in sentencing for offences of a less serious nature. Generally, Aboriginal adults constitute about 40 per cent of the adult prison population.[60] In 2004, Aboriginal people constituted more than half of all adult prisoners in custody for property damage and good order offences. With respect to driving offences Aboriginal people made up more than 60 per cent of all prisoners in custody.[61]

The ALS strongly supported the Commission's proposal observing that:

> There is strong need for legislation compelling judges and magistrates to take into account the particular circumstances of Aboriginal and Torres Strait Islander people ... the Western Australian legal system repeatedly demonstrates the systemic racism that occurs when response to the particular circumstances of Aboriginal and Torres Strait Islander people is left to the discretion of officials.[62]

The ALS also highlighted that imprisonment has become a 'normal part of life' for many Aboriginal people and that this cycle must be broken.[63] The Commission is of the view that the mass imprisonment of Aboriginal people in this state demands immediate attention. It is accepted that there are various methods for reducing Aboriginal offending and imprisonment rates. But until these methods are funded and operational the lives of Aboriginal people, their families and communities will continue to be destroyed by the over-use of incarceration.

The Commission wishes to make it clear that its recommendation does not mean that Aboriginal offenders will not go to prison. Nor does it mean that Aboriginal people will be treated more leniently than non-Aboriginal people just on the basis of race. By making this recommendation, the Commission strongly encourages courts in Western Australia to consider more effective and appropriate options for Aboriginal offenders, such as those developed by an Aboriginal community or a community justice group. What the Commission is recommending is that when judicial officers are required to sentence Aboriginal people they turn their minds not just to the matters that are directly relevant to the individual circumstances of the offender but to the circumstances of Aboriginal people generally. These circumstances include over-representation of Aboriginal people in the criminal justice system. A judicial officer would need to be satisfied that the particular offender has experienced in some way the negative effects of systemic discrimination and disadvantage within the criminal justice system and the community.[64]

Recommendation 37

Taking into account the circumstances of Aboriginal people when considering the principle that imprisonment is a sentence of last resort

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 (or a term of detention) is appropriate the court is to have regard to the particular circumstances of Aboriginal people.[65]

60. See discussion under 'Over-Representation in the Criminal Justice System', above pp 82–83.
61. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005) 140–43.
62. The Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 15.
63. Ibid. The ALRC has noted that for Aboriginal people it is a 'widely held view that no stigma attaches to going to gaol': see ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No. 31 (1986) [535]. Similarly, John Nicholson has observed that some Aboriginal men consider prison as a 'rite of passage' and therefore it may be pointless to continue to impose penalties that neither deter nor rehabilitate Aboriginal offenders: see Nicholson J, 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 88. This issue was alluded to during the consultations at Albany where it was stated that some 'boys see prison as a rite of passage, although they are still scared when they arrive': see LRCWA, *Thematic Summary of Consultations – Albany,* 18 November 2003, 19.
64. For example, this approach may justify giving an Aboriginal offender from a remote area one further chance in the community because on every other time the offender was released in the community there was not support programs available to assist in rehabilitating the offender and this explains, in part, why this particular person continued to offend.
65. The *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) should also be amended to provide a definition of an Aboriginal person which includes a Torres Strait Islander person: see Recommendation 4, above p 63.

Aboriginal Customary Law and Sentencing

In its Discussion Paper the Commission observed that there is extensive judicial authority for the consideration of Aboriginal customary law when sentencing. This has been done on the basis that customary law is one factor associated with an offender's Aboriginal background. Most commonly, customary law has been considered when an offender is liable to traditional punishment. Courts have also, although far less often, considered aspects of Aboriginal customary law when considering the reason or explanation for an offence.[66]

Traditional punishment as mitigation

If an Aboriginal person commits an offence against Australian law and the conduct giving rise to the offence also violates Aboriginal customary law the person may be liable to face two punishments. From an examination of the relevant cases the Commission has identified the most important issues:

- Courts cannot condone or sanction the infliction of traditional punishment that may be unlawful under Australian law.[67] While judicial officers have recognised that unlawful traditional punishment has or will take place they have avoided incorporating the punishment into a sentencing order.[68]
- Cases where traditional punishment has not yet taken place are difficult because there is no guarantee that the punishment will in fact take place or will take place in the manner suggested to the sentencing court.[69]
- When taking into account the fact that an Aboriginal person has been or will be punished under customary law, courts have acknowledged the principle that a person should not be punished twice for an offence. Many Aboriginal people consulted by the Commission were very concerned about the issue of double punishment. The Commission is of the view that it is important for courts to bear in mind that Aboriginal people may face double punishment if they have done something which breaches both Aboriginal customary law and Australian law.[70]
- The Western Australian cases (in comparison to other jurisdictions) that have taken into account traditional punishment have generally involved physical punishments only.[71] However, in other jurisdictions various other forms of traditional punishment (such as banishment, community meetings and reprimands by Elders) have been taken into account as mitigation.[72] The Commission is of the view that its recommendations for the establishment of community justice groups and Aboriginal courts will encourage greater awareness and recognition of non-violent forms of customary law punishment.
- During its consultations the Commission was made aware of the need to consider whether traditional punishment was properly undertaken in accordance with Aboriginal customary law. The Commission was told that the infliction of traditional punishment is a regulated process, generally involving Elders, and should not be confused with alcohol-related revenge violence.[73] The Commission stated that in order to prevent any distortion of Aboriginal customary law,

66. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 208 & 212.
67. Ibid 213.
68. The Department of the Attorney General, in its submission, referred to unlawful traditional punishments and suggested that courts in Western Australia currently exercise their powers to allow traditional punishment to occur. The Department submitted that the recognition of traditional punishment should not be formally recognised in legislation because of the 'tension' between traditional punishments and Western Australian law: see Department of the Attorney General, Submission No. 34 (11 May 2006) 8. However, the Commission is not aware of any case where a court in this state has structured its sentencing decision to facilitate unlawful traditional punishment. On the contrary, courts have regularly emphasised that when taking into account the fact that the offender has been punished under customary law the court is not condoning the behaviour. It is the Commission's view that under the current law in this state, and pursuant to the Commission's recommendations, a court will not be permitted to make a decision to allow an offender to be released for the purpose of undergoing traditional punishment where that punishment would constitute an offence against Western Australian law.
69. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 213–14. In its submission the Law Council of Australia suggested that the recognition of traditional punishment during sentencing proceedings is only likely to be appropriate if the traditional punishment has occurred prior to the sentencing decision: see Law Council of Australia, Submission No. 41 (29 May 2006) 14. The Commission agrees that taking into account traditional punishment that has not yet taken place is problematic. Nonetheless, if reliable and convincing evidence is presented which satisfies the court that the punishment will in fact take place, then it may be appropriate for the court to take this into account when determining the appropriate penalty.
70. LRCWA, ibid 214.
71. Ibid 214–15.
72. Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', LRCWA, *Aboriginal Customary Laws: Background* Papers, Project No. 94 (January 2006) 1, 10–12.
73. See for example, LRCWA, Project No. 94, *Thematic Summary of Consultations – Warburton,* 3–4 March 2003, 5; *Laverton,* 6 March 2003, 14; *Pilbara,* 6–11 April 2003, 8. In *R v Gurruwiwi* (Unreported, Supreme Court of the Northern Territory, SCC 20510847, Thomas J, 12 January 2006) 4–6, the accused assaulted his mother who was being sworn at in an offensive manner by another person. Evidence was presented to the court to explain that under the relevant customary laws of the community, the accused was obliged to protect his mother from this type of abuse. In the past, this would have been done by throwing a woomera at his mother and upon the drawing of blood the person who had been swearing would feel guilty

The Commission has rejected the argument that Australian courts permit Aboriginal men to rely on Aboriginal customary law as an excuse for family violence and sexual abuse.

courts should be satisfied that the punishment was properly done in accordance with customary law.[74]

Aboriginal customary law as the reason or explanation for an offence

The Commission has found that courts are generally reluctant to take into account Aboriginal customary law as the reason or explanation for an offence.[75] In some cases, this is because of the manner in which the information about Aboriginal customary law was presented to the court. In other cases, despite arguments to the contrary, the court has rejected the contention that the offence was committed because of Aboriginal customary law. For example, in *Ashley v Materna*[76] the accused was convicted of assaulting his sister. It was argued that because the victim's husband had sworn at her in the presence of the accused there was a breach of customary law and the accused was allowed to punish his sister. This explanation was rejected by the court. There was no evidence that the assault was obligatory under customary law or that the offender would face any consequences if he had not 'punished' his sister. In addition, the offender was affected by alcohol at the time of the offence. Therefore, the court held that the conduct could not be properly categorised as Aboriginal customary law.[77]

Violent and sexual offences

In Chapter One, the Commission has considered and rejected the argument that Australian courts permit Aboriginal men to rely on Aboriginal customary law as an excuse for family violence and sexual abuse.[78] The Commission acknowledged that, in the past, courts have at times imposed more lenient penalties on Aboriginal people who commit violent offences against other Aboriginal people, especially women and children.[79] However, the Commission found that courts have generally taken the view that violent and sexual offences are too serious under Australian law for there to be any significant reduction in penalty.[80] Further, arguments that family violence is generally acceptable within Aboriginal communities or permitted under customary law have been firmly rejected by courts.[81]

For example, in *R v Daniel*[82] it was stated that Aboriginal people who commit violent offences against other members of their communities should not 'be accorded special treatment by the imposition of lighter sentences'.[83] In relation to the belief by some Aboriginal men that violence against Aboriginal women is acceptable under customary law, Kearney J in the Northern Territory Supreme Court stated that courts must endeavour to dispel the widespread belief that

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and stop the abusive language. In this case the accused was heavily intoxicated and hit his mother with a rock. The evidence presented by an Aboriginal woman in the community also established that the accused was not required to hit his mother and he would not have been traditionally punished if he had done nothing. The sentencing judge held that because the accused was affected by alcohol, the court could not attach any weight to the customary law considerations.

74. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 215. Recently, in the Northern Territory, Riley J held that an attack on the offender by the victim's family could not properly be described as customary law punishment. It was noted that there was no anthropological evidence or evidence from Elders and Riley J concluded that what had occurred was merely private revenge. Riley J stated that traditional payback is 'not mere vengeance' and that it is 'directed towards securing the peace and welfare of a particular community': *R v Joran* (Unreported, Supreme Court of the Northern Territory, SCC 20015521, Riley J, 19 July 2006) 3–4. See also *R v Egan* (Unreported, Supreme Court of the Northern Territory, SCC 20510088, Olsson AJ, 16 December 2005).
75. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 216. In two South Australian cases Aboriginal customary law has been accepted to explain offences of arson. In *R v Goldsmith* (1995) 65 SASR 373 the Aboriginal offender set fire to the house where his friend had died. The court took into account the offender's cultural belief that the lighting of the fire would allow the spirit of his friend to rest in peace. In *R v Shannon* (1991) 57 SASR 14 the court took into account as mitigation the fact that the offender lit the fire to protect himself from his father who had threatened the offender with the 'kadaitcha' men: see Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', LRCWA, *Aboriginal Customary Laws: Background* Papers, Project No. 94 (January 2006) 1, 13.
76. (Unreported, Supreme Court of the Northern Territory, No. JA1/1997, Bailey J, 21 August 1997).
77. Ibid 9.
78. See discussion under 'Customary law as an excuse for violence and abuse', Chapter One, above pp 23–26.
79. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 216.
80. Ibid 206–207.
81. Ibid 217.
82. [1998] 1 Qld R 499, 530–31 (Fitzgerald P).
83. Ibid 530–31 (Fitzgerald P).

such violence is acceptable.[84] The Western Australian Court of Criminal Appeal has acknowledged the need to protect Aboriginal women and that this will often mean that mitigatory circumstances such as socio-economic disadvantage will have less weight.[85]

The Commission has also considered the continuing debate about offences that arise from the practice of promised brides under traditional Aboriginal law. The Commission examined the two relevant Northern Territory cases where it has been argued that it is permissible to have sexual relations with young Aboriginal girls because of the practice of promised brides.[86] The Commission is of the view 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. [87]

The Commission strongly condemns the suggestion that family violence or sexual abuse against Aboriginal women and children is justified under Aboriginal customary law.[88] Nevertheless, the Commission recognises the potential for offenders to argue that such behaviour is acceptable under customary law. The Commission has received submissions emphasising the need to ensure that Aboriginal women and children are protected by Australian law.[89] For example, the Indigenous Women's Congress submitted that customary law should not be used as a defence or mitigating factor in relation to violent crimes.[90] In response, the Commission stresses that there has never been a customary law defence in Western Australia for violent or sexual offences. And further, the Commission has rejected the introduction of a customary law defence which could potentially apply to violent and sexual offences in order to ensure that Aboriginal women and children are fully protected by Australian law.[91]

The Commission emphasises that just because an offender argues that violence or sexual abuse is acceptable under customary law does not mean that the behaviour is acceptable nor does it mean that courts will accept these arguments. The Commission concluded in its Discussion Paper that the potential for some accused to argue that violence or sexual abuse is acceptable under customary law does not justify a ban on courts considering Aboriginal customary law issues.[92] 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.[93] In Chapter Four the Commission has recommended that the recognition of Aboriginal customary laws and practices in Western Australia must be consistent with international human rights standards and should be determined on a case-by-case basis. It has also recommended that within this process particular attention should be paid to the rights of women and children.[94]

The Commission is aware that at a meeting of the Council of Australian Governments (COAG) on 14 July 2006 all state and territory governments agreed to ensure, if necessary by legislative amendment, that Aboriginal customary law or cultural practices cannot be used to excuse, justify, authorise, require or lessen the seriousness of violence or sexual abuse.[95] In Chapter

84. *Amagula v White* (Unreported, Supreme Court of Northern Territory, No. JA 92/1997, Kearney J, 7 January 1998). In *Jardurin v The Queen* (1982) 44 ALR 424 the Federal Court in the Northern Territory rejected an argument that it was acceptable in Aboriginal communities for women to be beaten if they do not obey their husbands: see Law Council of Australia, *Recognition of Cultural Factors in Sentencing*, Submission to Council of Australian Governments (10 July 2006) 11.
85. *R v Woodley, Boonga and Charles* (1994) 76 A Crim R 302, 318. See also *Wiggin v The Queen* (Unreported Supreme Court of Western Australia, Court of Criminal Appeal, Sct No. 120 of 1990, 24 January 1991) where the court emphasised the need to protect Aboriginal women.
86. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217–218. See also discussion under 'Customary law as an excuse for violence and abuse', Chapter One, above pp 23–26.
87. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 218.
88. In its submission, the Law Council of Australia similarly argued that Aboriginal customary law is not, and cannot, be used to support violent or abusive conduct against women and children: see Law Council of Australia, Submission No. 41 (29 May 2006) 5.
89. The Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006); Indigenous Women's Congress, Submission No. 49 (15 June 2006)1; LRCWA, telephone conversation with Dr Kate Auty SM (16 March 2006); Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 4–5.
90. Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1.
91. See discussion under 'Defences Based on Aboriginal Customary Law', above pp 137–39.
92. The Aboriginal and Torres Strait Islander Social Justice Commissioner indicated that the Commission has adequately ensured that the 'recognition of customary law is consistent with the protection of the rights of Indigenous women and children': see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 1.
93. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 218–19.
94. See Recommendation 5, above p 69. The Commission's approach to the recognition of customary law during sentencing proceedings is consistent with the approach adopted by the ALRC in its recent report about the sentencing of federal offenders: see ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [29.71]. The Commission's approach is also supported by the views of the Aboriginal and Torres Strait Islander Social Justice Commissioner: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 8.
95. COAG meeting, 14 July 2006, <http://www.coag.gov.au/meetings/140706/index.htm#indigenous>.

If courts are not permitted to have reference to customary law, the important issue of double punishment will be overlooked.

One the Commission explains why it remains of the view that a ban on courts considering customary law is both unnecessary and inappropriate.[96] It is unnecessary because courts today, in particular in Western Australia, do not appear to accept the argument that Aboriginal law or culture justifies or authorises family violence or sexual abuse. It is inappropriate because there are other aspects of Aboriginal customary law that could be relevant to an offence of a violent nature and therefore lessen the court's view of the seriousness of that offence.[97] For example, an Aboriginal person may receive traditional punishment in his or her own community as a result of committing a violent offence. Courts have taken into account the fact that an offender has been punished already under customary law in order to ensure that the offender is not punished excessively for his or her conduct. The ALS emphasised in its submission that one of the main objectives in the recognition of customary law is to avoid double punishment for Aboriginal people who are punished under both Aboriginal customary law and Western Australian law.[98] If courts are not permitted to have reference to customary law, the important issue of double punishment will be overlooked. In addition, the potential for customary law punishment and processes to rehabilitate an offender could not be taken into account.

If the Western Australian government was to impose a legislative ban on Aboriginal customary law from being referred to during sentencing proceedings, the Commission strongly discourages adopting the wording used at the COAG meeting; that is, 'that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse'.[99] In particular, the words 'lessens the seriousness of violence' could prohibit courts from taking into account in mitigation the fact that an Aboriginal person, either male or female, has been traditionally punished in respect of a violent offence.[100] But as stated above, the Commission does not agree with any legislative intervention in this regard and strongly believes that its recommendations in this report will equip courts to reject any arguments that customary law justifies family violence or sexual abuse.[101]

Aboriginal customary law as an aggravating factor

Generally, a sentencing court is entitled to take into account aggravating factors subject to the overriding principle that the sentence imposed must be proportionate to the offence committed. An accused who has engaged in conduct that is permitted or required under Aboriginal customary law may be considered less blameworthy. On the other hand, where an accused has engaged in conduct that is prohibited under customary law it could mean that the court will consider the accused to be more blameworthy. For example, an Aboriginal offender may commit an offence of sexual assault against a person that the offender was prohibited from having contact with because of avoidance rules under customary law. While the offence of sexual assault would be viewed seriously by both Aboriginal people and non-Aboriginal people, this additional violation would make the offence more serious from the point of view of the offender's Aboriginal community.

96. See discussion under 'Recognition of customary law in sentencing', Chapter One, above pp 28–29.
97. The Commission notes that Aboriginal customary law may also aggravate the seriousness of an offence of violence but at the same time the fact that the offender has been traditionally punished may provide mitigation.
98. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 2.
99. COAG meeting, 14 July 2006, <http://www.coag.gov.au/meetings/140706/index.htm#indigenous>.
100. The Commission notes that in November 2005 the Sentencing Amendment (Aboriginal Customary Law) Bill was introduced into the Northern Territory Parliament (and subsequently defeated) to provide that a court 'must not have regard to any aspect of Aboriginal customary law in sentencing an offender'. This bill was introduced for the sole purpose of preventing Aboriginal men from hiding behind customary law for violent offences against women: see Northern Territory, *Parliamentary Debates,* Tenth Assembly, 30 November 2005, Carney, Second Reading Speech. However, if this bill had been passed the wording would have prevented a court from considering all aspects of customary law, including the fact that someone had been traditionally punished and positive non-violent customary law punishments and processes. It would also have prevented a court from considering aggravating aspects under customary law.
101. For example, the establishment of community justice groups with gender balance will enable courts to hear relevant evidence from Aboriginal women. The Commission's recommendations in relation to Aboriginal cultural awareness will assist judicial officers (and others working in the criminal justice system) to understand what is and what is not acceptable under Aboriginal law and culture. The provision of Aboriginal liaison officers and the establishment of Aboriginal courts will also ensure that the criminal justice system is better informed about all aspects of customary law.

Legislative recognition of Aboriginal customary law during sentencing proceedings

In its Discussion Paper the Commission concluded that although there is judicial authority to support the consideration of Aboriginal customary law during sentencing proceedings, there is no consistent approach in Western Australia. Further, the judicial recognition of Aboriginal customary law in Western Australia has generally been limited to physical punishments. The Commission considered that reform is necessary in Western Australia to ensure that Aboriginal customary law is viewed more broadly. For example, in *R v Goutjawuy*[102] the Northern Territory Supreme Court has recently taken into account non-violent traditional punishment. The accused was convicted of arson. During an argument with his wife he set fire to some clothes in his house, and the house and its contents were destroyed. The court was told that following the offence the accused had been placed in 'territorial asylum' by members of his community for seven months. The accused was required to comply with various conditions: he was constrained as to his whereabouts; prohibited from drinking and smoking; and required to spend time on his clan's homeland. It was explained that the purpose for sending the accused to his homeland was so that the accused could 'remain in neutral territory, for him to appreciate the law of his country and to reflect upon the seriousness of his offending'.[103] The leaders of the clan also erected a physical structure (referred to as a 'chamber of law'). The accused was required to spend about four hours each day over a period of three months attending this chamber and being instructed about traditional law. The court was informed that the accused was still required to complete the final stage of the 'chamber of law' and during the first two stages the Elders believed that the accused was committed to the process and remorseful for his offending behaviour. Southwood J took into account that the accused had undergone traditional punishment and as a result imposed a sentence of suspended imprisonment. One condition attached to the suspended sentence was that the accused was required to complete the third and final stage of the 'chamber of law'. The Commission believes that this case is a useful example to demonstrate how Aboriginal customary law can be used effectively in the rehabilitation of an offender and to encourage a more holistic approach to the recognition of customary law.

The Commission proposed in its Discussion Paper 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; whether the offender has been or will be dealt with under Aboriginal customary law; and the views of the Aboriginal community of the offender and the victim in relation to the offence or the appropriate sentence.[104] The Commission stressed that in all cases the court would retain discretion and determine the appropriate weight to be given to Aboriginal customary law depending upon the circumstances of the case.

The Chief Magistrate submitted that the Commission's proposal would cause delays in court. He argued that the requirement that the court *must* consider any relevant customary issues would create a positive obligation on the court to conduct its own investigations.[105] As similarly explained in the section on bail, it was not the Commission's intention that judicial officers would be obliged in every case involving an Aboriginal accused to make their own inquiries about the possible relevance of customary law. Therefore, the Commission has recommended that the court must consider any *known* relevant Aboriginal customary law issues.[106]

The Commission has received significant support for this proposal.[107] In particular, the Department of Corrective Services agreed that courts should take into account relevant aspects of customary law and that courts are able to balance Aboriginal customary law and international human rights standards that require the protection of women and children.[108]

102. (Unreported, Supreme Court of the Northern Territory, SCC 20407332, Southwood J, 15 July 2005).
103. Ibid, 3.
104. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 219–20, Proposal 31.
105. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 3.
106. See discussion under 'Bail – Personal circumstances of the accused', above pp 165–68. The Commission notes the ALRC has recently concluded that it is appropriate for sentencing legislation to provide that courts *must* consider any relevant sentencing factor where that factor is *known* to the court: see ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [6.23].
107. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 2 & 16; Law Society of Western Australia, Submission No. 36 (16 May 2006) 6; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.
108. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11.

For Aboriginal customary law to be properly taken into account as a relevant sentencing factor, it is vital that reliable evidence or information about customary law is presented.

Recommendation 38

Aboriginal customary law and sentencing

That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide that when sentencing an Aboriginal offender[109] a sentencing court must consider:

1. any known aspect of Aboriginal customary law that is relevant to the offence;
2. whether the offender has been or will be dealt with under Aboriginal customary law; and
3. the views of the Aboriginal community of the offender and/or the victim in relation to the offence or the appropriate sentence.

Evidence of Aboriginal customary law in sentencing

For Aboriginal customary law to be properly taken into account as a relevant sentencing factor, it is vital that reliable evidence or information about customary law is presented. As provided by s 15 of the *Sentencing Act 1995* (WA) a sentencing court 'may inform itself in any way it thinks fit'. It is not bound by the strict rules of evidence that apply to a court when conducting a trial. The Commission has recognised that there is a need to balance the requirement for reliable evidence about customary law and the flexible nature of sentencing proceedings.

The Commission was told during its consultations with Aboriginal people that false claims are sometimes 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.[110] Of particular concern are cases involving violent or sexual offences against Aboriginal women (and children) if the information about customary law is presented from the viewpoint of the male offender.[111] In making its recommendations the Commission is mindful of the need to ensure 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.[112] 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 concluded in its Discussion Paper 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.[113]

The Commission examined the legislative provisions in the Northern Territory and Queensland that deal with the reception of information about Aboriginal customary law for sentencing purposes.[114] The Commission proposed that there should be a legislative provision in

109. The *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) should also be amended to insert a definition of an Aboriginal person to include a Torres Strait Islander person: See Recommendation 4, above p 63.
110. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 221.
111. Ibid 222. See also Indigenous Women's Congress, consultation (28 March 2006).
112. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 221.
113. Ibid 222–23. The Department of Corrective Services expressly agreed with the Commission's conclusion that information about customary law should not be presented solely from defence counsel: see Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11.
114. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 223. Following the legislative amendment in the Northern Territory the Commission notes that the Northern Territory Supreme Court took into account, after receiving affidavits from Elders in the offender's community and after hearing oral evidence from Elders belonging to the victim's family, that an offender had faced severe traditional punishment: see *R v Anthony* (Unreported, Supreme Court of the Northern Territory, SCC 20326538, Southwood J, 21 December 2005). The Commission also notes that s 9C of the *Criminal Law (Sentencing) Act 1988* (SA) was inserted in December 2005 to provide for sentencing conferences for Aboriginal defendants and that the views expressed during these conferences (which may include the views of Aboriginal Elders) can be taken into account by the sentencing court.

Western Australia to promote more reliable and balanced methods of presenting evidence about customary law to a sentencing court. The Commission's proposal provided that a sentencing court must have regard to any submissions made by a representative of a community justice group, or by an Elder or a respected member of the Aboriginal community of the offender or the victim. It was further proposed that submissions could be made orally or in writing on the application of the accused, the prosecution or a community justice group. The sentencing court must allow the other party a reasonable opportunity to respond to the submissions if requested.[115]

The Commission has concluded, throughout this Report, that whenever an Elder, a respected person or a member of a community justice group is providing information or evidence that person should disclose his or her relationship to the offender or the victim. The presence of a relationship may not necessarily weaken the relevance of the information put forward but it is important that whoever is relying on the information is appraised of any potential conflicts of interest. In relation to community justice groups, there will be an equal number of members from all relevant family and social groupings in the community. Therefore, if necessary, a court would be able to request evidence or information from a member of the community justice group that comes from a different family group to the offender (or the victim).

Numerous submissions agreed with the Commission's proposal to allow information or evidence in relation to customary law to be presented by Aboriginal community members.[116] The Department of the Attorney General suggested, while agreeing with the Commission's proposal, that any submission from community members should only be presented to the court with the agreement of the victim. The Commission does not agree with this proposition because victims do not currently have the right to veto what information is presented to a sentencing court. By providing that the court must consider any submissions made by an appropriate member of the victim's community, the Commission's recommendation ensures that the views of the victim can be taken into account.

Some submissions indicated that the practical implementation of the Commission's proposal may cause delays.[117] For instance, Aboriginal people may not be able to respond to a request from the court to provide information during Aboriginal law ceremonial times.[118] The Commission is of the view that where Aboriginal customary law is extremely important to the case, the interests of justice would necessarily require that the matter be adjourned for the relevant information to be presented. While any delays are regrettable, the Commission remains of the view that it is essential that courts are accurately informed about Aboriginal law and culture.[119]

Recommendation 39

Evidence of Aboriginal customary law during sentencing proceedings

That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide:

1. That when sentencing an Aboriginal person the court must have regard to any submissions made by a member of a community justice group,[120] an Elder and/or respected member of any Aboriginal community to which the offender and/or the victim belong.
2. Submissions for the purpose of this section may be made orally or in writing on the application of the accused, the prosecution or a community justice group. The court sentencing the offender must allow the other party (or parties) a reasonable opportunity to respond to the submissions if requested.
3. That if an Elder, respected person or member of a community justice group provides information to the court then that person must advise the court of any relationship to the offender and/or the victim.

115. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 224, Proposal 32
116. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11; Department of the Attorney General, Submission No. 34 (11 May 2006) 8; Law Society of Western Australia, Submission No. 36 (16 May 2006) 7; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3. In its submission the Law Society suggested an alternative way of drafting the recommendation. The Commission agrees with the suggestion because it takes into account the fact that the court may receive submissions from more than one person and that the offender and the victim may both come from the same community.
117. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11; Department of the Attorney General, Submission No. 34 (11 May 2006) 8.
118. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11.
119. The Commission notes that sentencing may be delayed for a significant period of time in order to obtain pre-sentence, psychiatric and/or psychological reports.

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 more punitive sentencing options (such as imprisonment). The police generally control options that divert offenders from entering the criminal justice system: a choice is made whether to charge or to divert the alleged offender. The role of police in diversion is considered below.[121] In its Discussion Paper the Commission examined the existing diversionary options available to sentencing courts in Western Australia for Aboriginal offenders (both adults and juveniles).[122]

For children there are two main diversionary options: a referral to a juvenile justice team and court conferencing. The Commission noted in its Discussion Paper that the juvenile justice team option has been potentially improved by the provision for Aboriginal Elders and others to become more directly involved in the team process.[123] Nonetheless, 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 Commission believes that community justice groups could play an active role in diversionary justice options. The exact nature of that role will be dependent upon further community consultation and agreement. The Commission also concluded that 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).

Apart from victim-offender mediation run by the Department of Justice there are currently no formal conferencing options for adults in Western Australia. The Mahoney Inquiry recommended that the Western Australia Police and the Department of the Attorney General should establish a conferencing trial based on the juvenile justice team model for first time and minor young adult offenders. It was suggested that after considering the outcome this model could be expanded.[124] While conferencing or other restorative justice programs may be beneficial for all adult offenders, in the context of this project, the Commission wishes to indicate its supports for Aboriginal-controlled diversionary options for adult Aboriginal offenders. [125]

In order to facilitate the use of Aboriginal diversionary options, the Commission proposed that s 16 of the *Sentencing Act* be amended to allow a sentencing court to adjourn sentencing for up to 12 months (instead of the current maximum of six months).[126] The Commission was of the view that 12 months should allow sufficient time for Aboriginal diversionary programs to be decided upon and completed. Most submissions in respect of this proposal were supportive.[127] The Department of the Attorney General, in its submission, commented that extending the adjournment period for sentencing may make diversionary options 'a more viable alternative to prison'.[128] The Western Australia Police did not support this proposal because an extension to the period that a court can adjourn sentencing may not be in the best interests of the victim. It was explained that if an offender is not sentenced as soon as possible the victim may suffer additional stress.[129] However, pursuant to s 33A of the *Sentencing Act* a court can currently adjourn sentencing for up to two years if it imposes a presentence order (PSO).[130] A court can impose a PSO if it considers that a term of imprisonment is warranted. Therefore, sentencing can be adjourned for up to two years for more serious offences. The Commission's

120. A community justice group is defined as a community justice group as established under the *Aboriginal Communities Act 1979* (WA).
121. See discussion under 'Police – Diversion', below pp 197–205.
122. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 224-–25.
123. Ibid 226.
124. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) Recommendation 46 [7.337].
125. The Commission is of the view that existing and future diversionary programs (whether they are government-controlled or Aboriginal-controlled) should be monitored and evaluated: see Recommendation 51, above p 205.
126. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 227, Proposal 33.
127. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 12; Department of the Attorney General, Submission No. 34 (11 May 2006) 9; Law Council of Australia, Submission No. 41 (29 May 2006) 14.
128. Department of the Attorney General, Submission No. 34 (11 May 2006) 9.
129. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 8.
130. The Department of Corrective Services mentioned that the introduction of conditional suspended sentences in May 2006, means that a prescribed court can adjourn sentencing for up to two years: see Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 12. However, the Commission notes that pursuant to s 81 of the *Sentencing Act 1995* (WA) a conditional suspended sentence is in fact a sentence (which incidentally can be imposed for up to two years).

proposal will broaden the available options for diversion: a court will effectively be able to consider diversionary options in circumstances where a PSO is not appropriate.

It was also argued by the Western Australia Police that delays in sentencing may increase the possibility of 'retribution and violent payback' because it could be seen that 'justice has not been done'.[131] It is not clear whether the Western Australia Police are referring to Aboriginal traditional payback or retribution in a wider sense. Traditional punishment generally takes place irrespective of any decision by a criminal court. The Commission is of the view that the risk of general retribution would generally be greater where there is dissatisfaction about the actual penalty imposed rather than merely because the decision about penalty has been delayed. In any event, the Commission does not consider that the proper administration of justice should be affected by concerns that some members of the community, who do not agree with the court's decision, may act unlawfully. The Commission is of the view that it is appropriate to extend the time available for a court to consider whether an offender has successfully engaged in a diversionary option. This recommendation does not mean that every court will adjourn sentencing for 12 months: it means that a court can adjourn sentencing for up to 12 months in appropriate circumstances.

Recommendation 40

Adjournment of sentencing

That s 16(2) of the *Sentencing Act 1995* (WA) be amended to provide that:

> The sentencing of an offender must not be adjourned for more than 12 months after the offender is convicted.

Community-based sentencing options

The Commission has stressed that Aboriginal people should be involved in the design and delivery of community-based sentencing options.[132] Earlier in this chapter the Commission recommended that the Western Australian government ensure there are adequate culturally appropriate programs and services for Aboriginal people in the criminal justice system, including offenders.[133] In making that recommendation the Commission concluded that priority should be given to Aboriginal-owned programs and services. The Commission is of the view that community justice groups may develop programs and services for Aboriginal offenders and that these programs and services could be incorporated into community-based sentencing options. It may also be appropriate for members of a community justice group to be involved in the administration of community-based sentencing options; for example, by assisting with community education about the fines enforcement system and, with adequate resources, assisting with the collection of fines in remote areas. Similarly, members of a community justice group could supervise community work and development orders or supervise offenders who are subject to a sentencing order imposed by a court.[134]

131. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 8.
132. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 227.
133. See Recommendation 7, above p 86.
134. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 228–29.

The Commission has stressed that Aboriginal people should be involved in the design and delivery of community-based sentencing options

The Commission noted in its Discussion Paper that some Aboriginal communities are already involved in the supervision of both adult and juvenile offenders. These communities have entered into Aboriginal Community Supervision Agreements with the Department of Corrective Services. The Commission observed that these agreements essentially provide that the Aboriginal community takes over the supervision on behalf of the Department.[135] More flexible supervision arrangements—where Aboriginal customary law processes could be used to rehabilitate and support an offender—could be accommodated by the use of diversionary options or through specific conditions attached to a court order.

The Commission recognises that there may be some Aboriginal offenders who 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 offenders (or particular offenders). For example, the Ngaanyatjarra Council has indicated its opposition to community justice groups being involved in the supervision of offenders because of insufficient resources to effectively take on this task.[136] Therefore, if a sentencing court is considering making an order that requires an Aboriginal offender to be supervised by members of an Aboriginal community or a community justice group or diverting an offender to be dealt with by their community, it is vital that the court is properly informed of the views of the community (or the community justice group).[137] When considering the involvement of Aboriginal communities in sentencing orders the Commission also suggested that courts should be flexible, focusing on the outcome of the process from the perspective of the offender, the victim and the community. Any sentencing order providing for the involvement of an Aboriginal community should not be unduly restrictive about the nature of that involvement. At the same time, the court can retain an overall monitoring role by requiring that the offender re-appear in court on a specified day to determine the final outcome, in the light of his or her response to the program or supervision.

The Commission has separately discussed the establishment of Aboriginal courts in Western Australia.[138] Under the Commission's recommendations in relation to sentencing, any court will be required to consider relevant and known Aboriginal customary law matters and the views of a community justice group. Aboriginal courts will facilitate this process and provide a space within the criminal justice system where all of those involved in the proceedings are fully aware of the issues.

135. Ibid 229.
136. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 42.
137. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 230.
138. See discussion under 'Aboriginal Courts', above pp 124–36.

Practice and Procedure

Since European settlement Aboriginal people have been subject to Australian criminal law. The Commission acknowledged throughout its Discussion Paper that many Aboriginal people feel alienated by the criminal justice system. At the same time, the Commission concluded that in order to ensure the protection of all Australians, including Aboriginal Australians, Aboriginal people must be bound by the general criminal law.[1] 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.[2]

Juries

The fundamental principle underlying a jury trial is the right of an accused to be judged by his or her peers. Yet for Aboriginal people this is seldom the case: Aboriginal people are under-represented as jurors. The Commission does not consider that it would be appropriate to prevent an Aboriginal accused from having a trial by jury simply because the jury may not include any Aboriginal people. That approach would be discriminatory: an Aboriginal person must be allowed to exercise his or her right to a trial by jury. As previously outlined by the Commission, in circumstances where there may be prejudice, an Aboriginal person could apply for a trial by a judge alone or for a change in the venue of the trial which may affect the make-up of the jury.[3]

In its Discussion Paper the Commission considered some of the reasons for the under-representation of Aboriginal people on juries.[4] One of the reasons is that many courts are long distances from remote locations populated by Aboriginal people. This issue has again been drawn to the Commission's attention.[5] The Commission has recommended changes to the *Road Traffic Act 1974* (WA) and the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) in order to improve the transport options for Aboriginal people living in remote locations.[6] Under these recommendations the need to attend court, in circumstances where there are no other feasible transport options, can be one basis for an application for an extraordinary drivers licence or an application to cancel a licence suspension order.

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 231.
2. The majority of the Commission's recommendations in relation to court procedures can be found in Chapter Nine. This section deals only with procedural matters that are specific to the criminal justice system.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper,* Project No. 94 (December 2005) 232. The Commission notes that in July 2006 in Queensland an Aboriginal accused successfully argued for a change of venue of his trial from Townsville to Brisbane. The basis of the application was that a survey conducted of a number of Townsville residents indicated that because of the highly published incident that gave rise to the charges a large proportion of the residents were prejudiced against the accused and Aboriginal people in general: see *Wotton v Director of Public Prosecutions* [2006] QDC 202, Skoien ACJ (14 July 2006).
4. LRCWA, ibid 231.
5. Department of the Attorney General, Submission No. 34 (11 May 2006) 9; Dr Brian Steels, consultation (28 April 2006).
6. See Recommendations 13 & 14, pp 95–96.

Under Aboriginal customary law some matters can only be heard by women and some can only be heard by men.

Single-gender juries

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 Commission concluded in its Discussion Paper that 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.[7] In the only two known cases where gender-restricted evidence was relevant, a single-gender jury was obtained by agreement between the parties.[8] The Commission proposed that where gender-restricted evidence is relevant to the case, the court may order that the jury be comprised of one gender.[9]

The Department of the Attorney General agreed in its submission that it would not be in the interests of justice if relevant gender-restricted evidence could not be given because a jury was comprised of both genders.[10] The Department further commented that it would be necessary to ensure that this proposal did not 'lead to any bias towards the other party'. The requirement under the proposal—that a court can only order that a jury be comprised of one gender, if it is in the interests of justice—is sufficient to ensure that a court will consider all relevant issues when making such a decision. If having a jury of one gender would significantly prejudice the other party then it would be unlikely that a court would find that a single-gender jury was in the interests of justice.

The proposal for single-gender juries was also supported by the Law Council of Australia and the Criminal Lawyers Association.[11] In the absence of any submissions opposing this proposal the Commission is of the view that it is appropriate to recommend that criminal courts have the power in certain circumstances to order that a jury be comprised of one gender. Although the Commission does not consider that such an order would be a regular occurrence, it is important that Aboriginal people are not denied justice in appropriate cases. The Commission has also recommended that an application can be made to the relevant chief judicial officer of each court 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.[12] This recommendation will assist a court in determining whether a single-gender jury should be ordered because that judicial officer will be able to assess the relevance and importance of the gender-restricted evidence.

Recommendation 41

Single-gender juries

That the *Criminal Procedure Act 2004* (WA) be amended by inserting s 104A as follows:

104A. Application for jury of one gender

(1) A court may order, upon an application by the accused or the prosecution, that the jury be comprised of one gender.

(2) A court may only make an order under s 104A(1) if satisfied that evidence that is gender-restricted under Aboriginal customary law is relevant to the determination of the case and necessary in the interests of justice.

7. LRCWA, *Aboriginal Customary Laws: Discussion Paper,* Project No. 94 (December 2005) 232.
8. Ibid.
9. Ibid 232, Proposal 34.
10. Department of the Attorney General, Submission No. 34 (11 May 2006) 9. The Commission notes that this submission argued that the proposal for single-gender juries may be difficult in practice because of the problems in obtaining juries comprised of Aboriginal people. However, there was no suggestion in the Commission's proposal for single-gender juries that the jury would also have to be wholly comprised of Aboriginal people.
11. Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.
12. See Recommendation 114, below p 330.

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.

Fitness to plead on the basis of mental impairment

In its Discussion Paper the Commission briefly referred to the issue of fitness to plead and mental incapacity. It was suggested that the provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) should not be used in circumstances where Aboriginal people are not fit to plead because of language and cultural barriers.[13]

In its submission, the Office of the Public Advocate observed that there are a number of problems with the legislative provisions and processes for dealing with accused people who are mentally impaired.[14] If an accused is held to be unfit to plead because of mental impairment, he or she may either be released or made the subject of a custody order.[15] If a custody order is made, the accused can be placed in an authorised hospital (if he or she has a treatable mental illness), a declared place, a detention centre or a prison.[16]

Some of the issues referred to by the Public Advocate include that:

- A number of mentally impaired accused have been in prison for longer than the maximum period for the original offence charged.
- There are currently no declared places under the legislation.
- There is a lack of appropriate programs and services for mentally impaired accused Aboriginal people, in particular, those from remote and regional areas.
- As at April 2006 Aboriginal people comprised 24 per cent of the mentally impaired accused persons.[17]

The Public Advocate has mentioned that there are plans by the Western Australian government to address some of these problems. For example, there are plans to set up declared places, to establish declared services and proposals to amend the legislation. The Public Advocate stressed that there must also be adequate programs and services for Aboriginal people who fall under the provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).[18] The Commission fully supports the need for improved services for Aboriginal people in this context. It also agrees with the suggestion of the Public Advocate that Aboriginal community justice groups (as recommended by the Commission) could play a role in developing these services.[19]

Fitness to plead because of cultural and language barriers

The Commission noted its concern in the Discussion Paper 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.[20]

The relevant law is now contained in the *Criminal Procedure Act 2004* (WA). The Commission 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 ability of the accused to understand the nature and consequences of a plea. It was proposed that s 129 of the *Criminal Procedure Act* should 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

13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 233.
14. The Office of the Public Advocate, Submission No. 13 (18 April 2006) 6.
15. *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16 & 19.
16. Ibid s 24.
17. The Office of the Public Advocate, Submission No. 13 (18 April 2006) 6. Some of these issues are also discussed in Van der Giezen J & Sacha P, 'Unfit to Plead: Unsentenced prisoners in Western Australia' (2002) 5(16) *Indigenous Law Bulletin* 10.
18. The Office of the Public Advocate, Submission No. 13 (18 April 2006) 6.
19. The Commission has made a general recommendation about the need for improved and adequate programs and services for Aboriginal people across the entire criminal justice system. See Recommendation 7, above p 86. In that context the Commission has referred to the lack of programs and services for Aboriginal people with decision-making disabilities: see also Office of the Public Advocate, *Report into Programs and Services for People with Decision-Making Disabilities in the Department of Justice in Western Australia* (August 2005).
20. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 233.

its consequences.[21] The Commission did not consider that there was any justification in limiting the parameters of this provision to Aboriginal people. In fact, 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 understanding the Western Australian legal system.[22]

In response to this proposal the Department of the Attorney General observed that the judiciary already 'adopts the practice of ensuring that the defendant understands the plea'.[23] It was also argued that making sure that an accused fully understands the consequences of a plea would require sufficient interpreting and support services.[24] The Commission noted in its Discussion Paper that if an accused does not understand the consequences of a plea because of language barriers then in practice the court would need to request the services of an interpreter.[25] Similarly, where other cultural or communication issues arise the court could arrange for the accused to speak to a lawyer (if not already represented) or an Aboriginal court liaison officer. Separate recommendations have been made in this regard.[26] Given that the proposal has been supported by other submissions[27] and the Commission has not received any comments in opposition, it considers that it is appropriate to recommend that the *Criminal Procedure Act* be amended.

Recommendation 42

Fitness to plead

That s 129 of the *Criminal Procedure Act 2004* (WA) be amended by providing, that for all accused persons:

> 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.

21. Ibid 234 and see Proposal 35.
22. Ibid 234.
23. The Department of the Attorney General, Submission No. 34 (11 May 2006) 9.
24. Ibid.
25. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 234.
26. See Recommendations 120 & 127, below pp 340 & 347.
27. M Lester, Submission No. 18 (27 April 2006) 2; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3. Also submissions received from Aboriginal people in Broome at community meetings and at the Broome Regional Prison on 7 March 2006 confirmed that Aboriginal people often do not understand the court process.

Police

Historically, Aboriginal people have been subject to oppressive treatment by police. As a consequence, Aboriginal people often distrust and resent police officers. During the Commission's consultations many Aboriginal people complained about their treatment by police. The lack of respect by police for Aboriginal people generally, and for Elders and community leaders, was highlighted.[1] Many Aboriginal people believe that there is extensive racism within the police service.[2] Lack of sensitivity by police towards Aboriginal victims and lack of appropriate support for victims of family violence were also mentioned.[3] Many communities commented that young Aboriginal people were treated poorly by police.[4] It is clear that relations between Aboriginal people and the police are still extremely strained.

The Commission concluded in its Discussion Paper that over-policing and inappropriate policing of Aboriginal people continues today.[5] The Commission also observed that because police have wide discretion about who to arrest and charge, as well as where to patrol and which offenders will be targeted, they play a direct role in the over-representation of Aboriginal people in the criminal justice system.[6] Nonetheless, in order to maintain law and order in Aboriginal communities, cooperation between Aboriginal people and the police is essential. Overall, the Commission found that Aboriginal people wish for greater police presence in their communities.[7] The Commission acknowledged that there are many police who work well with Aboriginal communities. However, in order to improve the status of police-Aboriginal relations and to ensure more effective policing of Aboriginal communities, the Commission concluded that reform is necessary.

Police and Aboriginal Customary Law

Traditional punishment

The Commission has recognised that a difficult issue confronting police officers in their dealings with Aboriginal people is the appropriate response to traditional physical punishment that may constitute an offence under Australian law.[8] There are two important issues – whether police should 'allow' traditional physical punishment to take place and whether police should lay charges against a person who has inflicted traditional punishment pursuant to Aboriginal customary law.

During the Commission's consultations it was emphasised that, when an Aboriginal person has committed an offence against Australian law and has also contravened customary law, it is vital that customary law processes take place first.[9] Traditional physical punishment under customary law is often required when an Aboriginal person is involved in the death of another Aboriginal person. If the offence is murder or manslaughter under Australian law, once the accused is arrested by police it is extremely unlikely that he or she will be released on bail prior to appearing in court. The decision by a police officer to arrest an accused prior to traditional punishment taking place may have

1. LRCWA, *Thematic Summary of Consultations – Fitzroy Crossing*, 3 March 2004, 42; *Derby*, 4 March 2004, 52.
2. LRCWA, *Thematic Summary of Consultations – Derby*, 4 March 2004, 53; *Mowanjun,* 4 March 2004, 49.
3. LRCWA, *Thematic Summary of Consultations – Midland*, 16 December 2002, 37; *Broome,* 17–19 August 2003, 29; *Fitzroy Crossing*, 3 March 2004, 43; *Derby*, 4 March 2004, 53.
4. LRCWA, *Thematic Summary of Consultations – Carnarvon*, 30–31 July, 2003, 6; *Broome,* 17–19 August 2003, 21; Mirrabooka, 4 November 2002, 14; Albany, 18 November 2003, 19.
5. One of the most notorious examples of over-policing is the 'trifecta': disorderly conduct, resisting arrest and assaulting a police officer. The Commission observed in its Discussion Paper, that many of the 'trifecta' charges eventuate because police approach Aboriginal people in public spaces for behaviour that would go unnoticed if committed by non-Aboriginal people: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 235. It was also observed that move-on notices pursuant to s 50 of the *Police Act 1892* (WA) appear to be affecting Aboriginal people at a disproportionate rate. See also discussion under 'Move-on notices', below p 208.
6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 235.
7. Ibid 119.
8. The difficulties facing police with respect to traditional punishment were again mentioned during a community meeting in Broome: LRCWA, Discussion Paper community consultation – Broome, 10 March 2006.
9. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 198–99.

Aboriginal people have been subject to oppressive treatment by police ... over-policing and inappropriate policing of Aboriginal people continues today.

dire consequences for the accused, the accused's family and the relevant Aboriginal communities. If the accused is not available for punishment a member of his or her family may be punished instead. The failure of traditional punishment to take its course can also cause disharmony in communities and in some cases lead to ongoing conflict or feuding.

The Western Australia *Police Strategic Policy on Police and Aboriginal People* asserts that 'violent aspects of customary law' are inconsistent with Western Australian criminal law and contravene international human rights standards.[10] On the other hand, it is recognised that there are positive features of non-violent aspects of Aboriginal customary law, such as maintaining the 'social structure of Aboriginal communities'.[11] This policy provides that where there is violent punishment under Aboriginal customary law, police officers will pursue charges against those who inflicted the punishment. However, in practice this is not always the case and the Commission understands that in some instances police officers have been present while the punishment took place.[12]

While the Commission acknowledged in its Discussion Paper that many Aboriginal people resent intervention by police that prevents traditional punishment from taking place, it was concluded that it is not appropriate to recommend that police officers should in any way facilitate the infliction of *unlawful* violent traditional punishment.[13] However, in this Report the Commission has recommended that the offence of unlawful wounding should be repealed. The principal reason for this recommendation is that the offence is unnecessary and the distinction between unlawful wounding and assault occasioning bodily harm is arbitrary and potentially unfair for all Western Australians.[14] In terms of traditional physical punishment, the effect of this recommendation may be that particular examples of traditional punishment will now be lawful. In order for a spearing to be lawful it would be necessary that the injury was no more serious than bodily harm. It would also be essential that the person receiving the punishment freely and voluntarily consented to the degree of physical punishment imposed.

For Aboriginal people, and for police officers who work closely with Aboriginal communities, a potential benefit of this recommendation is that it may allow police to respond to requests from Aboriginal people to be present during traditional punishment. The Commission understands that Aboriginal people will often request police presence during traditional punishment for safety reasons.[15] Currently, because all spearings are illegal, police (as well as other people such as nurses or community corrections officers) cannot assist or be present while the punishment takes place. The Commission's recommendation may also, in some cases, alleviate the problem that arises when an Aboriginal person is arrested and taken away by police before

10. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: A strategic approach to working with Aboriginal people in providing equitable and accessible policing services – policy statement and rationale* (2004) 10. The Commission concluded in its Discussion Paper that the question whether traditional punishments under Aboriginal customary law will contravene international human rights standards is undecided, but there are many customary law practices, including some traditional punishments, that will not contravene such standards: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 74 & 170.
11. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: A strategic approach to working with Aboriginal people in providing equitable and accessible policing services – policy statement and rationale* (2004) 10.
12. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 237–38. In recent years the only case known to the Commission (in a superior court) where an Aboriginal person has been charged with an offence resulting from the infliction of traditional punishment is *R v Judson* (Unreported, District Court of Western Australia, POR No. 26/1995, O'Sullivan J, 26 April 1996). A number of sentencing cases indicate that the police were either present during the punishment or were at the very least aware of it. See, for example, *R v Njana* (Unreported, Supreme Court of Western Australia, No. 162/1997, Scott J, 13 March 1998); *R v Rictor* (Unreported, Supreme Court of Western Australia, No. 34/2002, McClure J, 30 April 2002); *R v Nelson* [2003] NTSC 64 (4 June 2003).
13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 238.
14. See discussion under 'Consent', above, pp 139–48.
15. Superintendent Steve Robins, Western Australia Police, Kimberley District, telephone consultation, 25 August 2006. The Commission notes that in May 2006 Aboriginal Elders in the Kimberley requested police presence during an arranged fight between members of feuding families. The rules were set by Aboriginal Elders and two men would fight for a specified period of time. It was reported that police decided when the fighting should stop. The Commission recognises the benefits of this approach – an end to the feuding and police assistance to ensure that the fighting does not get out of hand. See Hewitt S, 'Police Let Aboriginals Slug it Out', *The West Australian*, 19 May 2006, 5.

traditional punishment has occurred. In Geraldton, it was suggested that police should wait for a couple of days to allow customary law punishment to take its course.[16] The Aboriginal Legal Service (ALS) Executive Committee believes that, as long as the accused consents, he or she should be allowed to face customary law punishment before being arrested by the police and this would allow the community to heal.[17] If a police officer was satisfied that the proposed traditional punishment would not breach Western Australian law then this may be an appropriate response. However, the Commission maintains its view that where traditional punishment would be unlawful, police should not do anything to encourage or facilitate that punishment.

The decision to charge or prosecute

The Commission has considered whether Aboriginal customary law should be relevant to the decision to charge or prosecute an Aboriginal person. In the same way that customary law may be relevant to sentencing[18] there is no reason in principle to prevent a prosecuting agency from considering customary law when making a decision to charge or prosecute an alleged offender. Of course, the decision will have to balance the seriousness of the offence against any customary law considerations. In its Discussion Paper, the Commission examined the guidelines of the Western Australia Police and the Office of the Director of Public Prosecutions (DPP) that govern decisions to charge and prosecute offenders.[19] One of these guidelines requires that a prosecution must be in the 'public interest'. The ability of prosecutorial guidelines to cover cases involving customary law is constrained by the express directive that when considering the question of what is in the public interest, the 'race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or *cultural views* of the alleged offender' are not to be taken into account.[20]

The Commission concluded that police or prosecuting agencies should be required to take into account any relevant Aboriginal customary law considerations when deciding whether to charge or continue a prosecution against an Aboriginal person. The decision not to charge or not to pursue a prosecution should take into account customary law in its broadest sense if there is to be effective diversion away from the criminal justice system for Aboriginal people. In this context, the Commission emphasises that there are many customary law punishments and processes that do not involve violence. The Commission proposed that the Western Australia Police *Commissioner's Orders and Procedures Manual* (COPs Manual) be amended to require consideration of any relevant Aboriginal customary law issues in the decision to charge or prosecute an alleged offender. It was also proposed that the DPP consider making a similar amendment to the *Statement of Prosecution Policy and Guidelines 2005*.[21]

The Western Australia Police responded to this proposal by advising that if there are legislative changes that recognise Aboriginal customary law then the police will accordingly amend the *COPs Manual*.[22] The Law Council of Australia supported the proposal and, in particular, agreed that police officers should consider whether an Aboriginal person committed an offence because they were required to engage in the relevant conduct under Aboriginal customary law.[23] The DPP agreed that for the purpose of diversion (for offences that would ordinarily be dealt with in the Magistrates Court) it is appropriate to take Aboriginal customary law into consideration when deciding whether to charge or continue a prosecution.[24]

In its submission, the DPP explained that the cases which it deals with are usually more serious, such as those involving violence. The DPP did not agree that its guidelines should be amended because customary law considerations are more appropriately taken into account during sentencing. Further, in the context of offences usually dealt with in the District or Supreme Court, the DPP did not believe that customary law considerations could outweigh the need to prosecute such serious offences. The DPP also stated that it is

16. LRCWA, Discussion Paper community consultation – Geraldton, 4 April 2006.
17. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7.
18. See discussion under 'Aboriginal Customary Law and Sentencing', above pp 178–84.
19. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 238–39.
20. Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005,* Policy Guideline No. 33, 10; Western Australia Police, *COPs Manual (Public Version)* (25 January 2005) OP-28.1.6.
21. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 239, Proposal 36.
22. The Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 8.
23. Law Council of Australia, Submission No. 41 (29 May 2006) 14 & 17. The example discussed by the Law Council was in relation to trespass – whether an Aboriginal person was following his or her customary laws when entering into particular lands. The Criminal Lawyers Association also supported this proposal: see Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.
24. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 5.

against any inclusion of Aboriginal customary law in its guidelines because the 'law must be applied equally to all Western Australians'.[25] In response to this argument the Commission emphasises that the principle of equality before the law does not mean that all people must be treated in the same manner. Relevant differences should be taken into account in order to ensure that substantive equality is achieved.[26]

The Commission notes that the DPP guidelines are applicable to all prosecutions including prosecutions in the Magistrates Court and the Children's Court.[27] Further, the guidelines stipulate that the DPP may take over the prosecution of summary matters in certain circumstances. Even so, the Commission is of the view that the need to consider Aboriginal customary law processes for the purpose of diversion could possibly arise in the District Court. As a hypothetical example, a 19-year-old Aboriginal male from a remote community is charged by the police with aggravated burglary. The accused entered another person's house at night while he was intoxicated and stole some cash. There was no violence and no one was present at the house when the offence was committed. The accused has no criminal record. Because the charge is aggravated burglary it must be dealt with in District Court.[28] The accused lives in a community which has established a community justice group. While the accused has been on bail the community justice group has met with the accused and he agreed to attend a bush camp organised by Elders in the community to receive instruction about traditional law. The community justice group also asked the accused to do some community work, including some maintenance on the house belonging to the victim. In order to attend court this accused will need to travel a long distance to the closest District Court. The community justice group has advised the DPP and the police that the community (including the victim) does not want the accused to leave the community in order to attend court or be further dealt with by the criminal justice system.

The Commission agrees that most matters dealt with in the District Court and the Supreme Court would be too serious for customary law considerations to lead to a decision not to prosecute. However, the Commission's proposal for Aboriginal customary law to be included in the guidelines does not remove the discretion of the DPP to determine its relevance in any particular case.

The Commission has examined the prosecutorial guidelines in other Australian jurisdictions. In the Northern Territory, the guidelines provide that a decision whether or not to proceed with a prosecution must not be influenced by

> the race, religion, sex, national origin or political associations, activities or beliefs of the offender or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account objectively).[29]

Unlike the guidelines in Western Australia, there is no reference to cultural views and the guidelines do allow the consideration of factors which are significant or relevant to the offence. The prosecutorial guidelines in all other Australian jurisdictions do not stipulate that the 'cultural views' of the alleged offender are an irrelevant consideration.[30] The Northern Territory guidelines also include a specific guideline in relation to Aboriginal customary law.[31] This guideline acknowledges that Aboriginal people in the Northern Territory are over-represented in the criminal justice system. Further, it provides information for prosecutors about the importance of customary law for Aboriginal people; the

25. Ibid.
26. See discussion under 'Formal equality vs substantive equality', Chapter One, above pp 8–9.
27. Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005,* Policy Guideline No. 4.
28. *Criminal Code* (WA) s 401.
29. Northern Territory Office of the Director of Public Prosecutions, *Guidelines*, Guideline 2.7 (1).
30. The Commission notes that the factors included in prosecutorial guidelines appear to be based upon the provisions in equal opportunity legislation. The *Equal Opportunity Act 1984* (WA) provides that the grounds of discrimination are sex, race, age, family responsibilities, impairment, religious conviction, political conviction, gender history and sexual orientation. The *Racial Discrimination Act 1975* (Cth) refers to 'race, colour, descent or national or ethnic origin'. There is no reference to 'cultural views' in either of these statutes.
31. Northern Territory Office of the Director of Public Prosecutions, *Guidelines*, Guideline 20.

need to ensure that Aboriginal women are protected from violence; the distinction between traditional payback and family violence and sexual assault; and the need for prosecutors to obtain accurate information about customary law from Aboriginal people and others with necessary expertise.

The prosecutorial guidelines in the Australian Capital Territory are also particularly instructive. It is stated that the decision to prosecute must not be influenced by:

> (a) The race, colour, ethnic origin, social position, marital status, sexual preference, sex, religion or political associations or beliefs or the alleged offender;
>
> (b) Any personal feelings concerning the alleged offender or victim;
>
> (c) Any political advantage or disadvantage to the Government or any political group or association; or
>
> (d) The possible effect of the decision on the personal or professional circumstances of those responsible for the decision.
>
> This rule does not mean that particular sensitivities or other factors relevant to the alleged offender's conduct should be ignored merely because they are related to the race, sex or religion concerned. It may be necessary to take into account a wide range of matters such as whether the person was acting in accordance with a perceived moral duty or religious obligation, whether the conduct was induced by provocation felt more acutely due to racial innuendo or whether it may have been attributable to post natal depression or other medical factors related to the sex of the person.
>
> The rule is intended to ensure that people are not discriminated against. It is not intended to exclude due consideration of factors, which, as a matter of fairness, should be taken into account in assessing their level of culpability.[32]

The Commission agrees with this explanation: factors associated with an alleged offender's membership of a particular group may be relevant to an offence. The purpose of such a guideline should be to prevent discrimination against a person solely on the basis of their race or membership of another group. This is entirely consistent with general sentencing principles which require that courts take into account relevant factors associated with an offender's membership of a particular group.[33] The Commission believes that the prosecutorial guidelines in Western Australia should enable relevant factors to be considered when deciding whether to prosecute an alleged offender for a particular offence. The Commission is also of the view that specific guidelines in relation to Aboriginal customary law would be beneficial. In this regard, it is emphasised that the guidelines in the Northern Territory are focused on informing prosecutors when Aboriginal customary law may or may not be relevant and ensuring that reliable information about customary law is obtained. These guidelines are, in the Commission's opinion, necessary because of the high level of violence and sexual abuse in Aboriginal communities and the misconceptions that such conduct is justified under Aboriginal customary law.[34]

Recommendation 43

Prosecutorial guidelines

That the Western Australia Police Service, *COPs Manual*, and the Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005,* should be amended:

1. To remove the reference to 'cultural views' in the list of factors which are stated to be irrelevant to a decision to charge or prosecute.
2. To provide that factors associated with an alleged offenders' membership of a particular race, sex or other group may be taken into account if those factors are relevant to the circumstances of the offence.
3. To include a specific guideline about Aboriginal customary law and that this guideline should contain information about the nature of Aboriginal customary law; the importance of obtaining reliable information or evidence about Aboriginal customary law; and the need to protect Aboriginal victims from family violence and sexual abuse.
4. To provide that any relevant aspect of Aboriginal customary law, including Aboriginal customary law processes for dealing with offenders, be considered when deciding whether to charge or prosecute an alleged offender.

32. Australian Capital Territory Officer of the Director of Public Prosecutions, *Prosecutions Policy,* 2.7.
33. See discussion under 'The Cultural Background of the Offender', above pp 171–73.
34. See discussion under 'Family Violence and Sexual Abuse', Chapter One, above pp 18–30.

Diversion

Diversionary measures aim to redirect offenders away from the formal criminal justice system or, alternatively, away from more punitive options such as imprisonment. The Commission has separately discussed court diversion in the section on sentencing.[35] This section focuses on diversion from the criminal justice system. It is well established that the best way to enhance community safety in the long-term is to prevent young offenders from entering the criminal justice system.[36] Because police primarily decide who enters the criminal justice system and because Aboriginal children have generally been referred by police to diversionary options less often than non-Aboriginal children, the Commission has focused on ways of achieving greater diversion for Aboriginal children.

Cautions

The Commission has examined the current cautioning scheme for children in Western Australia. A caution is a warning to the young person about allegedly unlawful behaviour. In Western Australia, a caution can only be administered by a police officer.[37] The Commission concluded in its Discussion Paper that, given the level of animosity felt by many Aboriginal children towards police, it is unlikely that a caution issued by a police officer would be as effective as a caution given by an Aboriginal person with cultural authority.[38] The Commission proposed that police officers must consider, in relation to an Aboriginal child, 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.[39]

A number of submissions responded favourably to all of the Commission's proposals that facilitate greater and more effective diversion for Aboriginal children.[40] The Western Australia Police expressed support for the Commission's proposal to allow a respected member of the young person's community to administer a caution. However, the Police were concerned about the availability of suitable adults to undertake this role and that this option would increase the amount of time spent by police dealing with young people.[41] The Commission is of the view that the availability of appropriate Aboriginal people to administer a caution will be significantly enhanced by the establishment of community justice groups. Where such a group exists there will be a pool of suitable people in the relevant community. At the same time, the Commission's notes that its recommendation is not mandatory – it only requires that police must consider whether it would be more appropriate for the caution to be administered by a member of the young person's community. If there is no suitable person available, or if it would cause undue delay to wait for a suitable person, then it may be more appropriate for the caution to be administered by a police officer. Nevertheless, the Commission strongly encourages the police to arrange, whenever possible, for a caution to be administered by a member of the young person's community.

Recommendation 44

Cautions

That Part 5, Division 1 of the *Young Offenders Act 1994* (WA) be amended to provide that a police officer must consider, in relation to an Aboriginal young person,[42] 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.

35. See discussion under 'Sentencing Options', above pp 185–86.
36. Jackson H, 'Juvenile Justice – The West Australian Experience' in Atkinson L & Gerull S (eds), (Paper presented at the National Conference on Juvenile Justice, Australian Institute of Criminology Conference Proceedings No. 22, 1993) 86. The Western Australian Office of the Director of Public Prosecutions acknowledges that special considerations apply to the prosecution of juveniles: see Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005,* Policy Guideline No. 34, 10. This principle is also recognised in s 7(g) of the *Young Offenders Act 1994* (WA) which provides that non-judicial proceedings for young offenders should be considered providing it would not jeopardise the safety of the community.
37. In New South Wales, Queensland and Tasmania a caution may be administered to a young Aboriginal person by an Elder or a respected member of the young person's community: see *Young Offenders Act 1997* (NSW) s 27(2); *Juvenile Justice Act 1992* (Qld) s 17; *Youth Justice Act 1997* (Tas).
38. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 240.
39. Ibid 241, Proposal 37.
40. Marian Lester, Submission No. 18 (27 April 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7–8; Law Council of Australia, Submission No. 41 (29 May 2005) 14; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4. The Department of the Attorney General suggested in its submission that the *Young Offenders Act 1994* (WA) had already been amended to allow for a respected member of the child's community to administer the caution: see Department of the Attorney General, Submission No. 34 (11 May 2006) 9. However, at the time of publication the *Young Offenders Act* provides that a caution can only be given by a police officer.
41. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 8.
42. The *Young Offenders Act 1994* (WA) should be amended to provide a definition of an Aboriginal person to include a Torres Strait Islander person.

The Commission also reviewed the relevant law concerning how a caution may subsequently be used against a young person in the justice system. The *COPs Manual* provides that previous cautions issued to the young person can be included in the instructions to the prosecutor and used in court if required.[43] The Commission noted in its Discussion Paper that a practice had developed in the Children's Court where the police prosecutor refers to the number of previous cautions and referrals to a juvenile justice team.[44] The Commission concluded it was unacceptable for a diversionary option that does not require any proof or admission of guilt to be subsequently used against a young person in court. It was proposed that the *Young Offenders Act* be amended to provide that any previous cautions cannot be used in court against the young person.[45]

The Commission has received support for this proposal.[46] However, the Department of Corrective Services and the Department of the Attorney General both submitted that the *Young Offenders Act* already provides that previous cautions cannot be used against the young person.[47] The Commission is aware that the *Young Offenders Act* covers the admissibility of previous cautions in limited circumstances. Section 29 of the *Young Offenders Act* provides that for the purpose of referring a young person to a juvenile justice team, previous cautions cannot be used to determine whether the young person has previously offended against the law. Further, s 22(4) provides that:

> If a caution is given any admission made by the person cautioned at or about the time the caution is given is not admissible in civil or other proceedings as evidence of any matter to which the caution refers.

This section refers only to the *admissibility of an admission* made by the young person at the time the caution is administered and not to the fact that a caution has been given. The Commission does not believe that there is anything in the legislation to prevent a court from being told that a young person has previously been cautioned.

The Western Australia Police opposed the Commission's proposal and argued that a court should be able to consider any information including previous cautions to assist in deciding how to deal with a particular matter.[48] At first glance this general statement appears valid; however, the Commission believes that it is necessary to consider the reason why a previous caution is being referred to. The Western Australia Police stated that a previous caution should be included in the information about the child's previous offending.[49] The Commission maintains its view that a previous caution should not be used to indicate that the young person has previously committed an offence. Just because a caution has been given does not mean that the young person was guilty of the relevant offence.

Recent cases in Western Australia have demonstrated that there may be a need to refer to previous cautions for purposes other than suggesting the young person committed an offence. In *WO (A Child) v The State of Western Australia,*[50] the Western Australian Court of Criminal Appeal referred to diversionary options for children and noted that Aboriginal children have been diverted less often than non-Aboriginal children. The court stated that as a consequence of past decisions with respect to diversion (or lack thereof), children appearing before a court may incorrectly be assumed to be the more serious offenders. It was held that it is necessary for the court to closely examine the details of past offences to determine whether that assumption is correct.[51] The Commission has recommended that when a court is considering a term of detention for an Aboriginal child the court must consider the particular circumstances of Aboriginal people.[52] The Commission emphasised that the particular circumstances of Aboriginal people include systemic bias within the criminal justice system. In relation to children, this bias is demonstrated by the fact that Aboriginal children have generally been diverted less often than non-Aboriginal children.

The Commission now believes that its original proposal may be counter-productive because it may preclude a

43. Western Australia Police, *COPs Manual (Public Version)* (25 January 2005) OP-24.1.3.
44. See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 183.
45. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 241, Proposal 38.
46. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Law Council of Australia, Submission No. 41 (29 May 2005) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.
47. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 12; Department of the Attorney General, Submission No. 34 (11 May 2006) 9.
48. The Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 8–9.
49. Ibid 9.
50. [2005] WASCA 94. This case is discussed above under 'The relevance of Aboriginality to sentencing', above pp 171–73 and 'Imprisonment – A Sentence of Last Resort', above pp 173–77.
51. Ibid [62]. These observations were repeated by Wheeler JA in *TL (A Child) v Western Australia* [2005] WASCA 173 [35]–[37].
52. See Recommendation 37, above p 177.

court from taking into account the fact that a young person has not been cautioned before or has not been given adequate opportunities for diversion. Nevertheless, the Commission remains of the view that previous cautions should not be used *against* a young person – evidence of previous cautions should not be presented to a court to show that the young person has previously offended against the law.

Recommendation 45

Referring to previous cautions in subsequent court proceedings

That the *Young Offenders Act 1994* (WA) be amended to provide that any previous cautions issued under this Act can only be referred to in court for the purpose of determining whether the young person has previously been given an adequate opportunity for diversion and/or rehabilitation.

Juvenile justice teams

In Western Australia, pursuant to the *Young Offenders Act*, the police (or a court) can refer a young person to be dealt with by a juvenile justice team. The team will usually consist of a coordinator, a police officer, the offender, the victim (if he or she consents) and sometimes an education worker or a representative of the offender's ethnic community.[53] At the team meeting participants will recommend an action plan. Successful completion of the action plan will mean that the offender does not receive a criminal conviction for the offence.[54] In 2005 the *Young Offenders Act* was amended to allow for the involvement of a member of an approved Aboriginal community.[55]

A young person may be referred to a juvenile justice team provided that the offence is not listed in either Schedules 1 or 2 of the *Young Offenders Act*. The young person must accept responsibility for the offence and consent to the referral. The Commission noted in its Discussion Paper that the *Young Offenders Act* suggests that first offenders should generally be referred to a juvenile justice team. The Commission concluded that there should be a stronger direction which would require police to divert a young person to a juvenile justice team unless there are exceptional circumstances. It was proposed 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.[56]

The Commission has received a number of submissions supporting this proposal.[57] The ALS expressed strong support and contended that there should be less reliance on police discretion in order to ensure that Aboriginal children are diverted away from the criminal justice system.[58] The Department of Corrective Services suggested in its submission that the Commission's proposal would require compulsory referral for all first offenders. It was noted, therefore, that some serious offenders would have to be referred to a juvenile justice team. Even so, the Department expressed support for the proposal.[59] However, the Commission's proposal does not mean that every first offender must be referred to a team – there is provision that a police officer does not have to refer a first offender in exceptional circumstances. As the Commission explained in its Discussion Paper, exceptional circumstances 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.

53. *Young Offenders Act 1994* (WA) s 37(2).
54. *Young Offenders Act 1994* (WA) s 33(2).
55. *Young Offenders Act 1994* (WA) ss 36 & 37. An appropriate member of an approved Aboriginal community is nominated by the community council and approved by the CEO of the Department of Corrective Services and the Commissioner of Police.
56. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 242, Proposal 39. The Commission also proposed that the *Young Offenders Act* should provide that when determining whether a young person has previously offended against the law prior cautions cannot be taken into account. The Commission notes that s 29(2) of the *Young Offenders Act* does provide that cautions cannot be taken into account when determining whether a young person has previously offended against the law for the purpose of that section. The Department of the Attorney General stated in its submission that the Commission's proposal is already reflected in the legislation; however, it is apparent that this submission is in reference to the last sentence of the Commission's original proposal rather than the substance of the proposal. The Department did not comment on whether the police should be required to generally divert a first offender to a juvenile justice team. See Department of the Attorney General, Submission No. 34 (11 May 2006) 9.
57. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 12–13; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 8; Law Society of Western Australia, Submission No. 36 (16 May 2006) 7; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12. The Commission notes that the Aboriginal and Torres Strait Islander Social Justice Commissioner did not directly refer to this proposal but expressed general support for all proposals that promote diversion.
58. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 8.
59. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 12–13.

The Western Australia Police did not support the proposal and argued that it may limit the ability of police to effectively deal with young offenders.[60] The Western Australia Police referred to s 22B of the *Young Offenders Act* which requires that police must first consider, before commencing proceedings against a young person, whether it would be more appropriate to take no action or to administer a caution. Although not explicitly stated in its submission, the Commission assumes that the Police are concerned that they may have to refer a first offender to a juvenile justice team rather than take no action or administer a caution. In order to remove any doubt, the Commission has included in its recommendation that the obligation to refer a first offender to a juvenile justice team does not arise until after a police officer has first decided that it is inappropriate to take no action or to administer a caution. The Commission is of the view that its recommendation should apply to all young people. The main objective is to ensure that Aboriginal children are diverted in the same circumstances as non-Aboriginal children.

Recommendation 46

Referral by police to a juvenile justice team

1. That s 29 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.[61]
2. That this section only applies if the police officer has first determined that it is not appropriate to take no action or to administer a caution pursuant to s 22 B of the *Young Offenders Act 1994* (WA).

The Commission also concluded in its Discussion Paper that the categories of offences listed in Schedules 1 and 2 of the *Young Offenders Act* (which are excluded from the operation of juvenile justice teams) are unduly restrictive. It was observed that in some circumstances particular offences contained in the schedules may be of a less serious nature and therefore diversion to a juvenile justice team would be appropriate. The Commission proposed 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.[62] All submissions received in response to this proposal were supportive.[63] It was noted by the Department of the Attorney General and the Department of Corrective Services that the Western Australian government is already considering a review of the offences listed in the schedules.[64] It appears that this review has been underway since 2004. The Commission therefore considers that the review should be completed as a matter of priority.

Recommendation 47

Review categories of offences in Schedule 1 and Schedule 2 of the *Young Offenders Act 1994* (WA)

That the Western Australian government's review of the categories of offences listed in Schedule 1 and Schedule 2 of the *Young Offenders Act 1994* (WA) be immediately completed to enhance the availability of diversion to juvenile justice teams.

The Commission concluded, for the same reasons discussed in relation to cautions, that a referral to a juvenile justice team should not later be used against a young person as part of his or her previous history of offending. Although a young person must accept responsibility for the alleged offence and consent to the referral, this is not the same as proof of guilt. A person may accept responsibility without being aware that a defence to the charge was available. For some Aboriginal children, an acceptance of responsibility may

60. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 9.
61. The Commission notes that s 29(2) should remain in its current form to provide, among other things, that a young person should not be taken to have previously offended against the law merely because he or she has been previously cautioned.
62. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 242, Proposal 40.
63. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006)13; Department of the Attorney General, Submission No. 34 (11 May 2006) 9; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 9; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4. The Aboriginal and Torres Strait Islander Social Justice Commissioner expressed general support for all proposals that promote diversion.
64. Department of Corrective Services (WA), Submission No. 31 (4 May 2006)13; Department of the Attorney General, Submission No. 34 (11 May 2006) 9.

be based on customary law notions of collective responsibility. For example, a young Aboriginal person may accept responsibility for an offence because he or she was merely present while others committed the crime. Therefore, the Commission proposed that previous referrals to a juvenile justice team cannot later be used in court against the young person. It was acknowledged that an exception should be provided where a court requires information about a past referral by police to a juvenile justice team in order to determine whether there should be another referral by the court.[65]

Overall, the Commission received a positive response to this proposal.[66] However, as discussed above in relation to cautions, the Commission now recognises that it may be necessary for a court to be informed about previous referrals to a juvenile justice team in order to determine whether a young person has been given adequate opportunities for diversion and rehabilitation. In other words, it may be important for a court sentencing a young person to be fully appraised of how that young person has previously been dealt with. Again, the Commission emphasises that a previous referral to a juvenile justice team is not proof that the young person committed the offence.

Recommendation 48

Referring to previous referrals to a juvenile justice team in subsequent court proceedings

That the *Young Offenders Act 1994* (WA) be amended to provide that any previous referrals to a juvenile justice team under this Act can only be referred to in court for the purposes of determining:

1. whether the young person has previously been given an adequate opportunity for diversion and/or rehabilitation; and/or
2. whether the young person should again be referred to a juvenile justice team.

Attending court without arrest

In Western Australia a police officer can institute criminal proceedings against a young person either by way of arrest or by issuing a notice to attend court. The choice of arrest is the more punitive option because it requires the young person to be taken to a police station, processed and either released on bail or remanded in custody. Section 42 of the *Young Offenders Act* provides that unless inappropriate, a notice to attend court is the preferred option. The *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 child is not arrested; if it will prevent further offending; if it will ensure attendance at court; or if there is no other appropriate course of action.[67]

In its Discussion Paper, the Commission proposed that the relevant criteria for arrest should be set out in legislation in Western Australia.[68] The Commission has received widespread support for this proposal.[69] However, the Western Australia Police opposed the

65. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 242, Proposal 41.
66. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 13; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4. The Department of the Attorney General stated that the *Young Offenders Act* already provides that previous referrals to a team cannot be used in court: see Department of the Attorney General, Submission No. 34 (11 May 2006) 10. However, the Commission is not aware of any provision in the legislation that prevents a court from being informed about a previous team referral other than for the purposes of s 29. The Western Australia Police opposed the Commission's proposal: see Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 9.
67. Western Australian Police Service, *COPs Manual (Public Version)* (25 January 2005) OP-24.4.
68. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 243, Proposal 42.
69. Marian Lester, Submission No. 18 (27 April 2006); Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14; Department of the Attorney General, Submission No. 34 (11 May 2006) 10; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 8; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12. Again the Commission notes that the Aboriginal and Torres Strait Islander Social Justice Commissioner expressed general support for all proposals that promote diversion.

proposal and argued that the inclusion of the criteria in the *COPs Manual*, in addition to s 7(h) of the *Young Offenders Act*, 'ensures compliance'.[70] Section 7(h) provides that 'detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary'. Yet, as explained by the Department of Corrective Services:

> The high number of admissions to Rangeview Remand Centre and the very few young people sentenced to detention or high end community based orders indicates over-reliance on arrest by Police.[71]

Moreover, the Commission is of the view that legislative amendment is necessary even if police do currently comply with the relevant criteria. If police routinely follow the guidelines in the *COPs Manual*, then including the criteria for arrest in legislation should cause no difficulty to police in practice.

Recommendation 49

Legislative criteria for the decision to arrest a young person

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

Diversion to a community justice group

In its Discussion Paper, the Commission expressed strong support for the development of Aboriginal-controlled diversionary programs and, in particular, programs or processes determined by a community justice group.[72] The Commission explained that, where a community justice group exists, the members of the group may decide to deal with a possible breach of Western Australian criminal law. This approach would mean that there is no involvement in the criminal justice system at all. The Commission compared this to a family discovering that their child is using drugs and deciding to deal with it without recourse to the criminal law. Similarly, children may be involved in behaviour at school, that strictly speaking constitutes an offence, but the authorities and those involved make a choice to deal with it internally. Of course, in any such case a victim may chose to report the matter to the police, irrespective of the views of the community justice group. For Aboriginal children who have committed minor offences, the Commission strongly encourages a community justice group to deal with the matter without recourse to the criminal justice system. For serious offences, such as violence or sexual assault, the Commission considers it is vital that Aboriginal people are fully informed of their rights under Australian law and supported by criminal justice agencies to report the offence and have it dealt with by the criminal justice system.[73]

In many cases a matter may come to the attention of the police (via the victim, a member of the community, or directly as a result of witnessing the behaviour). In this situation the police must consider whether referral to a community justice group or Aboriginal diversionary program would be appropriate. The Commission proposed the establishment of a pilot diversionary scheme for young Aboriginal offenders that involves referral by the police to community justice groups.[74] It was also proposed that any diversion to a community justice group should not be used against a young person in court. The Commission has explained that it is not appropriate for previous cautions and referrals to a juvenile justice team to be used to establish that a young person has previously offended. Similarly, diversion to a community justice group should not be used against a young person because referral to a community justice group does not mean that the young person is guilty of an offence. What it means is that the young person has agreed to be dealt with by the community justice group instead of being formally charged. However, as discussed in relation to cautions and referrals to a juvenile justice team, a court may wish to be informed of a previous referral to a community justice group if it is considering another

70. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 9. The Commission is of the view that the case referred to by the media as the 'ice-cream boy' and which was referred to by the Commission in its Discussion Paper, suggests that in practice the current guidelines in the *COPs Manual* are not being adequately complied with: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 240.
71. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14.
72. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 243. For a detailed discussion of the Commission's recommendation for the establishment of community justice groups, see 'Aboriginal Community Justice Groups', above p 97–113.
73. See Recommendation 90, below p 286.
74. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 234–44, Proposal 43.

The Commission's view is that there should be diversion to Aboriginal-owned or Aboriginal-controlled processes.

referral or to determine if the young person has been given adequate opportunities for diversion.

The Commission has received a number of submissions in support of its proposal for diversion to a community justice group.[75] Both the Department of Corrective Services and the Department of the Attorney General stressed the need for adequate resources in order for the implementation of this proposal to be effective.[76] The Western Australia Police, however, opposed the proposal on the basis that diversionary schemes already exist for children in Western Australia. In particular, the Western Australia Police referred to the amendments to the *Young Offenders Act* in 2005 which provided that a member of an approved Aboriginal community may replace either or both the police representative or coordinator of a juvenile justice team.[77] As the Commission indicated in its Discussion Paper, these amendments should improve the effectiveness of juvenile justice teams for Aboriginal children.[78] However, the Commission also emphasised that the successful engagement of Aboriginal children and their families in the team process may be hindered by the fear and distrust of police and other government agencies.[79] There is no requirement that a member of an Aboriginal community must replace the police representative or coordinator of the team – it is only an option that may be utilised if the relevant justice agencies consider it to be appropriate. The Commission's view is that there should be diversion to Aboriginal-owned or Aboriginal-controlled processes. Further, the juvenile justice team process is subject to the requirements of the *Young Offenders Act*. For example, certain offences cannot be referred to a juvenile justice team. The Commission's aim is to establish a flexible diversionary process with greater involvement of the relevant Aboriginal community.

The Aboriginal and Torres Strait Islander Social Justice Commissioner expressed strong support for diversionary processes. His submission referred to a number of necessary principles for best diversionary practice.[80] These principles are applicable to all forms of diversion. In the context of the Commission's proposal for diversion by the police to Aboriginal community justice groups, the following principles are particularly relevant:

- The need for adequate resources.
- The need for adequate consultation with Aboriginal communities and the requirement that diversionary processes be reflective of local needs and circumstances.
- That a young person should not obtain a criminal record as a consequence of participating in a diversionary process and previous diversion should not prevent subsequent referrals.
- That the referral to the diversionary process must require the informed consent of the young person and his or her parents.
- That diversionary options for Aboriginal children should be culturally appropriate.
- That the decision to divert a young person should be based upon established criteria.
- That diversionary options include sufficient procedural safeguards such as the right to silence, access to legal representation, access to an interpreter and the right to have a parent present.
- That a young person who has been referred to a diversionary option has the right to make a complaint about his or her treatment during the diversionary process.
- That diversionary options should be regularly monitored and evaluated.

75. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4; LRCWA, Discussion Paper community consultation – Broome, 10 March 2006.
76. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14; Department of the Attorney General, Submission No. 34 (11 May 2006) 10.
77. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 9–10.
78. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 225–26.
79. Blagg H, 'A Just Measure of Shame: Aboriginal youth and conferencing in Australia' (1997) 37 *British Journal of Criminology* 481, 496.
80. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12–14. The best practice principles are discussed in detail in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (Sydney: Human Rights and Equal Opportunity Commission, 2001) 135.

The Commission is of the view that these principles should be taken into account when developing diversionary processes to a community justice group. However, the requirement for procedural safeguards should be balanced against the need to ensure that Aboriginal-controlled processes are not unduly restricted by western legal procedures. Accordingly, the Commission has included certain procedural safeguards to be followed by the police at the time a decision is made to refer a young person, but not during the actual diversionary process itself. The Commission stresses that its recommendation is to develop a diversionary scheme: the precise details and applicable procedures will need to be determined in consultation with Aboriginal communities and relevant justice agencies, such as the police. Further, the Commission has recommended that there should be ongoing evaluation and monitoring of any diversionary options for Aboriginal people and, therefore, any future need for procedural changes or legislative amendments should be determined at this stage.[81]

Recommendation 50

Diversion to a community justice group

1. That the Western Australian government establish a diversionary scheme for young Aboriginal people to be referred by the police to a community justice group.
2. That the Western Australian government provide adequate resources to community justice groups in order that they may develop and operate diversionary programs.
3. That the diversionary scheme be flexible and allow different communities to develop their own processes and procedures.
4. That the police fully explain to the young person (and responsible adult) the nature of the alleged offence and, that the young person has the right to seek legal advice before agreeing to participate in the diversionary scheme.
5. That the police ensure that the young person fully understands his or her options, if necessary by providing the services of an interpreter.
6. That any admissions made by the young person during the diversionary process cannot be used as evidence against the young person.
7. That a young person and an appropriate responsible adult must consent to any referral by the police to a diversionary scheme operated by a community justice group.
8. That, if the young person does not consent to be referred to a community justice group, if the community justice group does not agree to deal with the matter, or if the community justice group is not satisfied with the outcome, the matter can be referred back to police to be dealt with in the normal manner.
9. That the diversionary scheme provide that a referral to a community justice group does not count as a conviction against the young person and can only be referred to in a court for the purpose of considering whether the young person should again be referred to a community justice group or to determine if the young person has previously been given adequate opportunities for diversion and/or rehabilitation.

The Commission is of the view that any existing and future diversionary programs for Aboriginal people (whether they are government-controlled or Aboriginal-controlled) should be monitored and evaluated.[82] The Commission has recommended the establishment of an independent Commissioner for Indigenous Affairs. In evaluating diversionary options the Commissioner for Indigenous Affairs should determine whether Aboriginal people are receiving equitable access to and appropriate treatment during any diversionary options and whether any legislative changes are required in the long-term.

81. See Recommendation 51, below p 205.
82. The Aboriginal and Torres Strait Islander Social Justice Commissioner, in his submission, outlined the minimum requirements of any diversionary scheme and these included the need for ongoing monitoring and evaluation: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12–14.

Aboriginal people under police interrogation may be disadvantaged by language, communication and cultural barriers.

Recommendation 51

Evaluation of diversionary options for Aboriginal people

That the Commissioner for Indigenous Affairs regularly review and evaluate all diversionary options available in Western Australia for Aboriginal people to determine whether:

1. There are effective diversionary options for Aboriginal people and, if not, the Commissioner for Indigenous Affairs should make recommendations to ensure that there are effective diversionary programs.
2. Aboriginal people are being diverted at the same rate as non-Aboriginal people.
3. Any legislative or procedural changes are required to ensure the effective diversion of Aboriginal people from the criminal justice system.

Police Interrogations

In its Discussion Paper the Commission considered the vulnerability of Aboriginal suspects who are being questioned in police custody.[83] Aboriginal people under police interrogation may be disadvantaged by language, communication and cultural barriers. Further, Aboriginal people may be particularly susceptible to making false or unreliable confessions in police custody because of the long-standing fear and mistrust of police. The Commission also noted that Aboriginal people may be more likely to agree with propositions put to them by police even when these propositions are false (this is known as 'gratuitous concurrence').[84] Miscommunication can undoubtedly occur between a police officer and the suspect where English is not the suspect's first language. Further, some Aboriginal people may find it difficult to understand the concept of guilt under Australian law. Under customary law the concept of responsibility is much broader and collectively based. Thus a simple assertion by an Aboriginal person that he or she is guilty or responsible for the alleged crime must be viewed cautiously. 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.

Minimum requirements for police interviews

The Commission has examined in detail the law throughout Australia in relation to the questioning of suspects by police.[85] In particular, the Commission considered the Criminal Investigation Bill 2005 which is currently before the Western Australian Parliament. Although covering some of the important issues, it is the Commission's opinion that this Bill does not go far enough. 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. In summary, these requirements are that:

- A caution must be issued and questioning cannot commence unless the police officer is satisfied that the suspect understands the meaning of the caution. In order to be satisfied the 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 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.

83. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 224–45. The lack of understanding by Aboriginal people about police interviews and the right to silence was confirmed by prisoners during the Commission consultation at Broome Regional Prison: LRCWA, Discussion Paper community consultation – Broome Regional Prison, 7 March 2006.
84. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 398–99.
85. Ibid 245–48.

- 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, the police officer is to notify the ALS and provide a reasonable opportunity for a representative of the ALS to speak with the suspect prior to the commencement of the interview.
- That where a suspect does not wish for a representative of the ALS 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.

It was also proposed that, unless there are exceptional circumstances, failure to comply with these provisions will cause the interview to be inadmissible in court. The Commission suggested that the legislation should provide for appropriate exceptions, such as the interviewing officer would not be required to delay questioning if to do so would potentially jeopardise the safety of any person.[86]

The ALS fully supported the Commission's proposal and submitted that it should be implemented immediately.[87] The proposal was also supported by the Department of the Attorney General.[88] The Western Australia Police did not support the proposal because relevant principles are already well established by case law.[89] However, as the Commission concluded in its Discussion Paper, legislative provisions which set out the requirements for police questioning would constitute a stronger direction to police officers and courts of the *minimum* requirements for a fair interview.[90]

The Western Australia Police specifically opposed the requirement in the Commission's proposal that they should *notify* the ALS prior to interviewing an Aboriginal suspect. It was argued that this requirement could cause significant delays in circumstances where a suspect is taken into custody after normal working hours or in regional and remote areas.[91] However, the Commission's recommendation only requires that the police notify the ALS and provide a reasonable opportunity for a representative from the ALS to attend. The recommendation does not require that police must unreasonably hold a suspect in custody in circumstances where a representative from the ALS is unavailable. The ALS has submitted to the Standing Committee on Legislation that the Criminal Investigation Bill 2005 should include a requirement that the ALS should be notified if an Aboriginal person is taken into police custody.[92] In this submission, the ALS emphasised that such a requirement would ensure that the legal rights of Aboriginal people were upheld and would also assist the police by preventing confessional evidence from being subsequently excluded from the evidence in court because those rights were not respected. The Commission agrees and maintains its view that the minimum requirements for interviewing suspects should be set out in legislation – not only for the benefit of Aboriginal people but for all Western Australians.

Recommendation 52

Legislative requirements for interviewing suspects

That the following rights be protected in legislation so as to render inadmissible any confessional evidence obtained contrary to them save in exceptional circumstances:

1. That an interviewing police officer must caution a suspect and must not question the suspect until satisfied that the suspect understands the caution. In order to be satisfied that the suspect understands the caution the interviewing police officer must ask the suspect to explain the caution in his or her own words.
2. If the suspect does not speak English with reasonable fluency the interviewing police officer shall 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 any interview commences.

86. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 248–50, Proposal 45.
87. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 15.
88. Department of the Attorney General, Submission No. 34 (11 May 2006) 10.
89. Office of the Commissioner of the Police, Submission No. 46 (7 June 2006) 11.
90. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 250.
91. Office of the Commissioner of the Police, Submission No. 46 (7 June 2006) 12.
92. Aboriginal Legal Service (WA), Submission: Criminal Investigation Bill 2005 (July 2006) 5–6.

The Commission maintains its view that the minimum requirements for interviewing suspects should be set out in legislation.

3. 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.
4. In the case of a suspect who is an Aboriginal person the interviewing police officer 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. The interviewing police officer must provide a reasonable opportunity for a representative of the Aboriginal Legal Service to communicate with the suspect. The interviewing police 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.
5. If the suspect does not wish for a representative of the Aboriginal Legal Service to attend or there is no representative available, the interviewing police officer must allow a reasonable opportunity for an interview friend to attend prior to commencing the interview. The interviewing police officer does not have to comply with this requirement if it has been expressly waived by the suspect.
6. That appropriate exceptions be included, such as an interviewing police 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.

Interpreters

As recommended above (and provided for in the Criminal Investigation Bill 2005), a suspect should have a right to an interpreter if he or she does not speak or understand English with reasonable fluency. However, the Commission explained in its Discussion Paper that in practice it is not always easy to recognise when an Aboriginal person who may speak English to a limited extent requires the services of an interpreter. In this context it is vital to take into account the difference between Standard English and Aboriginal English.[93] The Commission proposed that in addition to a statutory requirement that an interpreter should be provided prior to police questioning, the Western Australia Police, in conjunction with appropriate Aboriginal interpreters, should develop a set of protocols for the purpose of determining whether an Aboriginal person requires the services of an interpreter.[94]

The Western Australia Police claimed in their submission that they already have a set of protocols to cover this issue. However, the matters referred to in the submission deal with procedures for police interviews. These procedures do not cover how a police officer should determine whether an Aboriginal person does not speak English sufficiently and therefore requires the services of an interpreter.[95] The Commission believes that there should be linguistic guidelines (developed in conjunction with Aboriginal interpreter services) to assist police. The Commission has made similar recommendations with respect to lawyers and courts.[96] Although the protocols for each agency would necessarily differ, the linguistic guidelines could be used or adapted for use by each agency.[97] Therefore, the Commission suggests that there should be collaboration between relevant justice agencies in relation to the implementation of these recommendations.

93. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 249 & 397–98.
94. Ibid 249, Proposal 44. This proposal was supported by the Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.
95. Office of the Commissioner for Police, Submission No. 46 (7 June 2006) 10. The Commission notes that the procedures mentioned in the submission include reference to s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). This section has been repealed and therefore the Commission suggests that the Western Australia Police should review and update its procedures for interviewing Aboriginal people.
96. See Recommendation 10, above p 91 and Recommendation 122, below p 341.
97. This was noted by the Department of the Attorney General: see Department of the Attorney General, Submission No. 34 (11 May 2006) 10.

Recommendation 53

Police protocols for determining whether an Aboriginal person requires an interpreter

That the Western Australia Police, in conjunction with relevant Aboriginal interpreter services, develop a set of protocols (including linguistic guidelines) for the purpose of considering whether an Aboriginal person requires an interpreter during an interview.

Policing Aboriginal Communities and Aboriginal Involvement in Policing

In its Discussion Paper, the Commission referred to the lack of police presence in many Aboriginal communities and other policing options such as Aboriginal wardens and Aboriginal Police Liaison Officers (APLOs). The Commission concluded that the best approach is to allow Aboriginal communities to develop their own informal self-policing strategies and at the same time ensure that there is a greater police presence where it is required. The Commission indicated its support for the government's plan to establish a permanent police presence in nine remote locations.[98]

It was also observed that the role of APLOs was the subject of mixed views during the Commission's consultations. Aboriginal people were concerned that the role of APLOs had changed over time: it is now focused on 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 have implemented a voluntary transition program for APLOs. Under this program APLOs can make the transition to mainstream police officers. The Commission understands that about 90 of the existing 144 APLOs have indicated that they wish to make the transition to mainstream police.[99]

The Commission supports the transition program; however, it is also necessary that there is a strategy in place to ensure that the original community liaison role is addressed. The Commission understands that the Western Australia Police are considering the employment of civilian liaison officers to assist in liaison between the police and various ethnic groups in the community.[100] The Commission strongly encourages the Western Australia Police to engage with community justice groups because members of a community justice group could potentially take on a liaison role. Unlike Aboriginal police officers, who are responsible to the Western Australia Police, Aboriginal community members can maintain accountability to their community.

Move-on notices

As stated earlier, the Commission is of the view that inappropriate policing of Aboriginal people continues today. While this continues to take place, it will be difficult for the police to establish a positive relationship with Aboriginal communities. Following its Discussion Paper, the Commission has received complaints from Aboriginal people about the move-on laws.[101] The move-on laws are set out in s 50 of the *Police Act 1892* (WA) which provides that a police officer has the power to order that a person leave a public place for up to 24 hours if the officer reasonably suspects (among other things) that the person is committing a breach of the peace or intends to commit an offence. This section came into operation in June 2005.[102] Failure to comply with the order, without a reasonable excuse, is an offence and the penalty is a maximum of 12 months' imprisonment. More than 120 'move-on notices' were issued in the first two weeks that these provisions came into operation. It was reported that 36 per cent of these 'move-on notices' were issued to Aboriginal people.[103]

From one perspective, the provision for move-on notices, as an alternative to laying a substantive charge, may reduce the number of Aboriginal people charged

98. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 250–51. The nine locations are Warburton, Kalumburu, Balgo, Jigalong, Dampier Peninsula, Bidyadanga, Warmun, Wakakurna (Docker River) and Kintore (the latter is a multi-jurisdiction project with the Northern Territory and South Australia
99. Western Australia Police, Aboriginal Corporate Development Team, consultation (26 June 2006).
100. Ibid.
101. LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006.
102. The Commission notes that this provision is included in clause 27 of the Criminal Investigation Bill 2005 (WA).
103. Morfesse L, 'Youth Targeted in New Orders to Move Along', *The West Australian*, 13 June 2005, 11.

There are numerous accounts to suggest that move-on notices are being issued to Aboriginal people in inappropriate circumstances.

with an offence and detained in custody.[104] For example, a person may be issued with a move-on notice rather than being charged with an offence such as disorderly conduct.[105] However, there are numerous accounts to suggest that move-on notices are being issued to Aboriginal people in inappropriate circumstances and that Aboriginal people are being disproportionately affected by this law.[106] It appears that in some cases Aboriginal people are being targeted by the police for congregating in large groups in public areas even though no one is doing anything wrong. In Kalgoorlie, the Commission was told that if there are one or two troublemakers in a group, the police issue move-on orders to all present rather than just the people who were causing problems.[107] It was also reported that homeless Aboriginal women are moved on from well lit areas and forced to stay in unsafe locations.[108] The ALS has submitted that the move-on laws should be immediately repealed.[109]

The Commission is very concerned about the apparent discriminatory treatment of Aboriginal people with respect to move-on notices. If move-on notices are issued too readily or in circumstances where it is inappropriate or impossible to expect compliance, then any benefit obtained from not charging the person with a substantive criminal offence will inevitably be lost. The person will end up being charged with breaching the move-on notice. The ALS has highlighted that because a move-on notice can be issued when a police officer reasonably suspects that the person is likely to commit an offence there is a large scope for misuse of police discretion.[110] However, because the laws have only been in operation for just over one year, the Commission is of the view that it is premature to recommend that the laws be repealed. The Commission strongly encourages the Western Australia Police to review its practice with respect to issuing move-on notices, and to provide appropriate training and direction to police officers about how they should exercise their discretion in relation to Aboriginal people.

The Commission has concluded that it is necessary that the move-on laws are independently reviewed and evaluated within two years from their commencement. In particular, this review should consider whether the move-on laws could be amended to operate more justly for Aboriginal people (and others) or whether the laws should be repealed. If it is found that the move-on laws are required then the Commission suggests that consideration should be given to amending the laws to provide a wider defence. Such a defence could include: that the person did not have the capacity to understand the direction to leave the area or the request for an explanation; that the person did give a reasonable explanation; or that the person had a reasonable excuse for not leaving the area or returning to the area during the prohibited time. It may also be appropriate for the legislation to provide that the police must provide a reasonable opportunity for the person to leave the area. Further, a move-on notice could be given with appropriate exceptions – such as that the

104. The Commission recommended in 1992 that s 43(1) of the *Police Act 1892* (WA) should be repealed because it created an offence where a person was suspected of being about to commit an offence and failing to give a satisfactory account of oneself: see LRCWA, *Police Act Offences*, Report No. 85 (August 1992) [4.17] & [4.21]. The Commission made a recommendation for move-on powers; however, the defence suggested by the Commission was broader than what is currently contained in the *Police Act*. It was recommended that there should be a defence if the person did not have the capacity to understand the direction or give a reasonable explanation; or that the person gave a reasonable explanation.
105. Steve Sharrat SM, consultation (4 April 2006)
106. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 13; Steve Sharrat SM, consultation (4 April 2006); LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006; Penn S, 'McGinty Hits Move-on Orders' *West Australian*, 8 May 2006, 7; Calverley A, 'Court List Supports Move-on Criticism,' *West Australian*, 10 May 2006, 46.
107. LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006.
108. Ibid.
109. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 13.
110. Aboriginal Legal Service (WA), Submission: Criminal Investigation Bill 2005 (July 2006) – Appendix: Submission to the Attorney General (2 March 2006) 3. This submission contains a number of case examples which demonstrate the particular problems for Aboriginal people. These problems include a lack of understanding of the requirement of the order due to language or communication barriers; inadequate time provided for the person to leave the relevant area; inappropriate use of police discretion when deciding to charge a person for breaching a move-on notice where the circumstances did not appear to suggest that the person was doing anything wrong; the use of move-on notices against very young children; the imposition of the maximum period of 24 hours rather than a lesser period; and failure to consider the usual place of residence of the person when issuing the moved-on notice.

person is entitled to return to the prohibited area for the purpose of employment or to go to their usual place of residence.

Recommendation 54

Review of move-on laws

1. That the Commissioner for Indigenous Affairs review and evaluate the move-on laws after two years of operation.
2. That the Commissioner for Indigenous Affairs consider and report to the Western Australian government about whether the laws should be amended or repealed.

Northbridge curfew

Another area of policing that disproportionately impacts upon Aboriginal people, is the Western Australian government's Young People in Northbridge Policy (also known as the 'Northbridge curfew'). This policy came into effect on 28 June 2003.[111] The policy directs police officers to use existing powers to remove unsupervised children from the Northbridge entertainment precinct. The policy stipulates that children of certain age groups are not entitled to be in Northbridge unsupervised after hours.[112] At the time the Northbridge curfew was introduced it relied upon an existing power to remove children under s 138B of the *Child Welfare Act 1947* (WA). This section authorised a police officer to apprehend an unsupervised child who was 'away from their usual place of residence' if the police officer believed that the child was 'in physical or moral danger, misbehaving or truanting from school'.[113] The child could then be returned to his or her place of residence or school or detained until a responsible person could be found. The *Child Welfare Act* was repealed on 1 March 2006 and the relevant power to apprehend a child is now found under s 41 of the *Children and Community Services Act 2004* (WA). Section 41 authorises a police officer (or authorised officer) to move an unsupervised child to a safe place if that officer reasonably believes, that there is a 'risk to the well-being of the child because of the nature of the place where the child is found, the behaviour or vulnerability of the child at that place or any other circumstance'. The Commission notes that basis for removing a child under the new provision appears to be wider than the previous section – a 'risk to the well-being' of a child is arguably broader than 'physical or moral danger'.

While ostensibly the Northbridge curfew applies equally to all children, statistics show that the majority of children dealt with pursuant to the curfew policy are Aboriginal. For example, 88 per cent of children dealt with by police in 2004 were Aboriginal.[114] It has also been reported that the largest single category of contacts were young Aboriginal females aged between 13 and 15 years.[115] It has been argued that the curfew policy may be discriminatory because it disproportionately affects Aboriginal people.[116]

In the context of the history of the negative relationship between police and Aboriginal people, the Commission is concerned that the curfew policy may unnecessarily bring Aboriginal youth into contact with the police. Aboriginal people consulted by the Commission were concerned that young Aboriginal people were treated poorly by police.[117] In its Discussion Paper, the Commission observed that some Aboriginal people react negatively when police approach them for behaviour in public spaces that would generally go unnoticed if committed by non-Aboriginal people.[118] The Human Rights and Equal Opportunity Commission observed that the:

111. Office of Crime Prevention, Western Australia Department of Premier and Cabinet, *Young People in Northbridge Policy: One Year On* (June 2004) 2–3.
112. The policy states that children under the age of 12 years must leave Northbridge during the hours of darkness; that children aged between 13 and 15 years must leave Northbridge by 10 pm; and that children between the ages of 15 and 18 years may be apprehended by police at any time if by their 'anti-social, offending or health-compromising behaviour' they are placing themselves and/or others at risk of harm: see Office of Crime Prevention, Western Australia Department of Premier and Cabinet, *Young People in Northbridge Policy* (2003) 3–4.
113. An authorised officer from the Department of Community Development was also entitled to exercise the powers in s 138B of the *Child Welfare Act 1947* (WA).
114. Office of Crime Prevention, Western Australia Department of Premier and Cabinet, *Young People in Northbridge Policy: One Year On* (June 2004) 5.
115. Ibid 6. This raises an interesting question: are more Aboriginal girls being dealt with than Aboriginal boys because there are more Aboriginal girls in Northbridge or do the police perceive girls to be 'at risk' more readily?
116. Rayner M, 'Northbridge Curfew' (2003) 5(27) *Indigenous Law Bulletin* 9, 10 where it was stated that '[i]t may be that police are merely acting in response to the proportions of Aboriginal and non-Aboriginal young people on Northbridge streets, but since nobody is evaluating the policy it is impossible to say. The other possibility is worrying. Youth groups have anecdotes of police using their discretion to stop, question and direct young people out of the entertainment precinct who are neither under age nor misbehaving, but apparently 'Aboriginal''. See also Lombard K, 'Northbridge Curfew' (2004) 1 *Metior* 21; Koch T, 'Aboriginal Legal Service' (2003) 5(27) *Indigenous Law Bulletin* 7.
117. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 236.

While ostensibly the Northbridge curfew applies equally to all children, statistics show that the majority of children dealt with pursuant to the curfew policy are Aboriginal.

> Enforcement of curfews imposes on children and young people all the risks associated with contact with police (including the risk of provoked offences such as offensive language) and with police custody (including the risk of self-harm).[119]

More broadly, the policy has been criticised for violating the rights of children and young people such as the right to access public space and the right to freedom of association.[120] The Western Australian government's report, *Young People in Northbridge Policy: One Year On*, stated that an 'independent review' of the Northbridge curfew had 'recently been commissioned'.[121] However, as far as the Commission is aware this review has not yet been undertaken.[122]

In the absence of an independent review of the curfew policy, it is difficult to judge the effectiveness of the policy in terms of protecting young people and whether in practice the policy is operating unfairly on Aboriginal young people. Therefore, the Commission recommends that the Northbridge curfew policy be reviewed as a matter of priority. The Commission is of the view that the Commissioner for Indigenous Affairs would be an appropriate body to undertake this review; however, the Western Australian government has proposed to establish an independent Commissioner for Children and Young People.[123] Because the curfew relates only to children and young people it would also be an appropriate body to review the curfew.

Recommendation 55

Review of the Northbridge curfew policy

That the Commissioner for Indigenous Affairs or the Commissioner for Children and Young People (whichever office is established sooner) review and evaluate the Western Australian government's Northbridge curfew policy as a matter of priority.

Cultural awareness training

The Commission acknowledged in its Discussion Paper that the Western Australia Police provide cultural awareness training programs for its officers; however, many Aboriginal people consulted by the Commission argued that better cultural awareness training for police is required. The Commission 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.[124] This proposal received extensive support.[125] In its submission the Western Australia Police advised that all police recruits participate in training about the role and functions of APLOs and Aboriginal-police relations. Police officers who are selected to work in the new remote multi-functional police stations also receive specific cultural awareness training. The Western Australia Police also acknowledged the need to consult

118. Ibid 235
119. Human Rights and Equal Opportunity Commission, *Annual Report 2002-2003*, Ch 7 'Race Discrimination', <http://www.hreoc.gov.au/annrep02--_03/chap7.html>.
120. Human Rights and Equal Opportunity Commission, ibid; Youth Affairs Council of Western Australia, Submission to the Office of Crime Prevention on 'Preventing Violence: The State Community Violence Prevention Strategy 2005' (2006) 4
121. Office of Crime Prevention, Western Australia Department of Premier and Cabinet, *Young People in Northbridge Policy: One Year On* (June 2004) 7.
122. David Ray, Acting Director of the Office of Crime Prevention, telephone consultation (8 September 2006). The Commission was advised that the Office of Crime Prevention will be preparing a report about the curfew's first three years of operation.
123. Commissioner for Children and Young People Bill 2005.
124. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 253, Proposal 46.
125. Kimberly Aboriginal Law and Culture Centre, Submission No. 17 (17 April 2006) 8; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14; Department of the Attorney General, Submission No. 34 (11 May 2006) 10; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 3; Law Society of Western Australia, Submission No. 36 (16 May 2006) 1; Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4. See also LRCWA, Discussion Paper community consultations, Warburton, 27 February 2006; Kalgoorlie, 28 February 2006; Fitzroy Crossing, 9 March 2006.

with local Aboriginal groups to ensure that this training is locally based.[126] The Department of Corrective Services submitted that all police officers should be required to participate in cultural awareness training and, therefore, the Commission's proposal should be extended beyond just those officers who work in an Aboriginal community.[127] The Commission is concerned about the nature of training for police recruits. Bearing in mind that the role of APLOs is now nearly defunct, it appears that the training would necessarily be limited to Aboriginal-police relations. Therefore, the Commission agrees that it is appropriate to recommend that all Western Australian police officers should be required to participate in Aboriginal cultural awareness training.

Recommendation 56

Cultural awareness training for police officers

1. That the Western Australian government provide adequate resources to ensure that every police officer in Western Australia participates in Aboriginal cultural awareness training.
2. That every police officer who is stationed at a police station that services an Aboriginal community participates in relevant and locally based Aboriginal cultural awareness training.
3. That Aboriginal cultural awareness training should be presented by local Aboriginal people including, if appropriate, members of a community justice group.

Recording ethnicity

In its submission, the Department of Indigenous Affairs raised an important point in relation to the recording of ethnicity by the Western Australia Police.[128] It was explained that in recent years the recording of victim ethnicity has substantially declined. Research by the Crime Research Centre indicates that:

> For the second year running there was a large and significant increase in the number of offences against the person with unknown victim Indigenous status (from 3.4 percent in 2002 to 76.8 percent in 2004) and, consequently, the victimisation rates for Indigenous people for violent offences were not obtainable in 2004, nor were the relative risks of victimisation for Indigenous women.[129]

It has been observed that the poor quality of Indigenous data in relation to certain aspects of the criminal justice system is because some justice agencies do not 'ask explicitly for a person's Indigenous status'.[130] For another person to determine whether a person is Aboriginal or not, solely on the basis of physical appearance, is obviously not appropriate.

The Department of Indigenous Affairs highlighted that insufficient or inaccurate recording of victim ethnicity will make it difficult for Western Australia to determine its 'progress in providing safe communities for its Indigenous people' and provide adequate assistance to victims of family violence. Given the unacceptable level of family violence and sexual abuse in Aboriginal communities the Commission considers it is essential that accurate statistics are kept. The Department also referred to problems in recoding ethnicity for people who may be considered 'offenders' unless they are actually taken into police custody. Therefore, accurate statistics are not retained for procedures such as move-on notices.[131] Bearing in mind the extent of disadvantage and discrimination experienced by

126. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 12.
127. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14.
128. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 12.
129. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005) vi.
130. Australian Government Productivity Commission, *Review of Government Service Provision: Indigenous Compendium 2006,* <http://www.pc.gov.au/gsp/reports/rogs/compendium2006>.
131. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 13.

Aboriginal people in the Western Australian criminal justice system, the Commission is of the view that police should be required to ask all victims and alleged 'offenders' to state their ethnicity (including people who are issued with a move-on notice or otherwise dealt with without being formally charged). However, it should not be compulsory for the person to answer this question.

Recommendation 57

Recording of ethnicity by police

1. That the Western Australia Police ask all victims and alleged 'offenders' to state their ethnicity (including people who are issued with a move-on notice or otherwise dealt with without being formally charged) and, if a response is provided, appropriately record that response.
2. That police officers inform the person of the reason they wish to record the person's ethnicity (that is, to enable accurate statistics to be kept) and advise that a response is voluntary.

The future of police and Aboriginal relations

The Commission noted in its Discussion Paper that in November 2005 the Aboriginal and Policy Services Unit was amalgamated with the Strategic Policy and Development Unit. The Commission had been advised that this amalgamation was designed to improve the effectiveness of policy and services concerning Aboriginal people. However, it was noted that the failure to maintain a separate Aboriginal unit within the police service is contrary to the recommendations of the RCIADIC.[132] The Commission observed that the incorporation of Aboriginal policy into a mainstream policy unit runs the risk that the momentum to improve Aboriginal police relations will be lost. However, bearing in mind that the amalgamation had only just taken place, the Commission invited submissions as to whether the former Aboriginal Policy and Services Unit should be reinstated and provided with additional resources.[133]

The Commission has only received two submissions in response to this invitation. The Catholic Social Justice Council stated that there should be a separate Aboriginal unit within the Western Australia Police as recommended by the RCIADIC.[134] It appears that since the publication of the Commission's Discussion Paper further changes have been made. The Western Australia Police explained that there is currently an Aboriginal Corporate Development Team which reports directly, through the Assistant Director, to the Commissioner's delegate (Executive Director).[135] The Commission has been advised that the primary role of the Aboriginal Corporate Development Team has changed. Previously, the Aboriginal unit was involved in day-to-day issues. It is now considered appropriate that the team take on a strategic role: directing and overseeing other police in their dealings with Aboriginal people and communities. This role is designed to improve accountability; that is, to ensure that police officers on the ground are working more effectively with Aboriginal communities. The Commission has been advised that once the transition program for APLOs is completed, the Aboriginal Corporate Development Team may consider the development of guidelines for police about dealing with Aboriginal people.[136]

While the Commission is of the view that the changes described above appear to be appropriate, there is a need to improve transparency. Given the name of the team and the lack of public information about its role, it would be easy to assume that the Western Australia Police do not have a sufficient focus on Aboriginal issues. In this regard, the Commission notes that the Western Australia Police website is inadequate.[137] For most of 2005 until mid-2006, the 'Aboriginal Policy and Service' link was continually described as 'under construction'. At the time of publication of this report, the only information available was the address and contact details of the unit. The Commission is of the view that the website should immediately be updated and contain information for Aboriginal people about the role of the Aboriginal Corporate Development Team, staff details and other information such as policies and guidelines that are relevant to Aboriginal people.

132. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 253–54.
133. Ibid, Invitation to Submit 8.
134. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3.
135. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14–15.
136. Western Australia Police, Aboriginal Corporate Development Team, consultation (26 June 2006).
137. See <http://www.police.wa.gov.au>, 'Aboriginal Policy and Services'.

Recommendation 58

Western Australia Police website

That the Western Australia Police immediately update its website to include:

1. The current name and contact details of the Aboriginal Corporate Development Team.
2. The contact details for all staff who work for the Aboriginal Corporate Development Team.
3. The roles and responsibilities of the Aboriginal Corporate Development Team.
4. Relevant policies, guidelines and publications.

The Commission believes that its recommendation for community justice groups will be far more effective if there is a good working relationship between community justice group members and police. In this regard, the Commission suggests that the Aboriginal Corporate Development Team develop polices and/or guidelines for how police officers should engage and work with community justice groups. These policies and guidelines should be developed in conjunction with community justice groups. In consultation with community justice groups, the Aboriginal Corporate Development Team should also establish appropriate benchmarks to ensure that police officers working on the ground follow the relevant polices and guidelines. For example, it could be provided that the local police station must regularly report to the Aboriginal Corporate Development Team about how often and in what circumstances their police officers have met with and consulted local community justice group members.[138] The Commission strongly encourages the Western Australia Police to work with Aboriginal community justice groups and Aboriginal people generally to improve the relationship between Aboriginal people and the police, and as a consequence improve the justice outcomes of Aboriginal people in this state.

138. The Commission notes that Aboriginal people in Warburton suggested that if a person from Warburton is arrested in another location the police should notify the Warburton community justice group so that it can make appropriate submissions or provide information to the court where the person will appear: see LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006.

Prisons

Aboriginal people in Western Australia are disproportionately over-represented in prison and detention centres. The extent and causes of this over-representation were discussed at length by the Commission in its Discussion Paper.[1] While many of the Commission's recommendations are designed to reduce the unacceptable number of Aboriginal people in custody, any significant reduction in the level of over-representation will not happen immediately. Therefore, it remains a priority for those responsible for the management of custodial facilities to acknowledge the detrimental impact of custody upon Aboriginal people and to provide culturally appropriate programs, activities and services for Aboriginal prisoners.

Since June 2000 the Western Australian Office of the Inspector of Custodial Services (the Inspector) has been responsible for examining and reporting on conditions within Western Australian custodial facilities. The Inspector has made numerous recommendations concerning the adequacy of facilities and services for Aboriginal prisoners.[2] Recently, the Inspector has reiterated that inspections have 'continued to find Aboriginal prisoners facing conditions markedly inferior to non-Aboriginal prisoners'.[3] In 2005 the *Inquiry into the Management of Offenders in Custody and in the Community* (the Mahoney Inquiry) considered in detail the current state of custodial management in Western Australia. Both the Mahoney Inquiry and the Inspectors' *Directed Review of the Management of Offenders in Custody* addressed the position with respect to Aboriginal prisoners.[4] In its Discussion Paper the Commission concluded that it is not appropriate or necessary to re-examine all of these issues in detail. As a result the Commission has confined its examination of prison issues primarily to those matters raised during its consultations with Aboriginal people.[5]

Prisoner Attendance at Funerals

During the Commission's consultations the most important issue expressed in relation to prisons and Aboriginal customary law was attendance by prisoners at funerals.[6] The Commission observed in its Discussion Paper that if attendance is required at a funeral because of the prisoner's relationship to the deceased, failure to attend will cause distress and shame and will not be excused simply because the person is in prison. In this regard it is important to understand that responsibility under Aboriginal customary law is often strict and if an Aboriginal person fails to attend certain funerals he or she may be liable to punishment.[7]

Specific concerns expressed to the Commission during its consultations with Aboriginal people were that the criteria for approval for prisoner funeral attendance do not adequately recognise family and kin relationships; that the application process is difficult; and that the use of restraints during funeral attendance (such as

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 95–99. See also 'Over-representation in the Criminal justice system', above p 82.
2. In June 2006 the Inspector published a report which sets out the recommendations and observations made with respect to Aboriginal prisoners during the period from 2000 to 2005: see Office of Inspector of Custodial Services, *Digest of Aboriginality in Western Australian Prisons as Reported in Published Inspection Reports 2000–2005* (June 2006).
3. Ibid 2.
4. For example, the Mahoney Inquiry recommended that the relevant legislation should require the Department of Corrective Services to 'specifically contemplate the unique cultural needs of Indigenous offenders in the development, delivery and evaluation of policies, programs and services' (Recommendation 85); that the 'planning for all custodial facilities should ensure appropriate consideration is given to the needs of Indigenous offenders' (Recommendation 86); that there should be a new custodial facility in the Kimberley and the Eastern Goldfields (Recommendations 90 & 91); and that any new custodial facilities with a large proportion of Aboriginal prisoners should be constructed with the needs of Aboriginal offenders in mind (Recommendation 89): see Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.59] & [9.77].
5. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 255.
6. Ibid 256. The Commission notes that in 2002 approximately 75 per cent of Aboriginal people reported having attended a cultural event in the last 12 months and that the most commonly reported events were funerals (62 per cent). Nearly 90 per cent of Aboriginal people living in remote areas reported attending a cultural event in the last 12 months: see Australian Bureau of Statistics, *Selected Statistics for Aboriginal and Torres Strait Islander people in Western Australia* (June 2006).
7. Ibid 256. In a submission it was noted that Aboriginal prisoners become very distressed if they are not able to attend a funeral and some prisoners may even face punishment under customary law for non-attendance: see Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 4.

handcuffs and shackles) is inappropriate and unnecessary.[8]

Application process and defining family relationships

Pursuant to s 83 of the *Prisons Act 1981* (WA) a prisoner may be granted a permit of absence in order to attend a funeral of a near relative.[9] The Commission has examined the application process and policies governing prisoner funeral attendance for both adult and juvenile prisoners. In its Discussion Paper, the Commission found that these policies reflect Western lineal relationships (such as parents, grandparents and children) and do not take sufficient account of Aboriginal kinship structures.[10] Therefore, the Commission proposed that these policies be revised to include recognition of Aboriginal kinship and other important cultural relationships.[11]

The Commission has received support for this proposal from the Aboriginal Legal Service, the Law Society, the Inspector and the Criminal Lawyers Association.[12] The Department of Corrective Services indicated in its submission that it supports a review of the policy applicable for juvenile detainees.[13] This policy, *Juvenile Custodial Rule 802* (JC Rule 802), refers to the cultural significance of the relationship between the deceased and the detainee. But as noted by the Department, it does not expressly recognise 'Aboriginal kinship and other important Aboriginal cultural relationships'.[14] Bearing in mind that approximately 70 per cent of juvenile detainees in Western Australia are Aboriginal, it is crucial that the juvenile policy deals explicitly with Aboriginal kinship.

In respect to adult prisoners, the Department of Corrective Services does not state whether it supports or opposes the Commission's proposal. The Department indicated that in 2004 there was a review of *Policy Directive 9* (PD 9) and, as a result of this review, administrative procedures were changed.[15] In its submission the Department suggested that PD 9 currently includes reference to kinship by expressly including 'blood relationship, marriage/defacto relationship and other culturally important relationships'. But while relationships of grandparents, parents, siblings, children and spouses are stated in PD 9 to be sufficient to allow funeral attendance, the status of other relationships is not so clear:

> Where there has been an emotional, psychological or cultural significance attached to the relationship between the prisoner and the deceased but this relationship is not as described above, for example:
>
> - Where there has been an extensive history of contact between the prisoner and the deceased of a significant nature.
> - Where there has been a demonstrated commitment by either the prisoner or the deceased to their shared relationship.
> - Where either the prisoner or the deceased have significant community and/or tribal standing necessitating an obligation for attendance of the prisoner at the funeral.
> - Where there will be significant negative consequences resulting either to the prisoner, his family or community because of non-attendance of the prisoner at the funeral.
> - Where the relationship (between prisoner and deceased) has been that of foster child, foster parent or substitute caregiver.
> - The above includes the recognition of a cross-cultural relationship where prisoners of non-aboriginal descent have a recognised standing in the aboriginal community, to attend a funeral of an aboriginal person.

This policy does not expressly recognise Aboriginal kinship relationships. As discussed in Chapter Four, Aboriginal people use a 'classificatory kinship system'.[16] For example, a person who would be described as an 'uncle' under the Western lineal system may be considered a 'father' under an Aboriginal kinship system. Similarly, a 'cousin' could be described as a 'sister' or 'brother'. The funeral policy refers to relationships which

8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 256.
9. The Commission understands that the Department of Corrective Services intends to rename Policy Directive 9 to 'Grant of Permit': see Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006).
10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 256–57.
11. Ibid 259, Proposal 48.
12. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Law Society of Western Australia, Submission No. 36 (16 May 2006) 7; Office of Inspector of Custodial Services, Submission No. 44 (2 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.
13. Department of Corrective Services (WA), Submission No. 31 (May 2006) 15.
14. Ibid.
15. Ibid. The Commission notes although this review has resulted in administrative changes as well as recommendations in respect to the Department's funeral policy, Policy Directive 9 has not been amended since May 2001: see Mike Reindl, Acting Manager Policy and Standards, Department of Corrective Services, email (12 July 2006).
16. See discussion under 'The role of kinship in Aboriginal society', Chapter Four, above p 66.

have 'cultural significance' and then provides examples of the types of relationships that would satisfy that description. Although these examples do include matters that are relevant to Aboriginal prisoners (such as the tribal standing of the deceased or the prisoner and the fact that there may be negative consequences for the prisoner if he or she cannot attend the funeral) in the Commission's opinion these factors are not adequate to cover the importance of classificatory kinship structures. In its Discussion Paper the Commission stated that if a prisoner was to describe the deceased as his uncle (which may occur because the person assisting the prisoner to make the application frames the question in Western lineal terms) then the prison authorities may not appreciate the cultural significance of the relationship. Other examples listed in PD 9 may also work against Aboriginal prisoners. For example, the level of contact or commitment between the prisoner and the deceased may not have been significant and this may result from factors such as remoteness, lack of transport or lack of access to a telephone. Nevertheless, the relationship may be extremely significant from a cultural perspective.

The Inspector has argued that the funeral attendance policy is 'out of step with Aboriginal notions of family' and has suggested that the Department should rewrite the policy to ensure that it meets the 'specific needs and expectations of Aboriginal people'.[17] In its submission the Inspector also stated that the funeral policy is the 'single most important issue for most Aboriginal prisoners in the state'.[18] These observations are consistent with the vast majority of views expressed by Aboriginal people to the Commission during its consultations.[19]

Since receiving its submission, the Department of Corrective Services has advised the Commission that a number of recommendations to amend PD 9 were made during the review in 2004. Importantly, one recommendation is that PD 9 should include Aboriginal kinship as a separate criterion when deciding if a prisoner is eligible to attend a funeral.[20] It is anticipated that PD 9 will be amended to incorporate this recommendation (as well as other recommendations made during the review) in early 2007.[21] The Commission welcomes the proposed amendment to PD 9 but emphasises that it is also essential that the policy for juveniles is immediately reviewed. In relation to the policy for adults, the Commission wishes to express support for the Department's proposed change and indicate that this change should be considered a high priority.

Recommendation 59

Prison funeral attendance policies

That the Department of Corrective Services immediately revise Policy Directive 9 and Juvenile Custodial Rule 802 in relation to attendance at funerals. The eligibility criteria should expressly include recognition of Aboriginal kinship and other important cultural relationships.

Aboriginal communities consulted by the Commission also complained that the application procedures for funeral attendance were too complex. It was suggested that the forms should be more culturally appropriate and that prison officers who assist prisoners in completing the application form need to be more culturally aware.[22] In its Discussion Paper the Commission referred to the staff resource manual produced at the Roebourne Regional Prison and suggested that it was a useful model for other prisons.[23] This manual is designed to advise prison officers of relevant cultural considerations and to suggest appropriate ways of confirming information provided by prisoners in their application.[24] The Commission proposed that the Department of

17. Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No. 30 (November 2005) 45. The Inspector has suggested that the policy in Queensland is a useful model because it is more inclusive of Aboriginal kinship relations: see Office of Inspector of Custodial Services, *Report of an Announced Inspection of Roebourne Regional Prison – April 2002*, Report No. 14 (2003) 82. See also Queensland Department of Corrective Services' *Funeral Attendance by Indigenous Prisoners Policy* (undated) [3.1].
18. Office of Inspector of Custodial Services, Submission No. 44 (2 June 2006) 1
19. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 257.
20. Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006).
21. The Commission understands that two recommendations require legislative amendment and that these amendments are expected to pass through Parliament in late 2006. The Department has advised that once these legislative amendments are passed the other changes to Policy Directive 9 will be implemented: see Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006).
22. The Department of Corrective Services has told the Commission that it provides regular 'cross-cultural' training to new recruits as well as additional training at regional prisons. The Department has indicated that this training is adequate to cover the recommendation (made during the review of Policy Directive 9 in 2004) that cross-cultural training should include information about the significance of Aboriginal kinship: see Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006).
23. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 258.
24. Department of Justice, *Roebourne Regional Prison Funeral Applications: Staff resource manual* (undated).

Corrective Services, in conjunction with Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to assist prison officers and prisoners with applications for attendance at funerals. The Commission further proposed that consideration be given to the potential role of 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.[25]

The Inspector expressed support for the above proposal but also suggested that the application process should be developed in consultation with prisoners as well Aboriginal community representatives.[26] The Commission agrees that any changes to the application process should take into account the views of Aboriginal prisoners because they are well placed to explain any deficiencies under the current procedures. The Department of Corrective Services agreed, in its submission, that local advice about the significance of the relationship between the prisoner and the deceased would assist prison authorities when making decisions about funeral attendance and indicated its support for the Commission's proposal.[27] The Department has also subsequently advised that during the review of PD 9 a number of recommendations were made with respect to the application process for funeral attendance. These recommendations included that the approval of an application to attend a funeral should be made by the Superintendent of each prison; that cultural awareness training about the importance of Aboriginal kinship should be provided to each prison; that each prison should have a resource booklet containing relevant local contacts and procedures; and that each prison should access its own local reference group when considering applications for funeral attendance.[28] While these recommendations are consistent with the Commission's approach it is necessary to emphasise the need to consult with both Aboriginal prisoners and communities when developing policy and procedure manuals. Further, the Commission considers that community justice groups have a potential role to play in advising prison authorities and assisting prisoners.

Recommendation 60

Application process for funeral attendance

1. That the Department of Corrective Services, in conjunction with Aboriginal prisoners and Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to assist prisoners and prison officers with applications for attendance at funerals.
2. In drafting these manuals consideration be given to the potential role of community justice groups in assisting prisoners with the application process. In addition, community justice group members could provide advice to prison authorities about the significance of the prisoner's relationship with the deceased and the importance of the prisoner's attendance at the funeral.

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. Many Aboriginal people consulted by the Commission complained about the practice of restraining prisoners during funerals.[29] In its Discussion Paper the Commission acknowledged that community safety and the prevention of escapes is of paramount importance but

25. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 258, Proposal 47.
26. Office of Inspector of Custodial Services, Submission No. 44 (2 June 2006) 1. This proposal was also supported by the Aboriginal Legal Service and the Criminal Lawyers Association: see Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.
27. Department of Corrective Services (WA), Submission No. 31 (May 2006) 15. The Catholic Social Justice Council suggested, in its submission, that where there is a limit on the number of prisoners who can attend a particular funeral the decision as to who is permitted to attend should be made by the prisoners and not the family of the deceased: see Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 4. The Commission is of the view that decisions of this nature should be made in consultation with all relevant parties: the prisoners, the family of the deceased and the relevant Aboriginal community.
28. Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006). The Department of Corrective Services also stated that over the past two years prisons have established 'community/stakeholder reference groups to discuss and provide advice on a range of prisoner management issues'.
29. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 259. The Commission notes that in 2006 an Aboriginal accused applied for bail and one reason put forward in support of his application was that if he was escorted to his mother's funeral while in custody he would be physically restrained. It was also suggested that the use of handcuffs would impede his ability to act as a pall bearer: see *Morrison v State of Western Australia* (Unreported, Supreme Court of Western Australia, MCR 9 of 2006, Miller J, 8 March 2006) 10.

also concluded that the current policy and practice regarding the use of physical restraints during funeral attendances should be reviewed. The Commission argued in its Discussion Paper that certain prisoners, in particular those who are classified as minimum-security, should not generally be restrained at funerals. Further, the Commission contended that the policy should acknowledge Aboriginal customary law and cultural obligations and keep in mind that Aboriginal prisoners are less likely to escape during such an important ceremony.[30] The Commission proposed that the Department of Corrective Services review its policy relating to the use of physical restraints and direct that they be used as a last resort and, if necessary, be as unobtrusive as possible.[31]

In its submission the Department of Corrective Services outlined the current practice with respect to the use of restraints when escorting prisoners to funerals. When adult prisoners are escorted by the Department, prisoners with a medium, maximum or high-security classification are restrained. Minimum-security prisoners are not generally restrained but restraints are readily available. In the case of those prisoners who are escorted by the private contractor (Australian Integrated Management Services (AIMS) Corporation) all prisoners, irrespective of their security rating, are double handcuffed. All juvenile detainees are required to be restrained at funerals.[32] The Department expressed support for a review of the relevant policies but noted that in relation to juveniles it is necessary to take into account that young detainees can be impulsive and that the safety of the detainee, the staff and the community must be recognised.[33]

All submissions received by the Commission with respect to this proposal were supportive.[34] In one submission it was observed that when a prisoner is double handcuffed it can cause great difficultly for the prisoner and the family during the funeral. For example, if the prisoner is required to address the family, act as a pallbearer or 'throw a handful of soil or saltwater' it is distressing that these activities have to be undertaken

while the prisoner is handcuffed to an officer. This submission suggested that flexibility is required and one option is for a prisoner to be single handcuffed to an appropriate Elder or family member or for the handcuffs to be removed for certain purposes.[35] Similarly, in another submission the Commission was told that to watch a prisoner with both wrists handcuffed together and handcuffed to another person, while trying to mourn, was 'extremely disturbing for everyone'.[36]

The Aboriginal Legal Service (ALS) supported a review of the policy concerning physical restraints but expressed reservations about one aspect of the Commission's proposal, namely, that physical restraints should only be used as a last resort. The ALS agreed that physical restraints should be as unobtrusive as possible but suggested that a prisoner should be handcuffed by one hand. Some Aboriginal people consulted by the ALS were concerned that if a prisoner did escape during a funeral this would cause additional stress to the family.[37] The Law Society suggested that if physical restraints were required they should be minimal and that the type of restraint used should reflect the risk of escape and the risk, if the prisoner did escape, to the community.[38]

30. LRCWA, ibid.
31. Ibid 260, Proposal 49.
32. Department of Corrective Services (WA), Submission No. 31 (May 2006) 16.
33. Ibid.
34. Marian Lester, Submission No. 18 (27 April 2006) 2; Department of Corrective Services (WA), Submission No. 31 (May 2006) 16; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Law Society of Western Australia, Submission No. 36 (16 May 2006) 7; Office of Inspector of Custodial Services, Submission No. 44 (2 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.
35. Marian Lester, Submission No. 18 (27 April 2006) 2.
36. Bill Marchant, Submission No. 1 (10 February 2006) 1.
37. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10.
38. Law Society of Western Australia, Submission No. 36 (16 May 2006) 8.

The Commission now considers that its proposal requiring physical restraints to only be used as a last resort may not be appropriate in all circumstances. However, the Commission remains very concerned that minimum-security prisoners being escorted by staff from AIMS Corporation are required to be double handcuffed. The Commission understands that the majority of adult prisoners are escorted by AIMS Corporation. Only minimum-security prisoners at Karnet, Wooroloo and Boronia custodial facilities are escorted by custodial staff.[39] Bearing in mind that some minimum-security prisoners are granted home leave from prison,[40] it is unacceptable that there is no discretion with this category of prisoners. The Commission remains of the view that minimum-security prisoners should not generally be restrained while attending a funeral.

The Commission understands that AIMS Corporation is subject to contractual obligations that may result in financial penalties for an escape by a prisoner in custody.[41] Nevertheless, it is unjust that those minimum-security prisoners being escorted by AIMS Corporation are double handcuffed while those being escorted by the Department are not restrained at all.

The Commission is of the view that the Department of Corrective Services must ensure that the policy concerning physical restraints allows a degree of flexibility and that the necessity for restraints is determined with reference to the risk of escape by the prisoner and any risk to the safety of the public. If necessary, the Department should renegotiate its contract with AIMS Corporation to ensure that minimum-security prisoners are not physically restrained unless there is a significant risk to the safety of the public.[42] The Department could, for example, after assessing the prisoner's risk and determining that there is no significant risk to the safety of the public, provide an undertaking to AIMS Corporation that an escape by that prisoner will not result in a financial penalty being incurred.

Recommendation 61

Use of physical restraints on prisoners attending funerals

1. That the Department of Corrective Services review and revise its current policy in relation to the use of physical restraints on prisoners during funeral attendances. The revised policy should recognise the importance of Aboriginal prisoners attending funerals in a dignified and respectful manner. The policy should also provide that any decision about the use of physical restraints should take into account any risk of the prisoner escaping or absconding during the funeral and any risk to the safety of the public. The policy should state that, if required, restraints should be as unobtrusive and as minimal as possible in all the circumstances.
2. That the Department of Corrective Services ensure that its policy in relation to the use of physical restraints on prisoners during funeral attendances provides that, unless there is a significant risk to the safety of the public, all minimum-security prisoners should not be physically restrained while attending a funeral. If necessary, the Department of Corrective Services should renegotiate its contract with AIMS Corporation to reflect this policy.

Escorting prisoners and detainees to funerals

Although the Commission's consultations did not directly refer to problems with escorting prisoners and detainees to funerals, the appropriateness of staff escorting prisoners to funerals has been raised by the Inspector of Custodial Services. In its Discussion Paper the Commission considered observations made by the Inspector and initiatives in this area in other parts of Australia.[43] For example, the Department of Corrective

39. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 260.
40. Department of Corrective Services, Director General's Rule 16 [16.4]. Under this rule prisoners can only be considered for home leave if they have a minimum-security rating and if they only pose a minimum risk to the security of the public.
41. Hooker R, *Inquiry into the Escape of Persons Held in Custody at the Supreme Court of Western Australia on 10 June 2004* (July 2004) 28. The Commission notes that on 30 July 2005 the contract between AIMS Corporation and the Department of Corrective Services was extended for an additional three years: see Department of Justice, *Contract for the Provision of Court Security and Custodial Services Annual Report 2004–2005* (September 2005) 1.
42. The Commission understands that pregnant female prisoners who are classified as minimum-security must not be restrained. But this policy necessarily reflects that pregnant prisoners generally pose less risk than they would otherwise because of their physical condition. For medium and maximum security pregnant prisoners the relevant policy provides that mechanical restraints are not to be used unless there is a significant risk of a compromise to public safety: see Department of Corrective Services, Policy Directive 44.
43. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 260.

Services in South Australia has entered into agreements which enable local Indigenous people to supervise prisoners who are attending funerals on their lands.[44] In Queensland, the relevant policy states that wherever possible Indigenous custodial officers should be used to escort a prisoner to a funeral.[45]

The Commission proposed in its Discussion Paper that the policy and practice concerning the escort of prisoners and detainees to funerals should be revised in consultation with Aboriginal communities. The Commission emphasised that this process should pay particular attention to ensuring that any escort arrangements are culturally sensitive and do not intrude unnecessarily on the grieving process of the prisoner and the community.[46] This proposal has been supported in a number of submissions.[47] The Department of Corrective Services advised that the policy for juvenile detainees provides that, as far as possible, the escorting officer should be a person of Aboriginal descent.[48] The 2004 review of PD 9 also recommended that minimum-security prisoners at minimum-security custodial facilities should be entitled to attend a funeral escorted by a person other than a prison officer such as a 'prominent community member'.[49] The Department has advised that this recommendation will require legislative amendment and this is expected to occur by the end of 2006. However, the Department has not proceeded with a recommendation that escorts conducted by prison officers or contracted staff should be carried out in a sensitive manner and where possible civilian clothing should be worn.[50] While the Commission supports the option of minimum-security prisoners being escorted by respected community members, it also considers that the policy for all other prisoners needs to be reconsidered.

Recommendation 62

Escorting prisoners and detainees to funerals

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

Parole and Post Release Options for Aboriginal Prisoners

Parole and Aboriginal customary law

When an offender is sentenced to imprisonment a court will decide whether the offender is eligible to be released on parole or, in the case of a juvenile offender, on a supervised release order. The decision whether to allow the offender to be released is made by the Parole Board[51] (for adults) or by the Supervised Release Review Board (for juveniles). In its Discussion Paper the Commission observed that Aboriginal customary law may be relevant to the decision 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.[52] In order to encourage more reliable information about Aboriginal customary law and cultural issues the Commission proposed that the Parole Board and the Supervised Release Review Board should be able to receive information from Elders or members of a community justice group.[53] The Commission received support for this proposal from the Department of Corrective Services and the Department of the Attorney General.[54] In addition, during community

44. This type of approach was supported by Elders on the Catholic Social Justice Council who suggested that for minimum-security prisoners the family of the prisoner should be allowed to escort the prisoner to the funeral and return them to the prison the same day: see Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 4.
45. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 260.
46. Ibid, Proposal 50.
47. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006); Department of Corrective Services (WA), Submission No. 31 (May 2006) 16; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Law Society of Western Australia, Submission No. 36 (16 May 2006) 7; Office of Inspector of Custodial Services, Submission No. 44 (2 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4. The Commission notes that the ALS supported a review of the policy but expressed general concern about the possibility of escapes during a funeral.
48. Department of Corrective Services, Submission No. 31 (May 2006) 16.
49. Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006).
50. Ibid.
51. The Commission notes that the Parole and Sentencing Legislation Amendment Bill 2006 (WA) is currently before Parliament and if passed the name of the Parole Board will change to the Prisoners Review Board.
52. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 261. The Department of Corrective Services advised in its submission that the Supervised Release Review Board currently consults with relevant Aboriginal communities when developing a release plan for juvenile detainees: see Department of Corrective Services (WA), Submission No. 31 (May 2006) 17.
53. Ibid, Proposal 51.
54. Department of Corrective Services (WA), Submission No. 31 (May 2006) 17; Department of the Attorney General, Submission No. 34 (11 May 2006) 10. The proposal was also supported by the Catholic Social Justice Council and the Criminal Lawyers Association: see Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.

meetings Aboriginal people emphasised that the views of the Aboriginal community should be taken into account when deciding whether an offender on parole should return to that community or when determining any conditions that should be imposed on the offender while subject to a release order.[55]

The Department of Corrective Services suggested that the question of who should speak on behalf of the community and any potential conflict of interest should be further considered.[56] The potential for conflicts of interest was also raised by the Department of the Attorney General in its submission.[57] The Commission agrees and throughout this chapter it has taken into account the potential for a conflict of interest whenever a member of an Aboriginal community is providing information or advice about an offender (or a victim) to criminal justice agencies.[58] It is necessary, in the Commission's view, that any Elder, respected person or member of a community justice group should disclose their relationship to the offender or the victim. This may not necessarily weaken the relevance of the information put forward but it is important that whoever is relying on the information is appraised of any potential conflicts of interest. Community justice groups will consist of an equal number of members from all relevant family and social groupings in the community. Therefore, if necessary, the Parole Board and Supervised Release Review Board would be able to request evidence or information from a member of the community justice group that comes from a different family group to the offender (or the victim).

Recommendation 63

Parole Board and Supervised Release Review Board

1. 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 Review Board can request information or reports from an Elder, respected person or member of a community justice group from the offender's community and/or the victim's community.
2. That the *Sentence Administration Act 2003* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide that when an Elder, respected person or member of a community justice group provides information to the relevant board that he or she must advise the relevant board of any relationship to the offender and/or the victim.

Lack of programs and services

In its Discussion Paper the Commission emphasised the lack of suitable programs and services available for Aboriginal prisoners.[59] In some cases the only way for an Aboriginal prisoner to access programs is to transfer to another prison, which could be a long distance from his or her community. This adds to cultural and community dislocation.[60] The extent to which a prisoner has engaged in programs while in prison is a consideration for the Parole Board in their determinations.[61] The Commission highlighted in its Discussion Paper that the lack of Aboriginal-specific programs and services in prisons may therefore cause delays in Aboriginal prisoners being released on parole.[62] The Commission has recommended that the Western Australian government should ensure there are adequate and culturally appropriate programs and services available for Aboriginal people in all stages of the criminal justice system.[63]

55. LRCWA, Discussion Paper community consultations – Kalgoorlie, 28 February 2006; Geraldton, 3 April 2006.
56. Department of Corrective Services (WA), Submission No. 31 (May 2006) 17.
57. The Department of the Attorney General, Submission No. 34 (11 May 2006) 10.
58. See discussion under 'Bail – Conflict of interest', above p 167 and 'Evidence of Aboriginal customary law in sentencing', above p 183.
59. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 261. This issue was again referred to during a community meeting in Geraldton: see LRCWA, Discussion Paper community consultation – Geraldton, 3 April 2006.
60. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 261.
61. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94, (January 2006) 235, 300.
62. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 261.
63. See Recommendation 7, above p 86.

The lack of Aboriginal-specific programs and services in prisons may cause delays in Aboriginal prisoners being released on 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.[64] A similar view has been expressed by the Kimberley Aboriginal Reference Group which has recently published a report on the design and delivery of programs for Aboriginal prisoners.[65] This report emphasises the importance of involving community leaders and utilising 'Aboriginal cultural and customary practices'.[66] The Commission is of the view that its recommendation for community justice groups will provide one method whereby Aboriginal communities can become more directly involved in the provision of programs and services for Aboriginal prisoners and detainees.

Transport arrangements for prisoners when released from custody

There are a large number of Aboriginal prisoners who are sent to prisons which are not the closest available prison to their home community.[67] Therefore, some Aboriginal prisoners have been required to find their own transport back to their community even where the community is a long distance from the place of release.[68] Morgan and Motteram observed, in their background paper for this reference, that travel arrangements are a significant concern to the Parole Board and in some cases release may be delayed until satisfactory arrangements can be made.[69] The Commission was again told during community meetings following the release of its Discussion Paper that prisoners may be released from prison without any assistance to return to their community.[70]

Both the Mahoney Inquiry and the Inspector have recommended that strategies should be developed 'to assist prisoners, particularly from regional and remote areas, to return home following their release from custody'.[71] In order to minimise the risk of reoffending by prisoners it is clearly preferable that assistance is given to ensure that they return to a community that is willing to offer support to the prisoner rather than being stranded in a town or location without any support structures in place. The Commission is aware that the Department of Corrective Services is currently working on a pilot project in Roebourne and Kalgoorlie to assist prisoners with travel arrangements when released from custody.[72] The Commission commends this initiative but considers that it is essential for travel arrangements to be made for all prisoners who are released from custody long distances from their home communities. Therefore, the Commission is of the view that the Department of Corrective Services should continue to develop, and provide resources for similar strategies throughout Western Australia.

Recommendation 64

Transport arrangements for prisoners when released from custody

That the Department of Corrective Services continue to develop, and provide adequate resources for, strategies to assist prisoners to return to their home communities upon release from custody.

64. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 261.
65. Kimberley Aboriginal Reference Group, *The Kimberley Custodial Plan: An Aboriginal perspective* (February 2006) 6.
66. Ibid 24.
67. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 262.
68. LRCWA, Project No. 94, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 5;*Cosmo Newbery,* 6 March 2003, 20; *Kalgoorlie*, 25 March 2003, 27; *Pilbara* 11 April 2003 16.
69. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background* Papers, Project No. 94 (January 2006) 235, 307.
70. LRCWA, Discussion Paper community consultations – Kalgoorlie, 28 February 2006; Broome, 7 March 2006.
71. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [20.11] (Recommendations 146). See also Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No. 30 (November 2005) 134.
72. Robert Mills, Manager Aboriginal Services, Offender Services Directorate, Department of Corrective Services, telephone consultation (21 July 2006).

Aboriginal community-based alternatives to prison

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.[73] The Mahoney Inquiry as well as the Inspector recommended the development of additional custodial facilities in specific regional areas, including Aboriginal community-based facilities for low risk offenders.[74] 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.[75] In its Discussion Paper the Commission supported 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. Recently, the Kimberley Aboriginal Reference Group argued that Aboriginal people should be 'empowered and enabled to have control in the management of custodial issues through the exercise of customary authority'.[76] The Commission remains of the view that community justice groups could undertake a direct role in the design and implementation of alternative community-based custodial facilities.[77]

73. 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: see Kimberley Aboriginal Reference Group, *Kimberley Aboriginal Reference Group's initial recommendations toward the Kimberley Custodial Plan* (October 2005) 4.
74. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.78] (Recommendations 89–91); Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No. 30 (November 2005). The Commission is aware that the Department of Corrective Services is in the process of developing two new regional juvenile remand centres, one in Kalgoorlie and one in Geraldton. It is expected that the building of these facilities will commence in late 2007: see Department of Corrective Services, *Kalgoorlie-Boulder Juvenile Remand Centre: Community update* (March 2006); *Geraldton Juvenile Remand Centre: Community update* (March 2006).
75. For example, it would assist in overcoming transport difficulties for prisoners that are released long distances from their home communities. In addition, funeral applications for Aboriginal prisoners may also be more readily approved if the prisoner does not have to be transported long distances to attend.
76. Kimberley Aboriginal Reference Group, *The Kimberley Custodial Plan: An Aboriginal perspective* (February 2006) 4.
77. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 262.