

Traditional Aboriginal Law and Punishment

Due to the diversity of Aboriginal people in Western Australia and the secret nature of certain aspects of customary law, it is impossible to comprehensively identify all traditional offences, punishments and dispute resolution methods employed by Aboriginal people. It is also, as discussed in Part III of this Paper, undesirable to attempt to confine and codify Aboriginal customary law from a non-Aboriginal perspective.

In its 1986 report on the recognition of Aboriginal customary law, the ALRC warned against comparing 'notions of the criminal law (breach and subsequent punishment) to departures from kinship rules and expected norms of behaviour' under customary law.¹ While the Commission agrees with the ALRC in principle, it is of the opinion that in order to identify opportunities for recognition of Aboriginal customary laws in the Western Australian legal system, it is necessary to examine, so far as is possible, the similarities and differences between forms of 'criminal' law and punishment under Aboriginal customary law and Australian law.

The Foundation of the Law

Under Australian law there is a clear separation between legal matters and religious, social or moral standards.² In contrast, traditional Aboriginal law is inextricably linked to Aboriginal religion. The Dreamtime provides the source of acceptable codes of behaviour in all aspects of life. As observed by Berndt and Berndt:

[T]he mythical [Dreamtime] characters instituted a way of life which they introduced to human beings: and

because they themselves are viewed as eternal, so are the pattern they set.³

Aboriginal customary law does not distinguish between standards of social behaviour, sacred matters and binding rules: they are all 'the law'.⁴ The discussion in Part VI below, concerning the law of tort, shows that under Aboriginal customary law there is no clear distinction between civil law and criminal law matters in the general law understanding of those terms.⁵ Rather, under traditional law the distinction is made between public and private wrongs. Kenneth Maddock referred to the general categorisation of public matters as criminal and private as civil; however, he observed that the boundaries between the two are not always clear.⁶

Public wrongs include breaches of sacred law, incest, sacrilege or murder by magic; while private wrongs include homicide, wounding and adultery. The essential difference lies in the manner by which the dispute is resolved. For public wrongs, Elders are actively involved; whereas for private wrongs, the person who has been harmed (and their relevant kin) generally determines the appropriate response.⁷

Responsibility Under the Law

As with the nature of law itself, the concept of responsibility for breach of Aboriginal customary law differs from Australian criminal law. Fault—which includes concepts such as intention, recklessness and accident—is the primary indicator of criminal responsibility under Australian law. While Aboriginal customary law does

1. Australian Law Reform Commission (ALRC), 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 217.
2. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 81–82.
3. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 336.
4. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 82; ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 217.
5. Toohey J, *Understanding Aboriginal Law* (1999) 32 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 5 (September 2004).
6. Maddock K, 'Aboriginal Customary Law' in Hanks P & Keon-Cohen B (eds), *Aborigines and the Law* (Sydney: Allen and Unwin, 1984) 219.
7. A further distinction is that public wrongs require an obligatory response whereas private wrongs do not. The outcome for the latter in one case will in no way influence or determine the outcome for another similar case (ibid 232). There is also evidence to suggest that what commences as a private dispute may turn into a public matter and therefore be subject to the authority of the Elders. In this situation, Elders may intervene to prevent a matter from escalating into a feud, rather than deciding upon the appropriate punishment. See Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 67–68.

sometimes consider these issues in apportioning responsibility,⁸ the primary focus is on causation.⁹ In many instances under Aboriginal customary law, liability is strict. For example, if someone accidentally witnessed a prohibited ceremony or happened upon a sacred site, that person would be liable to punishment, regardless of motive or intention.¹⁰ During the Commission's consultations it was stated that 'under traditional law it is not important why you did what you did'.¹¹

The concept of causation is also different. While Australian law views causation in a 'mechanical sense', Aboriginal customary law considers indirect social causes.¹² For example, in the Commission's consultations at Fitzroy Crossing it was reported that an Aboriginal man was punished because someone fell from the back of a truck that he was driving:

The very fact that someone had died when he was in charge of the vehicle meant he had broken Aboriginal law irrespective of whether he was 'at fault' in the western legal sense.¹³

This demonstrates that the concept of responsibility under Aboriginal customary law remains constant even in its application to contemporary situations.¹⁴

Traditional Dispute Resolution

Responsibility for Dispute Resolution

Anthropologists and other commentators have expressed divergent views about whether traditional Aboriginal societies possessed authority structures (such

as a headman¹⁵ or a tribal council) or whether order was maintained through religious and kinship obligations.¹⁶

Referencing the practices of Aboriginal people at Jigalong in the 1960s, Robert Tonkinson described an 'informal council of initiated men' who dealt with religious matters as well as calling public meetings to deal with grievances. These meetings would continue until consensus was reached on how to deal with the grievance (or until there was no longer any public opposition), at which time punishment in the form of 'public denigration' or physical sanctions would take place.¹⁷ Tonkinson further explained that, traditionally, religious leadership would change according to the nature of the ritual or ceremony. In non-religious matters the head of the family was the leader and kinship governed what took place.¹⁸ Similarly, Kathryn Trees was told, during research for her background paper, that under traditional law families of the offender and the person who was harmed would negotiate the outcome and kin relationships would determine who would inflict the punishment.¹⁹

Order therefore appears to be maintained through self-regulation and consensus between family heads in Aboriginal society. When disputes do occur, kinship principally determines the manner in which individuals will respond.²⁰ That is not to say that there is complete freedom in the response: appropriate responses are known to all and must be followed. Failure to respond appropriately may lead to further transgression under

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8. Nancy Williams states that the Yolngu people when dealing with a dispute would 'try to discover the ill-will' such as being 'pushed' to seek revenge on behalf of another: see Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 73.
 9. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [414].
 10. ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 220.
 11. LRCWA, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23.
 12. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 6.
 13. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 4. See also LRCWA, *Thematic Summaries of Consultations – Cosmo Newbery*, 6 March 2003, 20. In his background paper to this reference, Philip Vincent refers to a similar example where an Aboriginal person was held responsible for the death of a female passenger who had stepped in front of his parked car and was run over by a passing vehicle. The explanation for responsibility under Aboriginal customary law was that the driver should not have taken the woman in the car in the first place: see Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 6.
 14. For further discussion of the concepts of liability and responsibility under Aboriginal customary law, see Part VI 'Tortious Acts and Omissions', below pp 267–70.
 15. Adolphus Elkin concluded that in traditional Aboriginal society there were headmen who would control meetings and make decisions: see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 2, 15.
 16. Edwards WH, 'Leadership in Aboriginal Society' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 161. See also Maddock K, 'Aboriginal Customary Law' in Hanks P & Keon-Cohen B (eds), *Aborigines and the Law* (Sydney: Allen and Unwin, 1984) 226. Robert Tonkinson concluded that 'Aboriginal society has no chiefs or law enforcement specialists': see Tonkinson R, 'MarduJarra Kinship' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 155. Larrisa Behrendt observed that there were examples in traditional Aboriginal society where a council of Elders would decide the issue: see Behrendt L, *Aboriginal Dispute Resolution: A step towards self determination and community autonomy* (Sydney: Federation Press, 1995) 19. Some anthropologists have taken a position somewhere in between these two views: see McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Company, 1991) 205.
 17. Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings, 1974) 62–63.
 18. *Ibid.*
 19. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 20.
 20. Tonkinson R, 'MarduJarra Kinship' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 156.

Aboriginal customary law.²¹ As observed by John Nicholson:

Decisions were generally brought about by consensus guided by the elders well known (indeed, often related) to, and respected by the parties, with little place for coercion to enforce a decision or punishment.²²

Generally, for more serious matters (especially those involving breaches of sacred law), authority is vested in Elders. There is also evidence that when a dispute is not able to be resolved within a family or kin group, Elders may be caused to intervene.²³ The advice of Elders in traditional societies was usually 'heeded and unquestioned'.²⁴

Early anthropological studies focused on the authority of male Elders; however, more recently it has been accepted that Aboriginal women 'play an important role in the maintenance of order and resolution of disputes'.²⁵ Sharon Payne has observed that:

Traditionally, women in Aboriginal culture have a status comparable with and equal to men. They have their own ceremonies and sacred knowledge, as well as being custodians of family law and secrets. They supplied most of the reliable food and had substantial control over its distribution. They were the providers of child and health care and under the kinship system, the woman's or mother's line was essential in determining marriage partners and the moiety (or tribal division) of the children.²⁶

Aboriginal women have been described as powerful 'conciliators and negotiators' and they have also at times

been involved in carrying out punishments.²⁷

The conflicting views in relation to who had the ultimate authority in traditional Aboriginal societies have no doubt arisen because of the diversity of Aboriginal people and changes that have occurred in Aboriginal communities since colonisation. As the ALRC has said:

The time has gone when the correct position can be ascertained. However, the issue may be relevant to a determination whether and, if so, how and in whom, authority to administer law, be it Aboriginal or Australian law, should be vested in any section of modern Aboriginal society.²⁸

The evidence before the Commission demonstrates that the responsibility for maintaining law and order and for resolving disputes will vary depending upon the nature of the dispute and the community in which the dispute takes place.

Methods of Dispute Resolution

The ALRC found that in 'many, if not all, Aboriginal communities there exist methods for social control and the resolution of disputes'.²⁹ Berndt and Berndt have stated that, in most parts of Australia, discussions or meetings (as distinct from formal judicial processes under Australian law) were held to resolve disputes and grievances. This would usually occur during ceremonial times when there is an obligation not to fight.³⁰ As mentioned above, the method of dispute resolution will often depend upon whether it is a private

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21. Toohey J, *Understanding Aboriginal Law* (1999) 27 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).
 22. Nicholson J, 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 87.
 23. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 349; ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 224.
 24. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 2, 14. Elders have been described as those who are the most knowledgeable of religious and ceremonial matters as distinct to just being the oldest members of the community: see Behrendt L, *Aboriginal Dispute Resolution: A step towards self determination and community autonomy* (Sydney: Federation Press, 1995) 20.
 25. ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 219. In his background paper Toohey notes that most of the early anthropologists were men and that they obtained their information primarily from men: see Toohey J, *Understanding Aboriginal Law* (1999) 23 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).
 26. Payne S, 'Aboriginal Women and the Law' in Eastaill P & McKillop S (eds), *Women and the Law* (Australian Institute of Criminology Conference Proceedings No 16, Canberra, 1993) 65.
 27. In one example from the Kimberley, the carrying out of the punishment imposed on an Aboriginal woman after the death of her husband was the responsibility of her mother-in-law and sister-in-law: see Toussaint S, *Phyllis Kaberry and Me: Anthropology, history and Aboriginal Australia* (Melbourne: Melbourne University Press, 1999) 87–88. The important role of women Elders is also referred to in Behrendt L, *Aboriginal Dispute Resolution: A step towards self determination and community autonomy* (Sydney: Federation Press, 1995) 13. An interesting method of resolving disputes was observed in the Kimberley: when two men of the same skin group were fighting, a woman (who the men were obliged to avoid under customary law) placed herself naked in between the fighting males and because they were unable to continue the fight without looking at her, the fight would cease: Syddall T, 'Aboriginals and the Courts' in Swanton B (ed), *Aborigines and Criminal Justice* (Canberra: Australian Institute of Criminology, 1984) 158.
 28. ALRC, *Aboriginal Customary Law – Recognition?*, Discussion Paper No 17 (1980) 12.
 29. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [692]. Berndt and Berndt stated that in 'all Aboriginal societies there are certain approved mechanisms—the council, the meeting, the magarada or ordeal, armed combat and the duel, and the inquest—whereby infraction may be resolved': see Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 360.
 30. Berndt & Berndt, *ibid* 347.

or public matter. Nancy Williams describes ways in which a private grievance may become public, including by public declaration by the person aggrieved or by withdrawal from an important activity to demonstrate that the person was in a dispute.³¹ Once a dispute became public other members of the community would then become involved.

The ALRC reported that in the Strelley community in Western Australia, regular community meetings were held which involved communal decision-making and negotiation to resolve disputes. These meetings were structured and took place in a circle format with the offender sitting inside. A 'ten-man committee' was authorised by the community to apprehend offenders (even if they were outside the community) and bring them before a community meeting.³² The ALRC stressed that this 'ten-man committee' could only act if the community initiated action and that the determination of sanction was made by the community.³³

The ALRC also highlighted that in many cases dispute resolution methods had been affected by the interaction with non-Aboriginal people and Australian law and that Aboriginal customary law had proved 'remarkably resilient, and able to adapt to changing circumstances'.³⁴ For example, at the time of the ALRC inquiry, the Edward River community in Queensland used customary law methods of dispute resolution as well as community courts.³⁵ In the Northern Territory, dispute resolution methods at the Yirrkala community involved intervention by senior members of the community who considered the facts, obtained admissions and applied sanctions. An essential feature of this process, which was called a 'moot' by Williams, was the active involvement of disputants and other interested parties who would discuss the matter.³⁶

Features of Aboriginal Dispute Resolution

Restoration of peace

An important feature of Aboriginal dispute resolution is the focus on healing or the restoration of peace between the affected parties.³⁷ While it is clear that retribution is relevant to Aboriginal customary law dispute resolution, Berndt and Berndt suggest that underlying the 'verbal emphasis on revenge' is a general aim to restore balance and order.³⁸ There are limits to the extent of retaliation permitted under Aboriginal customary law. If punishment has been inflicted properly then the matter is usually at an end; however, if the punishment has gone too far as a result of the over-emphasis on revenge, then further conflict may result. This further conflict (often referred to as feuds) may in fact indicate that traditional law has broken down.³⁹

This may be contrasted with the position under Australian criminal law which avoids concepts of retaliation or revenge. The principles of sentencing, which require punishment to reflect the seriousness of the conduct from the point of view of an objective arbitrator, do not incorporate the views of the victim or their families as to what constitutes the appropriate punishment.

Collective responsibility and community involvement

Aboriginal dispute resolution methods generally involve families and communities. Underlying traditional law is the concept of collective rights and responsibilities which is different from the western focus on individual rights.

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31. Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 74, 87. Nancy Williams distinguishes between grievances and disputes: conflicts are grievances but disputes are those matters that have become public (at pp 67–68).
 32. In his background paper Harry Blagg explains that this ten-man committee ceased to operate in the mid-1980s as it lost the support of the police and people were concerned about the coercive methods used by the committee to bring people back to the community: see Blagg H, *A New Way of Doing Justice Business? Community justice mechanisms and sustainable governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 29. During consultations in the Pilbara some Elders expressed the view that since the committee had ceased to operate behaviour had declined: see LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 6.
 33. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [713]–[718].
 34. *Ibid* [692].
 35. *Ibid* [694]–[699].
 36. *Ibid* [707]–[712]. The ALRC referred to the extensive research that had been undertaken by Nancy Williams in relation to dispute resolution methods at Yirrkala during a 12-month period from 1969–1970.
 37. Berndt and Berndt describe a public and ritualised washing of those who were involved in a dispute in order to 'heal dissension and make for mutual goodwill between the participants': 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. Many cases that have come before the courts have also referred to the purpose of traditional punishment as healing and restoration of peace within the community: see *R v Minor* (1992) 59 A Crim R 227, 228 (Asche CJ); *R v Wilson Jagamara Walker* (1994) 68(3) *Aboriginal Law Bulletin* 26; *R v Sampson* (Unreported, Supreme Court of the Northern Territory, SCC 9824061, Angel J, 26 March 2001); *R v Corbett* (Unreported, Supreme Court of the Northern Territory, SCC 20200373, Angel J, 16 April 2003).
 38. Berndt & Berndt, *ibid* 362. The Commission notes that indigenous notions of justice in other countries also focus, although not exclusively, on concepts of healing and the restoration of peace: see Cousins M, 'Aboriginal Justice: A haudenosaunee approach' (2004) 9(1) *Justice as Healing: A newsletter on Aboriginal concepts of justice* (Native Law Centre) 1.
 39. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 2, 21, 24.

Kinship relationships not only determine a person's rights and responsibilities to another but also impact on the process used to resolve a dispute.⁴⁰ During the Commission's consultations, Aboriginal people explained that customary law

enlists the family to prevent the offending in the first place, because of the prospect of retribution against the family if a member offends.⁴¹

Families are involved in deciding the punishment because Aboriginal law 'demands satisfaction between families when something wrong is done'.⁴²

Traditional Offences

Offences under traditional law have been categorised as falling under two main headings: breaches of sacred law and offences against other persons or property. The boundary between these categories is not always clear because some offences may cover both aspects, such as breaches of kinship avoidance rules.⁴³ Avoidance rules dictate the nature of permitted contact between particular kin, such as between a man and his mother-in-law. Avoidance rules may operate to prevent face-to-face contact, speaking to each other or mentioning each other's names.⁴⁴ It has been noted that the effect of these kinship rules can be seen during traditional meetings and ceremonies: people sitting apart from one another, facing different directions and communicating through another person.⁴⁵

Breaches of sacred law are public matters and therefore Elders are often directly involved in determining punishment. For example, it is an offence for women, children and uninitiated men to view certain sacred objects, places or ceremonies or for someone to disclose these matters to a person who is forbidden to see

them. Punishment for these offences is generally determined by ritual leaders and, in the past, might have involved death.⁴⁶

Offences against other persons or property would usually begin as private matters but, as mentioned earlier, could be made public by the person aggrieved. Offences against the person (which sometimes would also amount to a breach of sacred law) include unauthorised physical violence, murder, incest (which included classificatory as well as blood relationships), adultery, elopement,⁴⁷ insulting behaviour, and breach of a taboo such as referring to the name of a deceased.⁴⁸ There are also offences of omission such as the physical neglect of certain relatives, refusal to make gifts and refusal to educate certain relatives.⁴⁹ Offences against property were rare in traditional societies. As discussed in Part VI, most property was not individually owned in the Western legal sense and if a personal item (such as a digging stick, basket or spear) was needed, then it could be easily borrowed or demanded pursuant to kinship obligations.⁵⁰

Traditional Punishments

The Nature of Traditional Punishments

While there are clearly sanctions for behaviour that is contrary to Aboriginal customary law, those sanctions are not imposed in the same manner as punishments under Australian criminal law. The former are imposed in public and generally through family and community consensus, while the latter are imposed by a neutral, distant authority.⁵¹ The fact that punishments were carried out in public has been suggested as one reason

40. NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 21.

41. LRCWA, *Thematic Summaries of Consultations – Cosmo Newbery*, 6 March 2003, 19.

42. LRCWA, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 40. See also LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2004, 4; *Mowanjun*, 4 March 2004, 49.

43. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 343. The ALRC noted that this distinction was not recognised by Aboriginal customary law: see ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 219.

44. ALRC, 'Traditional Aboriginal Society and its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 217.

45. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 2, 13.

46. ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 217.

47. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 84.

48. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 2, 22.

49. *Ibid.* For further discussion of these matters, see Part VI 'Tortious Acts or Omissions', below pp 269–73. A useful account of matters that constitute offences under Aboriginal customary law is Meggitt's study of the Walbiri tribe in 1962: see Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 85.

50. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 345. This view is supported by Nancy Williams. In her research at Yirkala there were no examples of any grievances associated with theft over a 12-month period: see Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 74.

51. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [499].



why in traditional Aboriginal society there was a high degree of compliance with the law.⁵²

Sanctions or punishments under traditional law differ from place-to-place. Examples discussed in this section are for illustrative purposes and to provide a background to the question whether any sanctions under Aboriginal customary law are in conflict with Australian law. Berndt and Berndt state that there were both positive and negative sanctions under Aboriginal customary law. Positive sanctions included rewards and social approval for those who conformed to codes of behaviour, such as complying with kinship obligations, and to those who were productive in hunting or food gathering.⁵³ The

sanctions considered below are examples of negative sanctions.

Examples of Traditional Punishments

Death

Death, either directly or through sorcery, was a traditional punishment under Aboriginal customary law. In addition to the threat of being killed for a breach of customary law it has been reported that in some cases the threat also involved the denial of mortuary rites.⁵⁴ In his background paper, John Toohey emphasises that transgressions of Aboriginal customary law which may once have resulted in punishment by death 'will rarely do so today'.⁵⁵ It is widely considered that death is no longer carried out as a punishment because of the consequences under Australian law.⁵⁶

Sorcery and supernatural punishment

While the parameters of supernatural punishments are, for obvious reasons, difficult to determine, it appears that they were integral to the control of certain behaviour in traditional Aboriginal society.⁵⁷ Insanity caused through sorcery by a non-human agency has also been categorised as a sanction.⁵⁸ Berndt and Berndt conclude that the fear of, or belief in, sorcery in traditional societies acted as a form of social control and a 'powerful legal sanction'.⁵⁹ On the other hand, in some places (or in some situations) sorcery is regarded as a violation of customary law.⁶⁰

The Commission acknowledges that belief in sorcery remains important to many Aboriginal people and may influence their behaviour.⁶¹ With growing reluctance to use sanctions that may constitute an offence under

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52. Debelle B 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 86.
53. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 341.
54. Ibid 343. For further discussion of funerary and mortuary practices and their importance to Aboriginal society, see Part VI 'Funerary Practices', below pp 310–11.
55. Toohey J, *Understanding Aboriginal Law* (1999) 19 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).
56. McIntyre G, *Aboriginal Customary Law: Can it be recognised?*, LRCWA, Project 94, Background Paper No 9 (February 2005) 42–43. However, the Commission notes that recently the Supreme Court of Western Australia was informed by an offender that he would face death as a traditional punishment upon his release from prison: see *The State of Western Australia v Dann* (Unreported, Supreme Court of Western Australia, No 131 of 2005, Hasluck J, 26 October 2005).
57. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 342.
58. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 85–86.
59. Ibid.
60. Toohey J, *Understanding Aboriginal Law* (1999) 31–32 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).
61. In her background paper, Kathryn Trees refers to a specific example that shows that the power of threats of sorcery continue today. In that example, both the offender and his family members felt compelled to submit to punishment as a result of the fear of the feather foot. See Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 35–37.

Australian law 'there is a temptation to employ sorcery because of its covert nature' and to use it when the offender is not present to undergo physical punishments.⁶² While the recognition of sorcery is clearly outside the bounds of Australian law, the Commission understands that in situations where an offender is unable to undergo traditional punishment, such as where they are in prison, the threat of sorcery may be very real.⁶³

Physical punishments

Physical punishments that involve beatings or spearing (often referred to as 'payback') are perhaps the most well-known and controversial aspects of Aboriginal customary law. The formal sanction of spearing in the thigh has been used for offences as diverse as murder, adultery, elopement and personal injury. The process may involve the recipient standing quietly and 'offering no resistance' while the aggrieved person, or one of their kin, throws the spear.⁶⁴ Berndt and Berndt describe various examples of ritualised spearing duels. The common elements are the involvement of kin and the role of the Elders to ensure that there is a degree of restraint by opposing parties. The matter would generally be resolved once the offender had been speared in the thigh or blood had been drawn.⁶⁵

Examples of physical punishments show that it is not always the case that serious injury is intended. One example from the Kimberley shows that while numerous people were involved in throwing boomerangs, digging sticks and blunted spears, all those involved 'knew that none of the implements would be thrown with such force or accuracy as to maim or permanently harm those being punished'.⁶⁶ An Aboriginal woman explained a punishment for the deaths of two men in a car accident in the following way:

Everyone is [going to] fight together so those men can go free ... the relations of the people who were finished—the brothers and sisters—are going to fight those men ... hit them with boomerangs and sticks so they will fall down and cry and be sorry for what happened ... they will be free to walk around ... No-one will be thinking about that anymore ... no-one will be worrying for that anymore.⁶⁷

In relation to physical punishments it has been said that the primary purpose is to resolve the grievance and restore balance between the disputants.⁶⁸ As Toohey suggests 'the idea is to give the family of the injured person satisfaction and thereby bring the matter to an end' and because it occurs in public everyone knows that the matter has been finalised.⁶⁹ The continuing use of physical punishments in contemporary Aboriginal society is a major source of conflict with Australian law.⁷⁰

Banishment or exile

The extent of the use of banishment as a punishment under Aboriginal customary law has been the subject of some debate. Exile or banishment has been described as an extremely harsh punishment and was not embraced by all Aboriginal societies.⁷¹ There is, however, clear evidence that exile or banishment has been used, and continues to be used, by Aboriginal communities as a sanction for breaching Aboriginal customary law.⁷² Temporary exile to another place (often where there were relatives who were known to the offender) was one of the main sanctions employed by the Yolngu people at Yirrkala.⁷³ Temporary internal exile—where the offender is prevented from entering certain areas where an aggrieved person may be—was also used.⁷⁴

62. Toohey J, *Understanding Aboriginal Law* (1999) 32 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).

63. In the matter of an application by *Anthony*, the court was told that the accused, who was applying for bail, was concerned that if he did not undergo traditional punishment he may be 'cursed by Aboriginal magic which might kill him while he is in gaol': *Anthony* [2004] NTSC 5, [16].

64. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 347.

65. *Ibid* 350–51. In North-Eastern and Western Arnhem Land this was referred to as the 'Magarada'.

66. Toussaint S, *Phyllis Kaberry and Me: Anthropology, history and Aboriginal Australia* (Melbourne: Melbourne University Press, 1999) 91.

67. *Ibid*.

68. *Ibid* 91–92.

69. Toohey J, *Understanding Aboriginal Law* (1999) 29 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).

70. The complex issues in this area are considered later in this Part: see 'Criminal Responsibility – Consent', below p 163.

71. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 86 where the author refers to Meggitt's study of the Walbiri people and that exile was never used by them.

72. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [500], [717]; and see the discussion of cases involving banishment that have come before the courts in *Williams V, The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 19.

73. Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 97.

74. *Ibid* 98.

The Commission's consultations with Aboriginal people . . . demonstrate that many Aboriginal people in Western Australia remain subject to Aboriginal customary law offences and punishments.

Ridicule and shaming

Robert Tonkinson states that a 'pervasive fear of shame or embarrassment' generally maintains the system of kinship obligations, especially avoidance rules that require the exercise of restraint in interactions between specific kin.⁷⁵ Ridicule (including swearing and gossiping) has been described as a method of controlling quarrels or disputes, but it could also at times backfire and provoke further trouble.⁷⁶ One view is that ridicule was usually directed at offences involving neglect – such as the refusal to make gifts or care for certain family members.⁷⁷ Trees was told by a senior Aboriginal man from Roebourne that when a person offended they would often be put into the middle of a circle with everyone talking and 'making them feel shame for what they had done'.⁷⁸

The ALRC referred to 'shaming and public ridicule' as a traditional punishment that continues to be used by Aboriginal people.⁷⁹ It is clear that ridicule and shaming carried out with reference to kinship roles was, and remains, an important aspect of maintaining order in Aboriginal communities. To be effective as a sanction, shaming must be carried out by the correct person in the correct situation.

Compensation

Although it does not appear to be common, there is some evidence of sanctions involving compensation. Berndt and Berndt report that compensation was sometimes used in cases of death, but its use would not necessarily mean that other forms of punishment would not also take place.⁸⁰ The ALRC noted that use of compensation as a way of resolving disputes was increasing among Aboriginal communities and that some communities had modified the sanction of compensation to include informal fines as well as goods.⁸¹

Contemporary Situation

The Commission's consultations with Aboriginal people (as well as information contained in numerous cases that have come before the courts) demonstrate that many Aboriginal people in Western Australia remain subject to Aboriginal customary law offences and punishments.⁸² Modifications to traditional punishments have nonetheless evolved, in part, as a result of the effects of Australian law (in particular, the fact that Aboriginal people who inflict physical punishments under Aboriginal customary law may well be prosecuted for offences against Australian law)⁸³ and in part as a result

75. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rhinehart and Winston, 1978) 47.

76. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 341.

77. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 86.

78. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 20.

79. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [500]–[501]. For example, the Strelley community was said to use 'growling', ridicule or shaming [717]. A Kimberley magistrate has also observed a sanction that he described as public haranguing and that aggrieved persons would 'growl' at the culprits in public: see Syddall T, 'Aboriginals and the Courts' in Swanton B (ed), *Aborigines and Criminal Justice* (Canberra: Australian Institute of Criminology, 1984).

80. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 346.

81. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [500]–[501], [826]. The ALRC mentioned that the Strelley community in Western Australian used fines and community work in its resolution of disputes: see [717].

82. In her background paper, Victoria Williams identifies a number of sanctions that have been taken into account by Australian courts when sentencing Aboriginal people during the past 20 years including spearing, physical beatings, banishment, public meetings and reprimand (shaming). See Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 18–20.

83. In Tonkinson R, *The Jigalong Mob: Aboriginal Victors of the Desert Crusade* (California: Cummings, 1974) 66–67 it was stated that Aboriginal people at Jigalong had modified certain behaviours, such as taking wives under the age of 16 years and the punishment of death by spearing, as a consequence of Australian law. Also Nancy Williams stated that at Yirrkala during 1969–1970 physical sanctions were used less frequently because of the possible intervention of Australian law: see Williams N, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 101.

of changing circumstances facing many Aboriginal people.⁸⁴ For example, during her study at Yirrkala, Williams noted that removal from employment was used as a sanction for breaching customary law.⁸⁵ Similarly, the practice of spearing has been modified in some cases due to appreciation by Aboriginal people that an offender's physical health might not withstand such punishment.⁸⁶

Even where traditional law has changed, as long as it retains its 'essential character' it can still properly be regarded as Aboriginal customary law.⁸⁷ It is on this basis that traditional punishments inflicted while under the influence of alcohol are not regarded by Aboriginal people or by courts to properly represent Aboriginal customary law.⁸⁸

During the Commission's consultations many communities referred to the important role of Elders. Some communities were concerned at the breakdown of the traditional role of Elders and the lack of respect for Elders shown by many young people.⁸⁹ In Roebourne, Trees was told that Elders should always have 'the final say' in disputes; however, it is now often the 'strongest person' who exercises control because there are not enough Elders to maintain order and pass on knowledge.⁹⁰ A number of the Commission's proposals therefore aim to assist dispute resolution in Aboriginal communities by creating the means by which the cultural authority of Elders can be recognised and respected.⁹¹

Conflict with Australian Law

All Aboriginal people in Western Australia are subject to Australian criminal law.⁹² As stated by Trees 'the general legal system governs people's lives irrespective

of customary law, and customary law operates irrespective of the general legal system'.⁹³ However, there are some aspects of Aboriginal customary law that are in direct conflict with Australian criminal law, such as the fact that a person inflicting traditional punishment may commit an offence under Australian law; the existence of different dispute resolution methods; and the problem of double punishment.

The unlawfulness of some aspects of Aboriginal customary law (in particular, punishments that cause death, grievous bodily harm or wounding) means that Aboriginal people may be dealt with for an offence under Australian law when the conduct is required under Aboriginal law. The Commission's consultations revealed that many Aboriginal people were concerned that people who were authorised to inflict certain traditional punishments were liable to arrest and imprisonment under Australian law.⁹⁴ The complex issues in relation to the legality of traditional punishments are considered by the Commission in the context of defences under Australian law.⁹⁵

There are crucial differences between the Australian legal system and the process of Aboriginal dispute resolution, including that:

- Aboriginal dispute resolution methods involve the family and the community, while in the Western legal system strangers determine disputes and impose punishment;
- 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 hierarchical nature of decision-making found under Australian law.⁹⁶

84. In Part III the Commission concluded that there is nothing in the terms of reference for this project that limit the consideration or recognition of customary laws that have remained unchanged since colonisation: see Part III 'Is Aboriginal Customary Law 'Frozen in Time?'; above p 52.

85. Williams N, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 100.

86. Consultations showed that Aboriginal people in Cosmo Newbery accepted that spearing could be fatal if someone had diabetes or a heart condition: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Cosmo Newbery*, 6 March 2003, 19; *Pilbara*, 6–11 April 2003, 10.

87. McIntyre G, *Aboriginal Customary Law: Can it be recognised?*, LRCWA, Project 94, Background Paper No 9 (February 2005) 43.

88. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 14; *Pilbara*, 6–11 April 2003, 9–10; *Broome*, 17–19 August 2003, 23.

89. LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13; *Carnarvon* 30–31 July 2003, 3; *Wiluna* 27 August 2003, 22; *Meekatharra*, 28 August 2003, 30; *Mowanjun* 4 March 2004, 48.

90. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 31.

91. See discussion under 'The Commission's Proposal for Community Justice Groups'; below pp 133–41.

92. The High Court of Australia (Mason CJ) held in *Walker v The State of New South Wales* (1994) 126 ALR 321 that criminal laws apply to Aboriginal people.

93. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 7.

94. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 6; *Wuggubun*, 9–10 September 2003, 37.

95. See discussion under 'Criminal Responsibility' and in particular 'Consent', below p 163.

96. Behrendt L, *Aboriginal Dispute Resolution: A step towards self determination and community autonomy* (Sydney: Federation Press, 1995) 22.



Aboriginal people who are dealt with by the Australian criminal justice system may be alienated by the process and Aboriginal communities are disillusioned by their lack of involvement in the punishment of offenders. The fact that family and community members are involved in dealing with 'offenders' under customary law provides strong support for establishing mechanisms whereby Aboriginal people can be directly involved in the criminal justice system.

It is a reality that as a consequence of facing two laws, many Aboriginal people may also face two punishments. This issue continues to be a grave concern for Western Australian Aboriginal people.⁹⁷ Australian common law has long accepted that a person cannot be punished twice for the same offence and the *Sentencing Act 1995 (WA)* provides that if evidence that establishes one offence also establishes another offence, the

offender can only be sentenced for one of the offences.⁹⁸ Given that under customary law once punishment has been carried out the matter is at an end, it may be extremely difficult for a traditional Aboriginal person to understand the necessity for further punishment to occur under Australian law. The corollary is just as difficult to fathom: upon being arrested and imprisoned under Australian law (sometimes for many years) that person will still be required to undergo traditional punishment upon release.⁹⁹ The need for Australian law to recognise the problem of double punishment is considered in the section on sentencing.¹⁰⁰

The Commission's View

The preceding discussion demonstrates that Australian criminal law differs vastly from its nearest equivalent under Aboriginal customary law. The question what constitutes Aboriginal customary law is properly a matter for Aboriginal people and not something that the Commission is in a position to determine. Similarly, the Commission is not in a position to dictate the precise nature of the Elders' involvement: the customary laws of the relevant community will determine these boundaries. However, it is important to recognise and support the authority of Elders (including female Elders) and to refrain from imposing unnecessary restrictions on how Elders must resolve disputes within their communities.

The Commission considers that the basic legal foundations of criminal law in Western Australia cannot be altered to recognise Aboriginal customary law. However, where appropriate, legislative provisions, procedures and practices can be adapted in ways that enable aspects of Aboriginal traditional law and punishment to be accommodated in order to assist Aboriginal people to obtain the full protection of (and avoid discrimination and disadvantage within) the criminal justice system.

97. McIntyre G, *Aboriginal Customary Law: Can it be recognised?*, LRCWA, Project 94, Background Paper No 9 (February 2005) 41.

98. *Sentencing Act 1995 (WA)* s 11.

99. The Commission notes that when an Aboriginal person is unavailable for punishment under customary law, family members may become liable to face punishment instead. This issue is considered in more detail under 'Traditional Punishment and Bail', below pp 198–201.

100. See discussion under 'Sentencing – Double Punishment', below p 214.