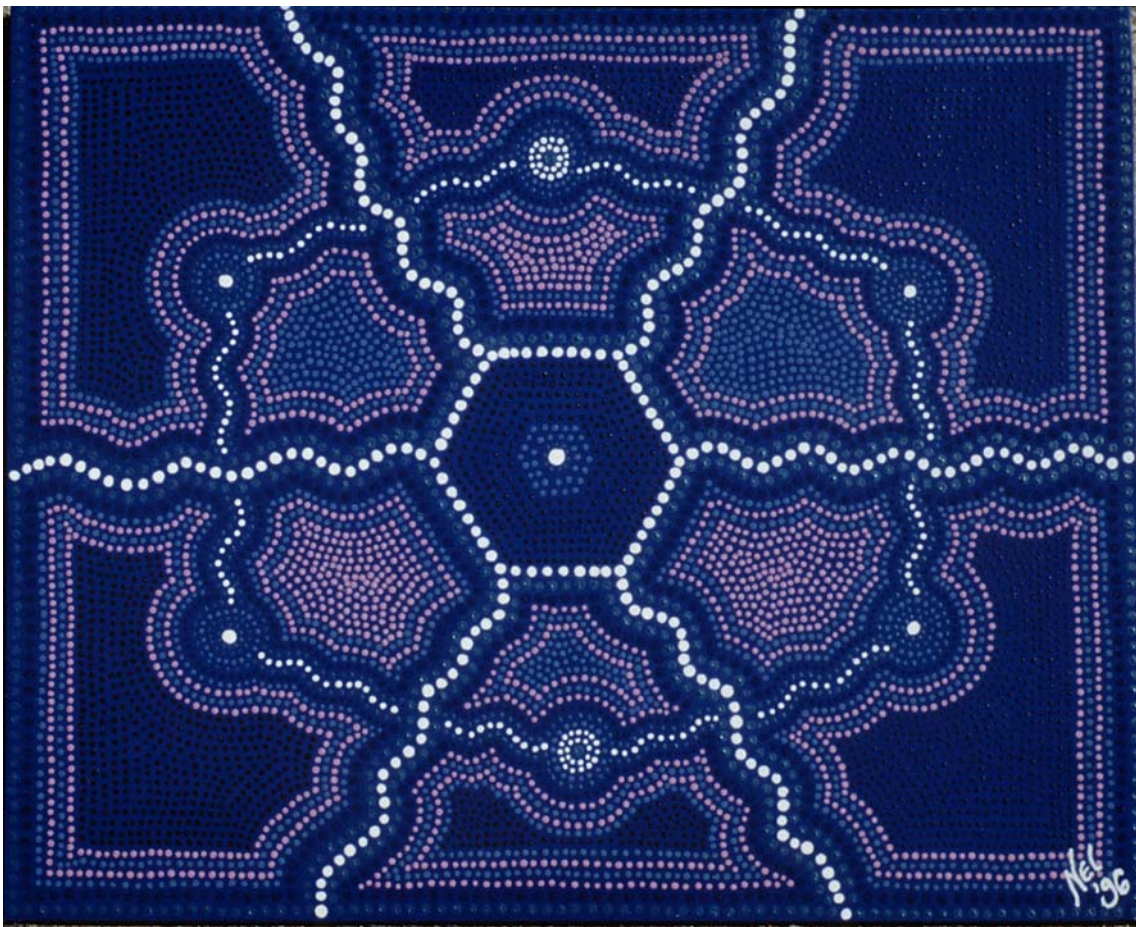


# Aboriginal Benchbook for Western Australia Courts

Second Edition



Stephanie Fryer-Smith



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# FOREWORD

The first *Aboriginal Benchbook for Western Australian Courts* was launched in May 2002. At that time, Aboriginal prisoners in Western Australia made up more than 30 per cent of the prison population and were imprisoned at almost 13 times the rate of non-indigenous prisoners.<sup>1</sup> Since then the rate of imprisonment of Indigenous persons in Western Australia has dramatically increased. Since October 2006, and despite being estimated to be 3.8 per cent of the State's population,<sup>2</sup> Indigenous prisoners have comprised over 40 per cent of the prison population.<sup>3</sup> In 2007, the rate of imprisonment of Indigenous adults was more than 27 times the non-indigenous adult rate.<sup>4</sup> It is of note that the rate of over-representation of Aboriginal people in Western Australian prisons has now reached the same level that applied prior to the Report of the Royal Commission into Aboriginal Deaths in Custody in 1991.<sup>5</sup>

I have said before that I believe that the gross over-representation of Aboriginal people in the criminal justice system of Western Australia remains the greatest challenge facing our system.<sup>6</sup>

The question is: what do we do about this challenge? It needs to be borne in mind what purpose imprisonment serves. Recently, in a public lecture, the President of the Western Australian Court of Appeal, Justice Steytler, considered the objectives and effectiveness of sentencing, with particular reference to imprisonment.<sup>7</sup> The President suggested that increased prison terms have often no discernable impact on crime rates;<sup>8</sup> that the solution to offending lies 'to a large extent outside the purview of the courts';<sup>9</sup> and that imprisonment only sometimes, but not usually, leads to rehabilitation of the offender.<sup>10</sup> The President also noted that while imprisonment can protect the community while offenders are imprisoned, much surer long term protection would be secured by rehabilitating them.<sup>11</sup> The President highlighted, however, that the other sentencing objective of retribution (or denunciation), is achieved by imprisonment and is important to the victim and often to the community.<sup>12</sup> He noted the need for the legislature and courts to respond to community outrage over the conduct of offenders; apart from anything else to avoid the real risk of people taking matters into their own hands.<sup>13</sup> This prompted the President to comment: 'We need to decide how far we want to go in satisfying this need for retribution or revenge. What kind of society do we want to be?'

The stark reality is that the rate of recidivism for non-Aboriginal prisoners in Western Australia is 40 per cent; for Aboriginal prisoners in Western Australia it is 70 per cent.<sup>14</sup> Imprisonment appears to be a particularly ineffective tool if measured with reference to protecting the community from crime. The State's Special Adviser on Indigenous Affairs, Lieutenant General (Retired) John Sanderson, has also reported that Indigenous participation in the Justice and

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<sup>1</sup> Australian Bureau of Statistics, *Prisoners in Australia 2002*, 4517.0, 2002, p 12.

<sup>2</sup> Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, 4705.0, 2007, p 18.

<sup>3</sup> Department of Corrective Services, *Monthly Graphical Report, June 2008*, p 4.

<sup>4</sup> Australian Bureau of Statistics, *Prisoners in Australia 2007*, 4517.0, 2007, p 18.

<sup>5</sup> *Aboriginal Benchbook for Western Australian Courts*, 1<sup>st</sup> ed, 2002, p 4:12.

<sup>6</sup> Law Week Address by the Hon Chief Justice of Western Australia Wayne Martin, May 2007, p 12 ([www.supremecourt.wa.gov.au/publications/pdf/Law\\_Week\\_Address\\_05052008.pdf](http://www.supremecourt.wa.gov.au/publications/pdf/Law_Week_Address_05052008.pdf)).

<sup>7</sup> President of the Court of Appeal Christopher Steytler, 'Sentencing in the Criminal Justice System', Vista Public Lecture Series 2008, 23 April 2008 ([www.sat.justice.wa.gov.au/\\_files/Sentencing\\_in\\_the\\_Criminal\\_Justice\\_System\\_Presented\\_by\\_Justice\\_Steytler.pdf](http://www.sat.justice.wa.gov.au/_files/Sentencing_in_the_Criminal_Justice_System_Presented_by_Justice_Steytler.pdf)).

<sup>8</sup> *ibid*, p 17.

<sup>9</sup> *ibid*, p 20.

<sup>10</sup> *ibid*, p 21.

<sup>11</sup> *Ibid*, p 25.

<sup>12</sup> *ibid*.

<sup>13</sup> *ibid*.

<sup>14</sup> Productivity Commission, *Overcoming Indigenous Disadvantage Key Indicators 2007 Report*, 2007, Table 9A.2.2 – Number and proportion of prisoners with known prior adult imprisonment under sentence, by gender and State/Territory, 30 June 2006.

Corrective systems now absorbs 'approximately half of the total State expenditure on Indigenous Affairs'.<sup>15</sup>

The gross over-representation of Aboriginal people in the criminal justice system of this State challenges our notions of equality before the law, the purpose of imprisonment, and the benefits derived from the considerable resulting financial and other costs. At the same time, however, there is a need to respond appropriately to the challenge that offending behaviour, particularly family violence and child abuse, poses. Denunciation of such conduct – whether perpetrated against Aboriginal or non-Aboriginal women and children – may call for the imprisonment of Aboriginal as much as other offenders.

The original Aboriginal Benchbook, and this second edition, were commissioned by the National Indigenous Cultural Awareness Committee of the Australian Institute of Judicial Administration, responding to the grave judicial and community concerns about the over-representation of Aboriginal persons in Australia's criminal justice systems. The Benchbook was informed by the recommendation of the Royal Commission into Aboriginal Deaths in Custody that judicial officers participate in appropriate cross-cultural training and development programs so that contemporary Aboriginal society and customs were understood in the context of the historical and social factors contributing to contemporary Aboriginal disadvantage. That project was a valuable and important one; it is one which is even more critical now in light of the increasing rates of Aboriginal overrepresentation in the criminal justice system. This updated and considerably extended edition of the Aboriginal Benchbook furthers that project. It remains imperative that judicial officers' own cultural heritage not work an injustice against those who do not share it.

It is also important that while the denunciation of serious offences by Aboriginal people is equally as important as it is for other offenders, we need to remain alive to alternatives that may in fact be more effective in achieving the other aims of sentencing: deterrence, rehabilitation, and protection of the community. This Benchbook contributes to our understanding of why alternatives which draw upon Aboriginal communities, families and culture may be more effective in meeting those ends.<sup>16</sup> It also contributes to our awareness of the existing extensive body of law which has developed to recognise the continuing importance of Aboriginal communities, families and culture in legal proceedings involving Aboriginal people.

Finally I would like to congratulate and thank all those involved in the preparation of this second edition of the Benchbook, and in particular Associate Professor Stephanie Fryer-Smith, Dean International, Curtin Business School, Curtin University, for her outstanding contribution. I would also like to acknowledge the continuing commitment to this project by the Australian Institute of Judicial Administration and the very welcome support of the Western Australian Department of the Attorney General.

The Hon Wayne Martin  
Chief Justice of Western Australia

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<sup>15</sup> Lieutenant General (Retired) John Sanderson, Special Adviser on Indigenous Affairs, Letter to the Premier, 19 June 2007.

<sup>16</sup> For example, refer to the preliminary evaluation of circle sentencing in NSW (I Potas, J Smart, G Brignell, B Thomas & R Lawrie, *Circle Sentencing in New South Wales - A review and evaluation*, Monograph 22, Judicial Commission of NSW, October 2003) and of the Shepparton and Broadmeadows Koori Courts in Victoria (R Kirby, 'Koori Courts - A View from Victoria' (presentation), 3<sup>rd</sup> National Indigenous Justice CEO Forum, Brisbane, 21-22 November 2007).

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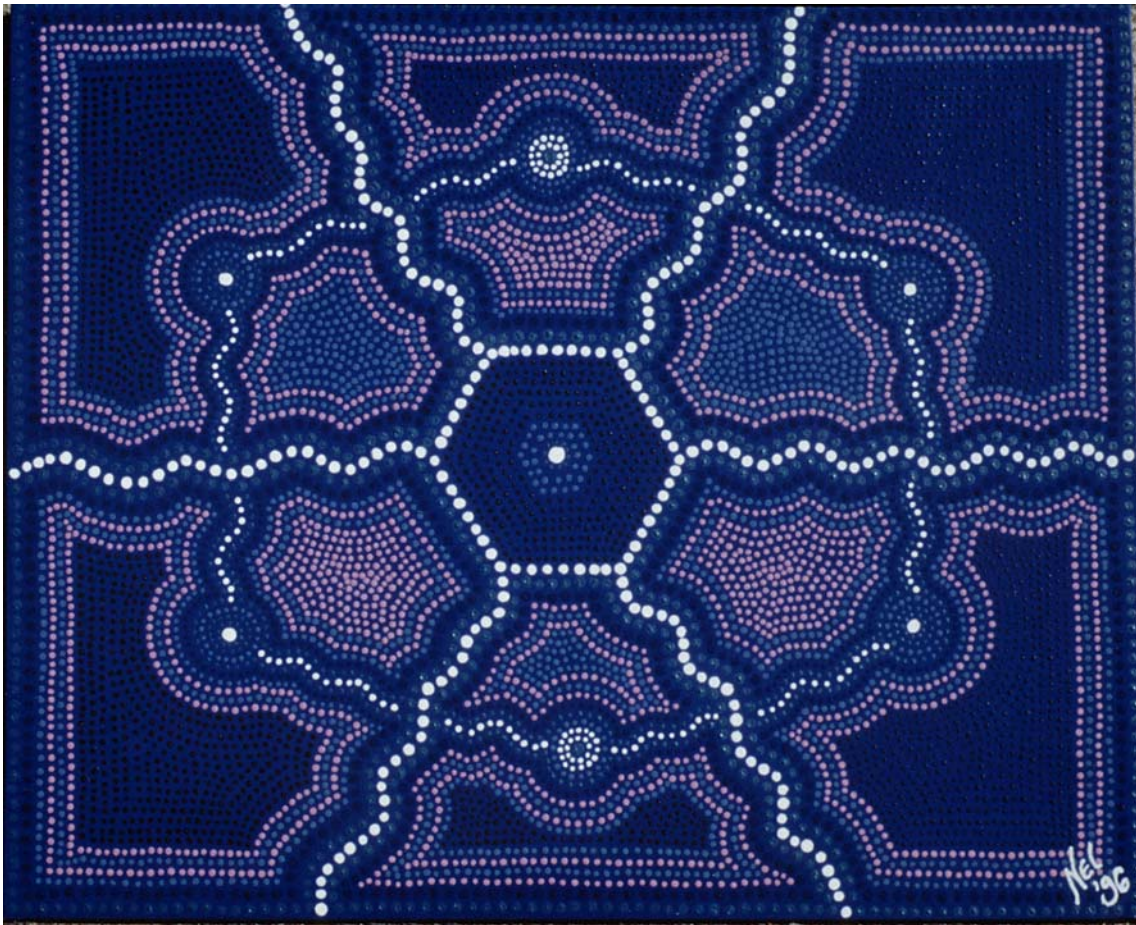
- The Hon Wayne Martin, Chief Justice of Western Australia
- The Hon J A McGinty BA BJuris (Hons) LLB JP MLA, Attorney-General for Western Australia
- The Hon Justice M Murray, Supreme Court of Western Australia
- The Hon Justice N Owen, Supreme Court of Western Australia
- The Hon Justice A Templeman, Supreme Court of Western Australia
- The Hon Justice G Miller, the Supreme Court of Western Australia
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- Ms L Langdon, SM
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Stephanie Fryer-Smith  
Perth, July 2008

# Chapter One: Introduction



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#### **NOTE**

The author acknowledges that the indigenous inhabitants of Australia descend from many hundreds of distinct and diverse culture groups. Accordingly, the use of the generic adjective "Aboriginal" in the Benchbook may be criticised. However, the employment of a collective term cannot be avoided, and the word "Aboriginal" rather than "Indigenous" has been used throughout the Benchbook upon the recommendation of Aboriginal advisers to the author.



## CHAPTER ONE

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# Introduction

The first edition of the *Aboriginal Benchbook for Western Australian Courts* was published by the Australian Institute of Judicial Administration (AIJA) in 2002. The Benchbook was commissioned by the National Indigenous Cultural Awareness Committee of the AIJA in response to grave concerns held by the judiciary about the continuing over-representation of Aboriginal persons in Australian criminal justice systems. Those grave concerns, which are shared by the legal profession and the broader community, are reflected in domestic and international law.

Recommendation 96 of the *Royal Commission into Aboriginal Deaths in Custody: National Report*<sup>17</sup> (RCIADIC) was also a key driver for the development of the first edition of the Benchbook. Recommendation 96 proposes the participation by judicial officers in appropriate cross-cultural training and development programs, which programs “explain contemporary Aboriginal society, customs and traditions” in a context which emphasises of the historical and social factors contributing to contemporary Aboriginal disadvantage.

The objectives of the first edition of the Benchbook were first, to provide a practical resource for judicial officers presiding over criminal proceedings involving Aboriginal persons in Western Australia; and secondly, to create a template Benchbook for adaptation in other Australian jurisdictions. To those ends, the Benchbook contained descriptive materials of a cross-cultural nature, and provided an overview of relevant legal principles in respect of pre-trial matters, criminal proceedings and sentencing in the Western Australian context.

During the years 2000 to 2006 the Law Reform Commission of Western Australia (LRCWA) undertook a detailed inquiry into all areas of Aboriginal customary laws in Western Australia, with the exception of native title and matters addressed under the *Aboriginal Heritage Act 1972* (WA). The LRCWA consulted widely with Aboriginal and non-Aboriginal people, groups and organisations throughout Western Australia. In its Discussion Paper<sup>18</sup>, published in December 2005, the LRCWA made 93 proposals which it considered “could lead to the principled recognition of Aboriginal customary laws in such a manner as would also address Aboriginal disadvantage in many areas of life in Western Australia”<sup>19</sup>. The following September, in *Aboriginal Customary Law: Final Report*<sup>20</sup>, the LRCWA made 131 recommendations for the reform of certain Western Australian laws, and certain policies and practices of Western Australian Governmental agencies. Those recommendations sought “not only to empower Aboriginal people by creating an environment where Aboriginal people can build and exercise their capacity to make decisions that affect their everyday lives, but also to bring respect to Aboriginal people, law and culture.”<sup>21</sup>

The judicial, professional and community concerns which prompted the development of the first edition of the Benchbook have not abated: far from it<sup>22</sup>. The grossly disproportionate rate of Aboriginal participation in the criminal justice system has not diminished during the past six years. A number of significant reports, including *Putting the Picture Together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in*

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<sup>17</sup> E Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report* Vols. 1-11, AGPS, Canberra, 1991 ([www.austlii.edu.au/au/other/IndigLRes/rciadic](http://www.austlii.edu.au/au/other/IndigLRes/rciadic)) (Accessed 5 July 2008)

<sup>18</sup> Law Reform Commission of Western Australia *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)) p 191. (Accessed 9 July 2008).

<sup>19</sup> LRCWA, Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) p vii (Accessed 9 July 2008)

<sup>20</sup> LRCWA, Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)). (Accessed 9 July 2008)

<sup>21</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) p 38. (Accessed 9 July 2008)

<sup>22</sup> The Hon Wayne Martin, Chief Justice of Western Australia, “The State of Justice: The Truth About Crime and Sentencing”, Law Week Address, 7 May 2007. ([http://www.supremecourt.wa.gov.au/publications/pdf/Law\\_Week\\_Address\\_05052008.pdf](http://www.supremecourt.wa.gov.au/publications/pdf/Law_Week_Address_05052008.pdf)). (Accessed 7 July 2008)



*Aboriginal Communities*<sup>23</sup> (the Gordon Report), "*Little Children are Sacred*"<sup>24</sup> and *Overcoming Indigenous Disadvantage: Key Indicators 2007*<sup>25</sup> have highlighted the social, cultural and economic marginalisation of Aboriginal people, and the decline of traditional cultural authority, which lie at the heart of Aboriginal offending. It is notorious that in 2007 the alarming incidence of dysfunction, domestic and child abuse and suicides in Aboriginal communities in the Kimberley region of Western Australia (and in other parts of northern Australia) prompted emergency Governmental intervention to protect the women and children in those communities, and to prosecute perpetrators of abuse. The continuing high Aboriginal crime rate, the contents of wide-ranging reports and the unprecedented Governmental interventions in Aboriginal communities clearly signal the urgent need for all Australians to strive for Aboriginal societal, economic and cultural gains.

Against that background, the second edition of the Benchbook was developed to extend and update the materials contained in the first edition. Accordingly, it provides broad descriptions of traditional and contemporary Aboriginal society, culture, language and law; it suggests ways of addressing the language and communication issues which can arise in court proceedings involving Aboriginal people; and it discusses relevant legal principles relating to pre-trial and criminal proceedings and sentencing. The Benchbook also incorporates references, where appropriate, to the LRCWA's *Aboriginal Customary Laws: Final Report* and its earlier Discussion Paper. As with the first edition, Western Australian judicial officers have kindly provided comments, examples of sentencing notes and other materials for inclusion in the Benchbook.

An Overview of the contents of each Chapter of the Benchbook is set out on the following page.

This Benchbook is intended primarily for judicial officers have been appointed to courts exercising criminal jurisdiction in Western Australia during the past five years. Such officers may have had little, if any, involvement in criminal proceedings involving Aboriginal people prior to their appointment. However, it is also hoped that the Benchbook will be of broader interest within the judiciary and the legal profession.

Finally, and consistent with the approach of the LRCWA in its *Aboriginal Customary Laws: Final Report*, the Benchbook seeks to demonstrate the extent to which the Western Australian legal system has the capacity, where appropriate, to recognise the significance of Aboriginal law and culture within the context of Anglo-Australian criminal proceedings.

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<sup>23</sup> S Gordon, K Hallahan, D Henry (2002), Department of Premier and Cabinet, Western Australia.

<sup>24</sup> Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, 2007.

<sup>25</sup> Steering Committee for the Review of Government Service Provision, Productivity Commission, 2007, Canberra.

## 1.2

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### OVERVIEW

The Benchbook is intended as a practical resource for judicial officers presiding over criminal proceedings involving Aboriginal persons by providing materials relating to:

- the key findings and recommendations of the 1991 *Royal Commission into Aboriginal Deaths in Custody: National Report*<sup>26</sup>; and recent data relating to Aboriginal deaths in custody. The meaning of the word “Aboriginal” for legal purposes is considered: (*Chapter One, Introduction*);
- the broad features of early Aboriginal occupation of Australia, traditional Aboriginal language groups, Aboriginal languages, social organisation, culture, spirituality, ritual, art and law: (*Chapter Two, Aspects of Traditional Aboriginal Australia*);
- features of contemporary Aboriginal Australia, including Aboriginal migration to urban areas, survival of language and culture; current demographic data. Apparent differences in the cultural values of Aboriginal and non-Aboriginal Australians are identified: (*Chapter Three, Aspects of Contemporary Aboriginal Australia*);
- current demographic data relating to Aboriginal people in Western Australia; statistics evidencing the continuing over-involvement of Aboriginal people in the criminal justice system; and background factual information including the names and locations of the many Aboriginal language groups in Western Australia: (*Chapter Four, Aboriginal People in Western Australia*);
- the linguistic and conceptual features of Aboriginal languages, such as *Ngaanyatjarra*; by identifying cross-cultural barriers to effective communication; and by suggesting strategies for communicating effectively with speakers of Aboriginal English: (*Chapter Five, Language and Communication*);
- issues which might affect Aboriginal accused persons in pre-trial proceedings including bail, fitness to plead; and interpreters. The *Appendix* contains information relating to the Aboriginal Legal Service of Western Australia (Inc.); Aboriginal Liaison Officers; a test for determining whether an Aboriginal interpreter is required and information about the availability and location of Aboriginal interpreters in Western Australia: (*Chapter Six, Pre-Trial Matters*);
- the conduct of criminal proceedings in respect of Aboriginal accused persons and witnesses. The discussion includes matters relating to representation, pleas of guilty, juries, evidence; confessions and admissions and defences. The *Appendix* includes comments from Western Australian judicial officers about criminal proceedings involving Aboriginal people and provides examples of directions to juries in trials involving Aboriginal accused persons: (*Chapter Seven, Criminal Proceedings*);
- the concept of “Aboriginality” in sentencing and the operation of sentencing principles in respect of Aboriginal offenders. Particular focus is placed upon imprisonment as a sentence of last resort, aggravating factors and mitigating factors including the circumstances underlying alcohol and substance abuse, the impact of imprisonment, cultural dislocation, racial conflict and the infliction of customary punishment. The *Appendix* contains comments relating to sentencing practices provided by Western Australian judicial officers and extracts from judicial sentencing remarks: (*Chapter Eight, Sentencing*).

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<sup>26</sup> RCIADIC ([www.austlii.edu.au/au/other/IndigLRes/rciadic](http://www.austlii.edu.au/au/other/IndigLRes/rciadic)).

## 1.3

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### ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

#### 1.3.1 Background

During the early 1980s the grossly disproportionate number of Aboriginal deaths in police or prison custody created intense community concern. In January 1988 a Royal Commission inquiry commenced into the deaths in custody of 44 Aboriginal persons. Subsequently the inquiry was widened to incorporate a wide-ranging investigation into Aboriginal involvement in the Australian criminal justice system. Ultimately the circumstances of the deaths in custody of 99 Aboriginal persons were examined and reported upon. Thirty three of those 99 deaths had occurred in Western Australia.

#### 1.3.2 Findings

The *Royal Commission into Aboriginal Deaths in Custody: National Report* (RCIADIC), released on 9 May 1991, contained key findings<sup>27</sup>, including that:

- it could not be asserted that abuse, neglect or racism were common elements in each of the deaths which had been investigated. However, in many cases “system failures” or the absence of due care had contributed to the deaths;
- Aboriginal people do not die in custody at a greater rate than do non-Aboriginal people. However, Aboriginal people come into custody at a rate which is “overwhelmingly different” from that of the general community; For example, in Western Australia, Aboriginal people were 43 times more likely to be in police custody; and 26 times more likely to be in prison custody, than non-Aboriginal persons;
- The most significant cause of Aboriginal over-representation in the criminal justice system was the continuing disadvantage experienced by Aboriginal persons within the broader society. Eighty-eight of the 99 Aboriginal persons who had died in custody were men whose average age was 32 years. In addition, of those 99 persons:
  - 83 were unemployed at the time of detention;
  - only 2 had been educated to secondary school level;
  - 43 had been removed from their families by the State;
  - 74 had been in trouble with the law before the age of 20;
  - 43 had been detained for drunkenness just prior to their last custody<sup>28</sup>.

The Royal Commissioner commented:

“Their deaths were premature. The circumstances of their deaths were extremely varied. One cannot point to a common thread of abuse, neglect or racism that is common to these deaths. However, an examination of the lives of the ninety-nine shows that facts associated in every case with their Aboriginality played a significant and in most cases dominant role in their being in custody and dying in custody.”<sup>29</sup>

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<sup>27</sup> RCIADIC, Vol 1, Chapter 1 ([www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/))

<sup>28</sup> RCIADIC, Vol 1, Chapter 1 ([www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/11.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/11.html) para 1.2.17 (Accessed 6 July, 2008)

<sup>29</sup> RCIADIC, Vol 1, Chapter 1 ([www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/7.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/7.html)) para 1.1.1. (Accessed 6 July, 2008)

The Royal Commissioner placed particular emphasis upon the devastation which had been wrought upon Aboriginal societies by British colonisation and the imposition of post-colonial laws and practices. The legacy of those laws and practices was systemic Aboriginal socio-economic disadvantage, disempowerment and cultural fragmentation. It appeared that an inevitable consequence was early, and repeated, contact by many Aboriginal persons with the criminal justice system.

### 1.3.3 Recommendations

RCIADIC contained 339 recommendations for Commonwealth and State Governments. The recommendations included reforms to the policing, criminal justice, juvenile justice and custodial systems. Other recommendations focused on Aboriginal empowerment and self-determination. RCIADIC Recommendations relevant to the conduct of criminal proceedings included:

- *Recommendation 96:* That judicial officers and persons who work in the court service and in the probation and parole services whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development programme, designed to explain contemporary society, customs and traditions. Such programmes should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should, wherever possible, participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.
- *Recommendation 100:* That Governments should take more positive steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant numbers of Aboriginal people appear before the courts.
- *Recommendation 104:* In discrete or remote communities sentencing authorities should consult with Aboriginal authorities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities. Further, that subject to preserving the civil and legal rights of offenders and victims, such consultation should in appropriate circumstances relate to sentences imposed in individual cases.
- *Recommendation 108:* That it be recognised by Aboriginal Legal services, funding authorities and courts that lawyers cannot adequately represent clients unless they have adequate time to take instructions and prepare cases, and that this is a special problem in communities without access to lawyers other than at the time of court hearings.

The Australian Institute of Criminology (AIC) has published an annotated bibliography of reports published between 1992 and 2000 which describe the extent to which the RCIADIC Recommendations have been implemented<sup>30</sup>. Among those reports are *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody*<sup>31</sup> and the *Government of Western Australia 2000: Implementation Report*<sup>32</sup>.

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<sup>30</sup> P Garfoot, *Annotated Bibliography* (<http://www.aic.gov.au/research/dic/bibliography.html>)

<sup>31</sup> R Harding, R Broadhurst, A Ferrante, N Loh Hawkins Press, Leichhardt, 1995.

<sup>32</sup> Indigenous Affairs Department, Western Australian Government, June 2001. See also E Marchetti *Critical Reflections Upon Australia's Royal Commission into Aboriginal Deaths in Custody* [2005] MqLJ 6.

### 1.3.4 Postscript: Aboriginal Deaths in Custody 1990-2006

In 1991 the Royal Commissioner commented:

“The conclusions are clear. Aboriginal people die in custody at a rate relative to their proportion which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community.”<sup>33</sup>

In December 1992 the AIC also established the National Deaths in Custody Monitoring and Research Program. In October 2000 the AIC reported that in the decade 1990 - 2000, a total of 909 persons had died in all forms of custody in Australia. One hundred and sixty-two of those 909 persons (almost 18%) were Aboriginal<sup>34</sup>. The largest number of Aboriginal deaths in custody (21 or 24% of all deaths in custody) occurred in 1995. In August 2005 Commonwealth funding for the Deaths in Custody Watch Committees in each State ceased.

In each of 2005 and in 2006, a total of 54 people died in all forms of custody in Australia, 13 fewer than in 2004. The total number of Aboriginal deaths in custody in 2005 was 15 (28%) compared with 13 (24%) in 2006<sup>35</sup>. As at 30 June 2006 Australia's estimated resident Aboriginal population was 517,000 persons (or 2.5% of the total population)<sup>36</sup>. The continuing grossly disproportionate rate of Aboriginal deaths in custody confirms the currency of the comments made by the Royal Commissioner in 1991: namely that Aboriginal people die in custody at a rate relative to their proportion which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community.

The Royal Commissioner emphasised the importance of reconciliation between Aboriginal and non-Aboriginal Australia, affirming that “reconciliation demands a level playing field, a negotiation based upon mutual respect and an acceptance of equality.” The process of reconciliation would demand “a very strong commitment to the elimination of that Aboriginal social, economic and cultural disadvantage which is the basic reason for the disproportionate number of Aboriginal men and women in custody, the deaths of some of them and the setting up of this Royal Commission.”<sup>37</sup>

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<sup>33</sup> RCIADIC, Vol 1, Chapter 1, [www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/12.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/12.html) para 1.3.3. (accessed 6 July 2008)

<sup>34</sup> L Collins and J Mouzos ‘Australian Deaths in Custody and Custody-Related Police Operations 2000, *Trends & Issues in Crime and Criminal Justice*, October 2001, No 217, Australian Institute of Criminology, Canberra, p 1.

<sup>35</sup> Australian Bureau of Statistics, *Year Book Australia, 2008*, 1301.0, Table 13.32([www.abs.gov.au](http://www.abs.gov.au)).

<sup>36</sup> ABS, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, 15 August 2007, 4705.0, p 4, ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 30 June 2008)

<sup>37</sup> RCIADIC, Vol 1, Chapter 1, ([www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/23.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/23.html)) para 1.9.1. (Accessed 6 July 2008)

## 1.4

## LEGAL MEANINGS OF THE WORD “ABORIGINAL”

In 1788, upon the acquisition of sovereignty over the colony of New South Wales by the British Crown, the Aboriginal occupants of the continent became British subjects, governed by colonial laws. Since colonisation, Australian courts have consistently rejected arguments that Aboriginal people are not subject to that law<sup>38</sup>. The claim that Aboriginal sovereignty survived the acquisition of sovereignty by the British Crown has also been rejected<sup>39</sup>. However, Aboriginal customary law survives to inform the law of native title<sup>40</sup>, and its relevance to legal proceedings - principally criminal proceedings - is the subject of discussion in this Benchbook<sup>41</sup>.

Under the colonial regimes, questions arose as to whether the descendants of unions between Aboriginal people and settlers were to be regarded as “Aboriginal” for certain defined (invariably restrictive) purposes such as the entitlement to vote. Thus, a person’s status as “Aboriginal” or non-Aboriginal became a matter of great significance for administrative purposes. During the period 1788-1984, more than 700 laws were enacted which expressly or incidentally affected the rights and status of Aboriginal people<sup>42</sup>. Ostensibly, many were enacted for the protection and advancement of Aboriginal people: the long title of the now infamous *Aborigines Act 1905* (WA) was “An Act to make provision for the better protection and care of the Aboriginal inhabitants of Western Australia”.

The dictionary definition of “Aboriginal” includes “first or earliest as far as history or science gives record....used both of the races and natural features of various lands”<sup>43</sup>. In all Australian jurisdictions early statutory definitions focused on descent, the relevant criterion being quantum of blood. Thus, terms such as “full-blood”, “half-caste” and “quadroon” were frequently employed. This approach appears to reflect the view that if a person were to be predominantly of non-Aboriginal descent, that person was not “Aboriginal”. Numerous books and articles have documented the elaborate tests which were devised to test “bloodline”: it has been asserted that such tests demonstrate more about the psychology of racism than they do scientific matters<sup>44</sup>.

In the latter half of the twentieth century a broader approach emerged. In *Ofu-Kolai v The Queen*<sup>45</sup> the High Court held that “racial origin or derivation” was the relevant measure of determining whether a person came within a racial group<sup>46</sup>. Their Honours commented that “at the edges of racial classification there is an uncertainty of definition”<sup>47</sup>. In *Re Bryning (Dec’d)*<sup>48</sup>, Lush J commented that the meaning of the words “Aborigine and “Aboriginal” varied in everyday usage. In his Honour’s view, when those words were used “to describe a general body of persons, without adjectives and without contrasting words or phrases”<sup>49</sup> they did not refer to persons of pure Aboriginal descent, and had not done so for many years.

<sup>38</sup> See *R v Murrell* (1836) 1 Legge 72; *R v Wedge* [1976] 1 NSWLR 581; *Re Phillips: Ex parte Aboriginal Development Commission* (1987) 13 FCR 384; *R v Walker* [1989] 2 Qd R 79; *Walker v New South Wales* (1994) 182 CLR 45.

<sup>39</sup> *Coe v Commonwealth* (1979) 53 ALJR 403. Compare the position in the United States, where subordinate indigenous sovereignty in the form of “domestic dependent status” was recognised in a series of the decisions of the Supreme Court in the mid-nineteenth century, most notably *Worcester v Georgia* 31 US 530; 6 Pet 515 (1832).

<sup>40</sup> See *inter alia Mabo v Queensland (No 2)* 175 CLR 1; s 253 *Native Title Act 1993* (Cth).

<sup>41</sup> See Chapters Six (Pre-Trial Matters), Seven (Criminal Proceedings) and Eight (Sentencing).

<sup>42</sup> J McCorquodale *Aborigines and the Law: A Digest* Australian Studies Press, Canberra, 1987.

<sup>43</sup> The Oxford English Dictionary, Second Edition, Vol 1, Clarendon Press, Oxford, 1989.

<sup>44</sup> H McRae et al *Indigenous Legal Issues* LBC Information Services, Second Ed, 1997, p 72.

<sup>45</sup> (1956) 96 CLR 172.

<sup>46</sup> *Ofu-Kolai v The Queen* (1956) 96 CLR 172 at 176 per Dixon CJ, Fullagar and Taylor JJ.

<sup>47</sup> *Ofu-Kolai v The Queen* (1956) 96 CLR 17 at 175 per Dixon CJ, Fullagar and Taylor JJ.

<sup>48</sup> [1976] VR 100.

<sup>49</sup> *Re Bryning (Dec’d)* [1976] VR 100 at 103

In *Commonwealth v Tasmania*<sup>50</sup> the High Court declared that Aboriginal persons from Tasmania are members of the “Aboriginal race” for the purposes of s 51(xxvi) of the Australian Constitution. Deane J expressed the view that definitions relating to race (which term his Honour applied to Australian Aboriginal people collectively) have “a wide and non-technical meaning”<sup>51</sup>. His Honour continued:

“By ‘Australian Aboriginal’ I mean in accordance with what I understand to be the conventional meaning of the term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as an Aborigine.”<sup>52</sup>

Deane’s J definition contains three criteria which have been used widely for administrative purposes since 1967: Aboriginal descent, self-identification as Aboriginal and community acceptance as Aboriginal. Those criteria are embedded in the definition of “person of Aboriginal descent” for the purposes of the *Aboriginal Affairs Planning Authority Act 1972* (WA):

“**person of Aboriginal descent:** any person living in Western Australia who is wholly or partly descended from the original inhabitants of Australia who claims to be an Aboriginal and who is accepted by such in the community in which he lives.”

In *Attorney-General (Commonwealth) v State of Queensland*<sup>53</sup> (*Attorney-General’s Case*) the Full Court of the Federal Court considered the meaning of the word “Aboriginal” in Letters Patent which had been issued to inquire into the deaths in police custody of certain “Aboriginal and Torres Strait Islanders” in Queensland<sup>54</sup>. The Full Court concluded that in the particular context of the proceedings the word “Aboriginal” should be given its vernacular meaning. Jenkinson J stated that in order to be “Aboriginal” a person must have “at least a real possibility of descent” from the people who had occupied Australia before colonisation<sup>55</sup>. Spender J stated that once a person has been established to be “non-trivially” of Aboriginal descent, that person is Aboriginal<sup>56</sup>. French J concluded that, for the purposes of the proceedings, the fact of Aboriginal descent was sufficient. His Honour also expressed the view that the definition formulated by Deane J in the *Tasmanian Dams Case* was not exhaustive<sup>57</sup>.

The statutory definition of the term “Aboriginal person” as “a person of the Aboriginal race of Australia” (which is contained in a number of statutes<sup>58</sup>) was examined by Drummond J in *Gibbs v Capewell*<sup>59</sup>. His Honour held that Aboriginal descent is an essential, but not necessarily a sufficient, condition of Aboriginality for the purposes of that definition. Drummond J concluded that the requisite degree of Aboriginal descent depends upon the circumstances of each case: a small degree of descent, coupled with genuine self-identification or communal recognition, might suffice<sup>60</sup>.

In *Wolf v Shaw*<sup>61</sup> Merkel J, examining the same statutory definition, approved the view expressed by Drummond J in *Gibbs v Capewell* that descent alone is not sufficient to establish Aboriginality.

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<sup>50</sup> (1983) 158 CLR 1.

<sup>51</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 at 273-274.

<sup>52</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 at 274.

<sup>53</sup> (1990) 94 ALR 515.

<sup>54</sup> At first instance it had been held that the death of a man who was of partly Aboriginal genetic descent, but of European appearance, could not be the subject of inquiry pursuant to those Letters Patent.

<sup>55</sup> *Attorney-General’s Case* (1990) 94 ALR 515 at 517.

<sup>56</sup> *Attorney-General’s Case* (1990) 94 ALR 515 at 524.

<sup>57</sup> *Attorney-General’s Case* (1990) 94 ALR 515 p 539.

<sup>58</sup> For example, s 3 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); s 2 *Aboriginal Councils and Associations Act 1976* (Cth); s 3 *Aboriginal Education (Supplementary Assistance) Act 1989* (Cth). The latter two enactments expressly include persons of Torres Strait Islander descent in the definition of “Aboriginal”. Compare s 3(1) *Racial Discrimination Act 1975* (Cth) and s 253 *Native Title Act 1993* (Cth) which contain separate definitions of “Aboriginal” and “Torres Strait Islander”.

<sup>59</sup> (1995) 128 ALR 577. The provision in question was s 4(1) *Aboriginal and Torres Strait Islander Act 1989* (Cth) (now repealed).

<sup>60</sup> *Gibbs v Capewell* (1995) 128 ALR 577 at 581-585.

<sup>61</sup> (1998) 83 FCR 113.

Commenting that inflexible notions of Aboriginal identity are inappropriate, Merkel J stated that the determination of whether a person is Aboriginal depends upon the application of the factors of descent, self-identification and communal recognition of that person to the facts of a particular case<sup>62</sup>.

The decisions of the Federal Court briefly discussed above indicate that genetic descent, albeit small, is essential to a person being considered "Aboriginal" where that term is defined very broadly<sup>63</sup>. The extent to which self-identification and communal affiliation might also need to be established depends upon the facts of each case, and the legal context in which the question of Aboriginality arises.

Legislative definitions and judicial pronouncements in relation to Aboriginal identity have been criticised on the grounds *inter alia* that they obstruct the cause of Aboriginal self-determination and legitimise unwarranted intervention in Aboriginal affairs<sup>64</sup>. The use of the word "Aboriginal" has been criticised as being inaccurate, racist and controlling<sup>65</sup>. However, it appears that if measures of positive discrimination are to be effected in respect of Aboriginal persons, judicial pronouncements upon Aboriginal identity cannot be avoided<sup>66</sup>.

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<sup>62</sup> *Shaw v Wolf* (1998) 83 FCR 113 at 118-122.

<sup>63</sup> Note the view of French J in *Attorney-General's Case* (1990) 94 ALR 515 at 539.

<sup>64</sup> C Cunneen 'Judicial Racism' in S McKillop (ed) *Aboriginal Justice Issues: Proceedings of a Conference Held 23-25 June 1992*, Australian Institute of Criminology, Canberra, 1992.

<sup>65</sup> M Mansell, quoted in H McRae et al *Indigenous Legal Issues* LBC Information Services, Second Ed, 1997, pp 71-72.

<sup>66</sup> See also Australian Law Reform Commission *The Recognition of Aboriginal Customary Law*, Report No 31, AGPS, Canberra, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) at paras 88-97; S Yeo 'The Recognition of Aboriginality by Australian Criminal Law' in G Bird, G Martin and J Nielsen *Majah: Indigenous Peoples and the Law* The Federation Press, Sydney, 1996. Matters relating to Aboriginal identity are discussed *inter alia* in J Sabbioni, K Shaeffer and S Smith (eds) *Indigenous Australian Voices: A Reader* Rutgers University Press, New Brunswick, New Jersey, 1998; D Oxenham, J Cameron, K Collard, P Dudgeon, D Garvey, M Kickett, J Roberts and J Whiteway *A Dialogue on Indigenous Identity: Warts 'n' All* Gunada Press, Curtin Indigenous Research Centre, 1999; De Plevitz L and Croft L "Aboriginality Under the Microscope: The Biological Descent Test in Australian Law" [2003] *QUT LJJ* 7; Connell R "Who is an Aboriginal Person: *Shaw v Wolf*" [1998] *ILB* 49; McRae H "The Criminal Justice System and the Construction of Aboriginality" *Law in Context* 17(1) 1999: 148-166.

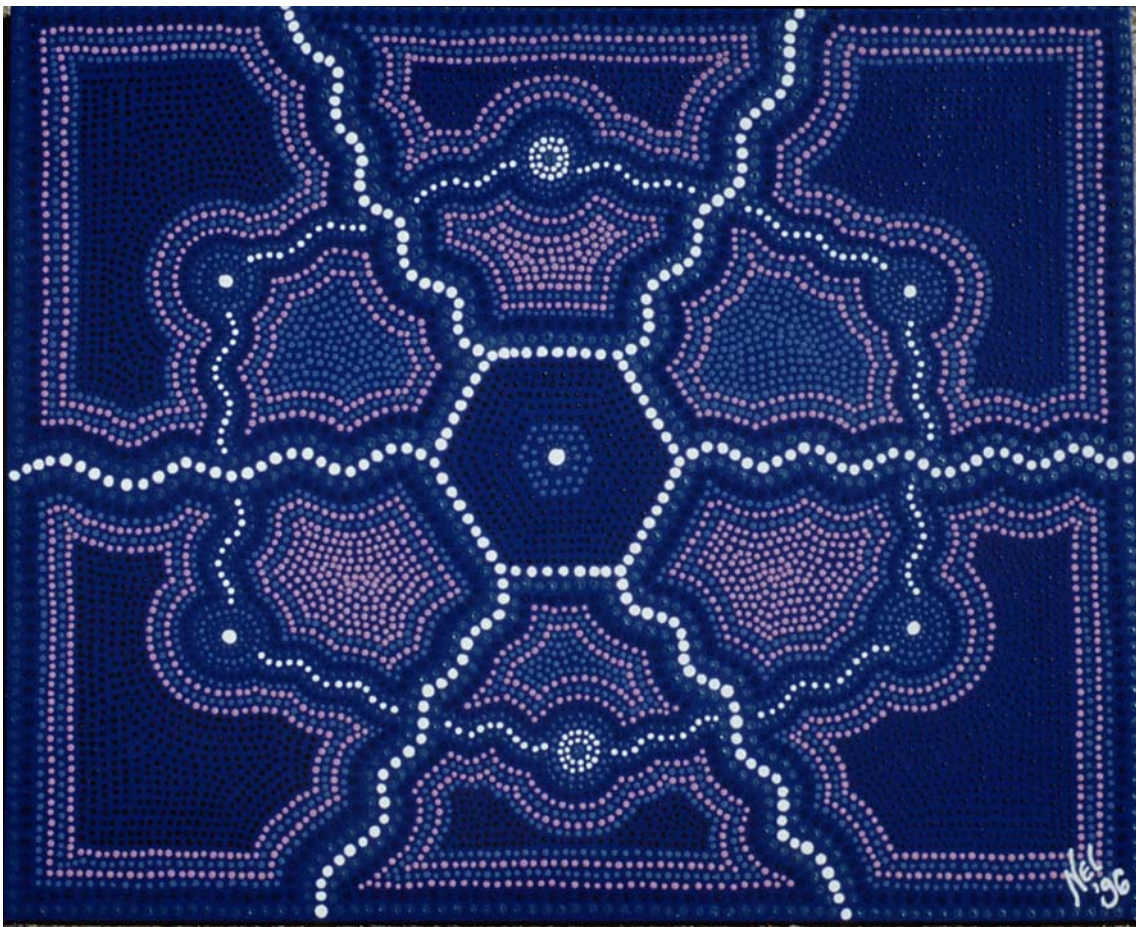


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## Chapter Two: Aspects of Traditional Aboriginal Australia



# Chapter Two: Aspects of Traditional Aboriginal Australia

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**NOTE**

- (1) This Chapter discusses historical, socio-economic and cultural aspects of traditional Aboriginal life in Australia. Of necessity, these matters are discussed in very broad and general terms. No notion of generic “Aboriginality” is intended or implied.
- (2) Most of the material in this Chapter relates to the Aboriginal language groups of mainland Australia. The language groups of Tasmania have different social histories from those of mainland Australia, and Torres Strait Islander peoples are socially, culturally and ethnically distinct from Aboriginal Australians.
- (3) In this Chapter, the present tense is used to describe aspects of traditional Aboriginal life which may continue today, albeit in modified form. The past tense is used to describe matters which are of historical, rather than current, significance.

## **Summary of Chapter Two**

### **Aspects of Traditional Aboriginal Australia**

#### **2.1 EXTENT OF SURVIVAL OF TRADITIONAL ABORIGINAL SOCIETY**

- It is difficult to know the extent to which traditional Aboriginal life survives completely intact, if at all

#### **2.2 OVERVIEW OF TRADITIONAL ABORIGINAL SOCIETY**

##### **2.2.1 Early Occupation**

- There is evidence of at least 60,000 years of Aboriginal occupation of the Australian mainland

##### **2.2.2 “Hunter-Gatherer-Cultivators”**

- The traditional Aboriginal socio-economic life was that of the “hunter-gather-cultivator”

##### **2.2.3 Languages**

- Possibly 270 Aboriginal languages, and 600 Aboriginal dialects, were spoken at the time of British colonisation
- Sign language was used extensively

#### **2.3 ABORIGINAL SPIRITUALITY**

##### **2.3.1 The Dreaming**

- Dreaming stories tell of the creation of the world and of everything within it, including the Law, by supernatural spirits known as Ancestral Beings

##### **2.3.2 Totems**

- Totems are the symbol of, and companion or protector to, a person or group
- The many kinds of totems include ancestral, group, conception and initiation totems

##### **2.3.3 Connection with Land**

- The relationship of an individual or group with land is sacred and cannot be exchanged or lost

## **2.4 ABORIGINAL SOCIAL ORGANISATION**

### **2.4.1 Language Groups**

- The largest traditional social unit is the language group, which confers both individual and group identity

### **2.4.2 Smaller Sub-Groups: Local Descent Groups, Bands, Families**

- Local descent groups occupy particular tracts of land within the larger group's territorial boundaries
- Bands are groups of people, usually family groups, which move through traditional territory together
- The smallest social unit is the family, which lives and moves around its traditional territory together

### **2.4.3 Inter-Group Relationships**

- Traditional language groups often engaged with one another on ceremonial occasions and to trade; however, inter-group relationships were not always peaceful

### **2.4.4 Social Classification (Skin Groups)**

- Social classification may be highly complex: in Western Australia social divisions are known as "skin groups"
- Types of social classification include alternate generational levels, the moiety system, section system, six-section system and subsection system

## **2.5 THE KINSHIP SYSTEM**

### **2.5.1 Classificatory Kinship**

- Classificatory kinship is based upon an expanded concept of family; it provides a powerful framework for individual identity, stable relationships and group cohesion
- The governing principle is that classificatory terms, which in Anglo-Australian society apply only to lineal relatives, extend to collateral relatives

### **2.5.2 Kinship Avoidance**

- The Law prescribes that some relatives must avoid one another.

## **2.6 ABORIGINAL CULTURE AND CUSTOMS**

### **2.6.1 Senior Men and Women**

- Elders are ritual leaders who are selected on the basis of their personal qualities and knowledge of the Law
- Women possess complementary knowledge and roles to those of men

## **2.6.2 Secular Authority and Decision-Making**

- Whether secular authority vests in any particular leader has not been established
- Important decisions are reached by consensus, which process requires the taking of ample time

## **2.6.3 Reciprocity**

- The principle of reciprocity guides mutual rights and obligations, and extends to the cultural norm of “payback” for wrongdoing

## **2.6.4 Medicine Men and Sorcerers**

- Medicine men or magic healers cure illness through rituals such as “singing”
- Sorcerers carry out acts of black magic

## **2.6.5 Visual Art, Literature, Songs and Dancing**

- Aboriginal visual art has spiritual or symbolic meaning for the group
- Aboriginal literature, songs and dance relate to the traditional life and the Dreaming

## **2.7 ABORIGINAL CEREMONY AND RITUAL**

### **2.7.1 The Function of Ceremony and Ritual**

- Traditional ceremonies and rituals are performed to obtain access to the Ancestral Beings and to spiritual powers

### **2.7.2 Initiation into Adulthood**

- Girls are initiated into traditional female roles at puberty
- Boys are initiated through socialisation processes, teaching of the Law, and tests of worthiness and courage

### **2.7.3 Betrothal and Marriage**

- Marriages are significant to the forming of alliances and betrothals occur early, even before birth

### **2.7.4 Death, Mourning and Burial**

- Death signifies a return of the spirit to the Dreaming: complex and often lengthy rituals are required
- Direct reference to the deceased's death is avoided, and the deceased's name becomes taboo
- “Sorry time” takes precedence over all other matters

## **2.8 ABORIGINAL CUSTOMARY LAW**

### **2.8.1 The Law Governs Both the Spiritual and the Secular**

- The Law governs the observance of sacred ritual, dictates economic activity, and maintains social order

### **2.8.2 Dispute Resolution**

- A variety of procedures may be invoked to resolve a dispute

### **2.8.3 Customary Offences**

- Many customary offences are offences of strict liability
- Breaches of the sacred law may be punishable by death
- Most crimes are personal or domestic; property crimes are rare; crimes of omission may occur

### **2.8.4 Punishment of Offences**

- Punishment usually takes the form of “payback” or the avenging of wrongdoing
- Forms of customary punishments include death, corporal punishment (including spearing), shaming, initiation, compensation and banishment





## CHAPTER TWO

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# Aspects of Traditional Aboriginal Australia

## 2.1

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### EXTENT OF SURVIVAL OF TRADITIONAL SOCIETY

The devastating effect of British colonisation and the imposition of post-colonial law, policies and practices upon traditional Aboriginal society have been well documented. It is difficult to know the extent to which traditional Aboriginal life survives intact, if at all, in the twenty-first century. The impact of the forces of white colonisation has varied enormously from one Aboriginal language group to another, the variable factors including:

- the extent to which Aboriginal individuals and language groups were dispossessed of their traditional lands;
- the various historical periods during which colonising acts occurred;
- the historical relationship of Aboriginal groups with the local non-Aboriginal community;
- the nature of the different economic industries in which Aborigines have participated (e.g. pastoral and pearling industries); and
- the various policies and practices of Australian governments and bureaucracies at different periods since 1788, including forcible removal, segregation and assimilation; self-management and self-determination; and more recently, "strategic intervention".

In addition, traditional territorial boundaries, so fundamental to the identity of language groups, have broken down in many areas. Demographic shifts, or the lack of surviving members of a particular language group, have created a form of territorial succession in some areas: in other words, traditional country sometimes has been "taken over" by another language group.

In 1987, in *The Recognition of Aboriginal Customary Law*, the Australian Law Reform Commission commented that "for practical purposes there are no Aboriginal people who have not had at least some contact with Australian society".<sup>1</sup> In 2006, in a Background Paper to the *Aboriginal Customary Laws Reference* of the Law Reform Commission of Western Australia, the Hon John Toohey AC QC remarked:

"[*The Recognition of Customary Law*] was published nearly 20 years ago; the degree of contact inevitably has grown since then. While many communities complain of the breakdown of traditional law and practices, there [is now] a greater awareness of Aboriginal identity.... [evident from the] acceptance of traditional ownership of land, the protection of sacred sites and the enhanced interest in Aboriginal dance, music and painting.... More directly in point, the courts have shown an increased willingness to look at aspects of traditional life that may throw light on the circumstances in which an offence was committed and on appropriate forms of sentence.

The paradox of course is that where customary laws have lost influence it is because of the impact of the non-indigenous population over the years. At the same time any effective recognition of those laws lies very much in the hands of that non-indigenous population."<sup>2</sup>

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<sup>1</sup> Report No 31, AGPS, Canberra, 1986 ([www.austlii.edu.au/au/other/alre/publications/reports/31/](http://www.austlii.edu.au/au/other/alre/publications/reports/31/)) para 34. (Accessed 5 July 2008)

<sup>2</sup> Law Reform Commission of Western Australia *Aboriginal Customary Laws: Background Papers* Project 94 (January 2006) ([www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-05.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-05.pdf)), pp 176-177. (Accessed 9 July 2008)

## 2.2

### OVERVIEW OF TRADITIONAL ABORIGINAL SOCIETY

Knowledge and understanding of traditional Aboriginal society and culture derive from Aboriginal oral traditions, the writings of early European explorers and settlers, and extensive research studies. Most of the recorded information was produced by non-Aboriginal researchers during the nineteenth century and afterwards. The findings of such researchers may be regarded as speculative, since many were observing Aboriginal peoples and communities in times of profound change<sup>3</sup>.

#### 2.2.1 Early Occupation

- **There is scientific evidence of at least 60,000 years of Aboriginal occupation of the Australian mainland**

Carbon-dated human remains provide evidence of at least 60,000 years of Aboriginal occupation of the Australian mainland<sup>4</sup>. There is evidence of more than 10,000 years of indigenous occupation of Australia's Torres Strait Islands<sup>5</sup>.

Although estimates vary, it is probable that at least 300,000 (and possibly more than one million) Aboriginal people inhabited the Australian continent at the time of first British colonisation in the later eighteenth century<sup>6</sup>. Aboriginal society comprised hundreds of language groups of varying sizes, many of which contained sub-groups or clans. Each language group was characterised by a common language, common territory and common cultural attributes. Most language groups traversed defined areas of territory varying in size from 500 to 100,000 sq km<sup>7</sup>.

In 1788, no overarching Aboriginal political system or institutions of government existed: there were "no chiefs or kings"<sup>8</sup>. Further, no direct lines of social communication existed across the continent. There was no mechanism to link the many Aboriginal language groups into a continent-wide system to resist colonisation.

#### 2.2.2 "Hunter-Gatherer-Cultivators"

- **The traditional Aboriginal socio-economic life was that of "hunter-gather-cultivator"**

The traditional Aboriginal socio-economic life has often been described as "semi-nomadic". More recently it became known that traditional Aboriginal groups intervene in the reproduction of plants and animals. Accordingly, the term "hunter-gatherer-cultivator" is now used to describe traditional Aboriginal socio-economic life<sup>9</sup>.

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<sup>3</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 11.

<sup>4</sup> AH Lynch et al. 'Using the Paleorecord to Evaluate Climate and Fire Interactions in Australia' *Annual Review of Earth and Planetary Sciences* 35, 2007, p 228.

<sup>5</sup> 'Aboriginal Australia' *New Encyclopaedia Britannica* Vol 14, 1985, p 423.

<sup>6</sup> E Bourke 'Australia's First Peoples: Identity and Population' in C Bourke et al (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, p 38.

<sup>7</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 11.

<sup>8</sup> CH Berndt and RM Berndt *The Aboriginal Australians: The First Pioneers* Pitman Publishing Pty Ltd, Carlton, 1978 p 1.

<sup>9</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, pp 94-96.

The location and seasonality of food and water dictated a highly mobile existence for Aboriginal people<sup>10</sup>. The size of each language group's territory was determined largely by water availability. In the well-watered eastern and southern coastal areas, where food was abundant, territorial areas might be as small as 2.5 sq km per person. However, in the arid regions of northern and central Australia, up to 260 sq km might be required to sustain one person<sup>11</sup>.

The traditional Aboriginal diet comprises native seeds, fruit, vegetables, small animals and – where available - fish. Kangaroos and other native game, often scarce or elusive, are highly valued food sources. The unpredictability of rainfall, particularly in arid regions, does not lend itself to subsistence agriculture, and very few native seeds are suitable for cultivation. Generally, animal husbandry is not practised but, as has been wryly observed, “hopping marsupials, goannas and emus do not encourage pastoral pursuits”<sup>12</sup>.

Each traditional language group possesses an intimate knowledge of its territory, its local flora and fauna and the seasonal cycles. Groups manage their land and waters through the deliberate propagation of preferred food plants, the construction of elaborate fish and eel traps and the use of fire. “Fire-stick farming”, a phrase used to describe the mosaic burning of forest, scrub and grassland to encourage the growth of desired food plants, requires a sound knowledge of fire behaviour and weather patterns. Controlled burning was used to maintain walking tracks in dense forest typically found along the east coast of mainland Australia and in Tasmania<sup>13</sup>.

The highly mobile life of traditional Aboriginal language groups required physical and psychological adaptation to the environment. In desert and semi-desert areas it is essential to have the capacity to travel long distances on foot, without becoming exhausted or overheated. In order to survive, each person must be able to obtain food and water well before the need becomes acute. In hot or otherwise difficult physical conditions energy must be preserved between periods of hunting and food gathering<sup>14</sup>.

Traditional Aboriginal life on the mainland requires very little in terms of dwellings or permanent purpose-built structures. Material possessions consist mostly of tools, weapons and implements for hunting and gathering. Within the language group, women and men carry out traditional gender-specific roles. These relate to obtaining and preparing food, conducting ceremonies, raising children, teaching, fashioning ceremonial objects, tools, weapons and implements and medicinal activities<sup>15</sup>.

The distinct language groups form broadly mapped cultural blocs which are generally congruent with the natural environment (riverine, woodland, desert or coastal) and with drainage basins created by topography and large river systems<sup>16</sup>.

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<sup>10</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 103

<sup>11</sup> DJ Mulvaney and J. Kamminga *Prehistory of Australia*. Allen & Unwin, St Leonards NSW, 1999, pp 62-63.

<sup>12</sup> AP Elkin *The Australian Aborigines* Angus and Robertson, Sydney, 1976, p 51.

<sup>13</sup> DJ Mulvaney and J. Kamminga *Prehistory of Australia*. Allen & Unwin, St Leonards NSW, 1999, Chapter 4.

<sup>14</sup> The practice of conserving energy provoked criticism from early European observers, who interpreted it as indolence: AP Elkin *The Australian Aborigines* Angus and Robertson, Sydney, 1976, quoting EJ Eyre *Journals of Expeditions of Discovery 1840-1* London, 1845.

<sup>15</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 11.

<sup>16</sup> D Trigger ‘Some Aspects of Cultural Diversity Throughout Indigenous Australia’ in F McKeown (ed) *Native Title: An Opportunity for Understanding* Proceedings of Induction Course conducted by the National Native Title Tribunal at the University of Western Australia, Nedlands, 1 – 3 December 1993, p 29.

### 2.2.3 Languages

- **Possibly 270 Aboriginal languages, and 600 Aboriginal dialects, were spoken at the time of British colonisation**

Although little is known about the origin of Aboriginal languages, it appears that all mainland Aboriginal languages derive from a common ancestral language, which is different from all other known languages. It appears that Tasmanian Aboriginal languages possess an ancestry which is distinct from that of mainland Aboriginal languages<sup>17</sup>. Although the lack of recorded evidence about Tasmanian languages leaves this hypothesis open to question, there is evidence that five different languages existed in Tasmania by the time of European settlement of that island<sup>18</sup>.

It is sometimes difficult to distinguish between separate but related languages, and dialects of a single language. Although estimates vary, it appears that at the time of British colonisation 600 dialects of more than 270 Aboriginal languages may have been spoken<sup>19</sup>. The *Pama-Nyungan* family of languages (which is characterised by the use of suffixes) were spoken throughout three-quarters of the continent. In north and north-western Australia between 28–70 different families of languages existed, most of which used both prefixes and suffixes<sup>20</sup>.

Many Aboriginal languages are similar in the sound and form of words, in sentence structure and in complexity of grammatical patterns. They are characterised by precision, brevity of expression, an emphasis on concreteness, and the endeavour to express in minimal words a complete picture of a situation or desire<sup>21</sup>.

Many traditional Aboriginal people were multilingual, which facilitated communication with neighbouring groups<sup>22</sup>.

- **Sign language was used extensively**

Sign language was used extensively in traditional Aboriginal societies. Finger, hand, face and body movements were often used, rather than words, during hunting, mourning, rituals and personal or secret communications. The *Walpiri* people of the Northern Territory and their neighbours employed a complete language of hand signs. This system of hand signs was used, for example, by grieving widows who were forbidden to speak for a period following their husbands' death<sup>23</sup>. Sign language was also used as a mode of communication between different language groups.

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<sup>17</sup> C Yallop *Australian Aboriginal Languages* The Thetford Press Limited, Thetford, Norfolk, 1982, p 3.

<sup>18</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 306.

<sup>19</sup> C Yallop *Australian Aboriginal Languages* The Thetford Press Limited, Thetford, Norfolk, 1982, p 27; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Language and Culture – A Matter of Survival* Report of the Inquiry into Aboriginal and Torres Strait Islander Language Maintenance, AGPS, Canberra, 1992, p 1.

<sup>20</sup> Characteristics of the Western Australian traditional *Ngaanyatjarra* language are discussed in **Chapter Five** of the Benchbook.

<sup>21</sup> AP Elkin *The Australian Aborigines* Angus and Robertson, Sydney, 1976, p 51.

<sup>22</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 70.

<sup>23</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 89. See also PA O'Shaughnessy *Traveller's Guide to Aboriginal Australia*. Desert Images, South Fremantle, 2000.

## 2.3

### ABORIGINAL SPIRITUALITY

The central tenet of traditional Aboriginal society is belief in the oneness of the spiritual, human and natural world. This spiritual worldview, which is known as the Dreaming, permeates every aspect of traditional Aboriginal life.

#### 2.3.1 The Dreaming

- **Dreaming stories tell of the creation of the world and of everything within it, including the Law, by supernatural spirits**

The expression “The Dreaming” (originally conceptualised as the “dreamtime”<sup>24</sup>) was coined in 1958 by anthropologist WEH Stanner<sup>25</sup>. The Dreaming exists outside Western concepts of linear time: it refers to a creation era long ago and to a present, supernatural world, which interacts with the natural world<sup>26</sup>. The Dreaming began at the dawn of time, remains bound up in the present, and will endure forever.

Dreaming stories tell of the creation by supernatural spirits of the world and of everything within it. Those spirits, sometimes called Ancestral Beings, emerged at the dawn of creation from the pre-existing formless earth, from spirit homes in the sky or from other far-off places. Some Ancestral Beings assumed forms and identities which combined features of humans with other species. Hence certain Dreaming stories refer to “kangaroo-man”, “serpent-woman”, “brolga-woman”, “shark-man” and so on<sup>27</sup>.

The Dreaming stories describe the movement of the Ancestral Beings over the earth, hunting, gathering food, tool-making, singing, dancing and fighting. (“All the affairs of human life, good and evil, are included in the Dreaming stories”<sup>28</sup>.) As they travelled over the earth, the Ancestral Beings created the physical characteristics of the landscape, including significant topographical features, and the sea and sky. The “Dreaming tracks” of the Ancestral Beings formed riverbeds and watercourses. The Ancestral Beings gave names to the places to which they journeyed, and to the flora and fauna.

Ancestral Beings created sacred rules of human social life and culture (the Law), passing onto human beings a system of existence which was complete in every respect. The Ancestral Beings entrusted custodianship of certain areas of land to particular language groups, which custodianship was conditional upon those groups following the Law.

Once their creation work was complete, the Ancestral Beings returned to their spirit homes, or merged with the landscape. Ancestral Beings are eternal, and the Dreaming places or sacred sites are a constant reminder of their spirit presence and power. Dreaming places represent the bond between the people (custodians) and the land.

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<sup>24</sup> The “dream time” or *alcheringa* was first described in WB Spencer and FJ Gillen *The Aboriginal Tribes of Central Australia* McMillan, London, 1899.

<sup>25</sup> WEH Stanner ‘The Dreaming’ in *White Man Got No Dreaming: Essays 1938 – 1973* Australian National University, Canberra, 1979, 23. (The original essay was published in WA Lessa and EZ Vogt, eds, *Reader in Comparative Religion: A Comparative Approach* Row, Peterson, Evanston, Illinois, 1958).

<sup>26</sup> Justice Peter Gray ‘Do the Walls Have Ears? Indigenous Title and Courts in Australia’ (2000) 5 *Australian Indigenous Law Reporter* 1, p 2.

<sup>27</sup> B Edwards ‘Living the Dreaming’ in C Bourke et al (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 77, p 80.

<sup>28</sup> B Edwards ‘Living the Dreaming’ in C Bourke et al (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 77, p 87.

In traditional belief the Ancestral Beings retain the power to intervene in the life of humans. Thus, they remain a vital force in ensuring the continuity of human existence and in maintaining the fertility of the land and natural species. For example, the *Wandjina* controls the rains and the seasons which replenish the lands in the Kimberley. If the *Wandjina* is offended, it will take revenge by creating cyclones and floods that will devastate the country<sup>29</sup>.

The Dreaming stories are broadly similar throughout Australia, although regional variations reflect local landscape features, flora and fauna. Some “travelling Dreamings” cross the territory of many language groups. Where this occurs, different language groups have affiliations to, and responsibility for, different Dreaming sites located along the Dreaming tracks<sup>30</sup>. The Rainbow Snake Dreaming (which is associated with rain, spirit children and fertility) is common to many parts of Australia: in Western Australia it is referred to as the *Wogal* or *Wagyl*. The *Wagyl* Dreaming track extends into the Kimberley, the eastern desert and the extreme south-west regions of Western Australia.

The essence of the Dreaming is that every part of the life force - the Ancestral Beings, the land, the sea, humans, fauna, flora and natural phenomena - is inextricably and eternally connected to every other part. Moreover, through the observance of ritual and ceremony, humans are able to enter into a direct relationship with the Dreaming<sup>31</sup>.

Mulvaney and Kamminga have observed that the Dreaming beliefs “embodied empirical wisdom which ensured survival, and also endowed territories with an organic relationship between places and their owners”<sup>32</sup>.

### 2.3.2 Totems

- **Totems are the symbol of, and companion or protector to, a person or group**

An important aspect of Aboriginal spirituality is the belief that every person has a totem. “Totemism” describes the relationship between an individual with a plant or animal species, or a condition or a situation:

“A totem is in the first place a thing; an entity, an event or a condition....Virtually anything perceivable can serve: plants and animals of all kinds – anything in the entire floral or faunal realms; wind, rains, storms, thunder, lightening, stars, sun, moon and clouds – anything of heaven; tools and weapons, food and cosmetics, fire and smoke, mist and spume, fresh water and salt – anything of earth; the human exuviae and genitals - almost anything of the human body..... Totemic significance goes far beyond utility. Sexual desire, cold weather, sweethearts, vomiting, runaway wives, mother's milk and innumerable pests have all been recorded as totems.”<sup>33</sup>

A totem serves as the symbol of, and companion or protector to, the relevant person or group. Where the totem has a physical form, harming it or killing it - sometimes even touching it - is prohibited. The totemic affiliation also provides a connection to the spiritual world. The performance of special rituals, often in secret, is essential to the preservation of the spirituality of the totem<sup>34</sup>.

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<sup>29</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 13.

<sup>30</sup> Justice Peter Gray ‘Do the Walls Have Ears? Indigenous Title and Courts in Australia’ (2000) 5 *Australian Indigenous Law Reporter* 1, p 2.

<sup>31</sup> B Edwards ‘Living the Dreaming’ in C Bourke et al (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 77, p 79.

<sup>32</sup> DJ Mulvaney and J. Kamminga *Prehistory of Australia*. Allen & Unwin, St Leonards NSW, 1999, p 65.

<sup>33</sup> WEH Stanner ‘Religion, Totemism and Symbolism’ in WEH Stanner ‘The Dreaming’ in *White Man Got No Dreaming: Essays 1938 – 1973* Australian National University, Canberra, 1979, pp 129 – 130.

<sup>34</sup> B Edwards ‘Living the Dreaming’ in C Bourke et al (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 77, p 86.

Special rules and obligations, many of them secret, are associated with each totem. Often people are custodians of their totems and are not allowed to kill or eat certain living things like emu or goanna. In other instances the totem acts as a guardian protecting an individual from injury. Traditionally people sharing the same totem, even if they came from distant or neighbouring territories, could not marry because they were linked spiritually<sup>35</sup>.

- **Types of totems include ancestral, group, conception and initiation totems**

There are various types of totems within Aboriginal culture. *Ancestral* totems derive from the Dreaming: the Ancestral Beings, in their travels, left behind life essences which transformed into some part of the natural environment (such as animal, plant, parts of the body, rocks, minerals or water). An ancestral totem is the place from which a person's spirit comes, which links them to their "country"<sup>36</sup>. Individuals who belong to the hawk totem, for example, are considered to be human descendants of the hawk spirit-being.

Ancestral totems are locally inherited, and can be traced through descent groups, usually the paternal lineage (like surnames). Personal names can be derived from the totem and become another term of reference, especially during ceremonies<sup>37</sup>. Collective or *group* totems are also ancestral, being traceable through a descent line in the language group.

*Conception* totems may be held in conjunction with ancestral totems. In traditional Aboriginal belief each person's conception totem originates in the place where that person's mother was impregnated with a "spirit child". "Spirit children" are released in particular sacred places by the Ancestral Beings. Thus, for example, should a pregnant woman first become aware of her pregnancy when near the site of a goanna, her unborn child is immediately affiliated with the goanna totem<sup>38</sup>.

In many Kimberley groups, especially the *Ngarinyin* and *Worrorra*, the father finds the *Anguma* or spirit children, rather than the mother. *Anguma* reside in waters associated with Ancestral Beings (*Wanjina* and *Wunggurr*): the father may find the spirit child in food collected from the water hole, or the child may be caught in his hair. Alternatively the spirit child may present itself in a lightning flash. The father will dream about the spirit child and its name; if, for example, the father's own deceased father brings *Anguma* to him, the deceased father's spirit is reincarnated as the grandchild. Conception may occur much later than the finding of a spirit child<sup>39</sup>.

In some groups an *initiation* totem was conferred after initiation ceremonies or upon reaching a certain age.

Upon death an individual's conception totem returns to dwell in the resting place of the spirit children. According to the *Ngarinyin* doctrine, the spirit children take a long journey before returning to their resting place, often hovering around the grave of the deceased and worrying the bereaved before reinterment<sup>40</sup>.

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<sup>35</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, pp 42-44.

<sup>36</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, pp 36-44.

<sup>37</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 39.

<sup>38</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 15.

<sup>39</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 231.

<sup>40</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 232.



### 2.3.3 Connection with Land

- **The relationship of an individual or group with land is sacred and cannot be exchanged or lost**

Land is vested in each member of the language group as a sacred bequest from the Dreaming, and thereby provides the foundation for the group's existence. Each group's territory is physically, spiritually, economically and culturally essential for survival. Accordingly, connection with land is an integral part of the psyche of every person within the language group.

The territorial boundaries of each language group are created and validated through the Dreaming stories. Those boundaries, which are often defined by natural features (but which in some instances may be permeable) indicate primary responsibility for country. Members of the language group are responsible for the spiritual maintenance of the land through ceremonies and rituals.

The relationship of an individual or group with land is sacred and cannot be exchanged or lost. Thus –

“It would be as correct to speak of the land possessing men as of men possessing land.”<sup>41</sup>

Since the Dreaming stories relate only to one's own territory, there is no reason to covet country which belongs to others<sup>42</sup>. Accordingly, in early times, rights to land or custodianship of land was rarely challenged. Indeed, to leave one's own territory meant moving away from its protection: other parts of the country might be regarded as being “full of danger and mystery”<sup>43</sup>.

The anthropologist WEH Stanner has famously described the richness of the multi-dimensional relationship of Aboriginal people with land:

“No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word ‘home’, as warm and suggestive though it be, does not match the Aboriginal word that may mean ‘camp’, ‘hearth’, ‘country’, ‘everlasting home’, ‘totem place’, ‘life source’, ‘spirit centre’ and much else all in one. Our word ‘land’ is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of earth and use it in a rich symbolic way to mean his ‘shoulder’ or his ‘side’. I have seen an Aboriginal embrace the earth he walked on. To put our words ‘home’ and ‘land’ together into ‘homeland’ is a little better but not much. A different tradition leaves us tongueless and earless towards this other world of meaning and significance.”<sup>44</sup>

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<sup>41</sup> K Maddock *The Australian Aborigines* Allen Lane, London, 1972, p 27.

<sup>42</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 14.

<sup>43</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 58.

<sup>44</sup> WEH Stanner ‘After the Dreaming’ in WEH Stanner ‘The Dreaming’ in *White Man Got No Dreaming: Essays 1938 – 1973* Australian National University, Canberra, 1979, 198, p 230.

## 2.4

### ABORIGINAL SOCIAL ORGANISATION

In social and political terms traditional Aboriginal life is remarkably stable. Despite the intimacy occasioned by life-long, relatively small-group living, it appears that struggles for wealth or power are rare in traditional Aboriginal communities. This stability is largely attributable to the unique social and cultural framework of traditional Aboriginal society.

#### 2.4.1 Language Groups

- **The language group, which confers both individual and group identity, is the largest social unit**

The language group is the largest traditional social unit, comprising men, women and children who descend from the same ancestors. The language group forms the primary basis of individual, as well as group, identity.

Language groups may have many, or relatively few, members: they may or may not contain sub-groups. The language group occupies particular tracts of land and obtains its food and other resources according to its Law. The birthright of each member of the group involves reciprocal rights and obligations. A language group may be loosely organised, but loyalty to it usually remains strong<sup>45</sup>.

Membership of a language group is determined according to principles of patrilineal/male or matrilineal/female descent. Marriage is usually, but not always, exogamous (outside the group). Upon marriage, a woman usually lives with her husband's family. Children retain membership of the language group of their birth throughout their lives<sup>46</sup>.

A language group may be more concerned with internal than external matters<sup>47</sup>. It has been suggested that the language group *per se* possesses no particular political or economic importance<sup>48</sup>. Nor is it stratified by social indicators such as wealth or inherited status. In traditional Aboriginal society, spiritual activity is the only means through which elevated social status may be gained<sup>49</sup>.

#### 2.4.2 Smaller Sub-Groups: Local Descent Groups, Bands, Families

- **Local descent groups occupy particular tracts of land within the larger group's territorial boundaries**

Smaller sub-groups of a language group, described as local descent groups, may occupy particular tracts of land within the larger group's territorial boundaries. Usually each such tract centres upon a watering place where the group's ancestors lived and where the spirits of the Ancestral Beings dwell. At intervals, perhaps once a year, local descent groups may gather together for ceremonial, social, and/or trading purposes<sup>50</sup>.

<sup>45</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, pp 13-14.

<sup>46</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 119.

<sup>47</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988 p 366.

<sup>48</sup> ALRC 'Traditional Aboriginal Society and Its Law' in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 191.

<sup>49</sup> 'Aboriginal Australia' *New Encyclopaedia Britannica* Vol 14, 1985, p 424.

<sup>50</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 119.

- **Bands are groups of people, usually family groups, which move through traditional territory together**

The term “band” (or horde or resident group) refers to a group of people which lives and moves around its traditional territory together, combining efforts to provide for everyday economic, social and reproductive needs<sup>51</sup>. Typically bands are not vested with custodianship of land<sup>52</sup>. The composition of a band is inherently variable: it may comprise members of different local descent groups and/or language groups. Bands often range over large tracts of territory, avoiding ancestral and sacred sites<sup>53</sup>.

Bands also fluctuate greatly in size, typically comprising 14-33 members<sup>54</sup>. The size and mobility of a band are dependent on the density, distribution, mobility and nutritional value of resources<sup>55</sup>. Group composition is also important in determining band size: if a band contains a high number of “productive” members it can support more dependent members such as children, the sick, and the elderly. A large band would be required to engage in extensive foraging. While the core group remained the same, individuals often moved between bands. As many as 10,000 bands may have existed throughout the continent before European settlement<sup>56</sup>.

- **The smallest social unit is the family, which lives and moves around its traditional territory together**

The smallest distinct social unit is the family group or “hearth group” (i.e. one which sleeps around a common fire). A family group might include secondary wives (or, in some areas, husbands), children, grandparents and other old or close relatives. Where possible, a family lives and moves around its traditional territory together<sup>57</sup>.

### 2.4.3 Inter-Group Relationships

- **Traditional language groups often engaged with one another on ceremonial occasions and to trade; however, inter-group relationships were not always peaceful**

Traditional language groups often engaged with one another on ceremonial occasions and to trade. Interaction occurred most frequently with the nearest groups: groups beyond one’s immediate neighbours might be regarded warily<sup>58</sup>.

However, inter-group relationships were not always peaceful. Disputes in relation to personal matters such as marriage arrangements, or ceremonial arrangements were not uncommon. While the unannounced crossing of territorial boundaries might result in punishment, possession of land or other property was rarely in dispute. Physical conflict might arise, sometimes initiated by small surprise raiding parties: pitched battles might also take place<sup>59</sup>. Inter-group disputes of a personal nature tended to be resolved quickly: however, some feuds might last for many years, even though long periods of time might elapse between acts of retaliation. It has been claimed that the

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<sup>51</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 307.

<sup>52</sup> FR Myers *Pintupi Country, Pintupi Self* Australian Institute of Aboriginal Studies, Canberra, 1985, pp 72-73.

<sup>53</sup> A Yengoyan ‘Economy, Society and Myth in Aboriginal Australia’ in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 203, p 208.

<sup>54</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 106

<sup>55</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, Chapter 4.

<sup>56</sup> WEH Stanner ‘The Dreaming’ in *White Man Got No Dreaming: Essays 1938 – 1973* Australian National University, Canberra, 1979, p157

<sup>57</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 61.

<sup>58</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 18.

<sup>59</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 18.

*Aranda* and *Kutjatja* peoples of Central Australia fought with each other for extended periods throughout the nineteenth century<sup>60</sup>.

#### 2.4.4 Social Classification (Skin Groups)

- **Social classification may be highly complex: in Western Australia social divisions are known as “skin groups”**

At birth, each member of a traditional Aboriginal language group is classified into a social group dictated by its Law. Many methods of social classification exist, some of which are highly complex. In Western Australia these social divisions are often referred to as “skin groups”. At birth, each child is given a “skin name”, which establishes that child’s place within the language group. Traditionally the “skin system” was used to control marriage, ownership of land and sacra<sup>61</sup>.

- **Types of social classification include alternate generational levels, the moiety system, section system, six-section system and subsection system**

Types of social classification include:

- *alternate generational levels*: this is the simplest classification system, in which members of a language group are divided into alternate generational levels. An individual is on the same generational level as his or her siblings, grandparents and grandchildren: that individual’s parents and his or her own children are on an alternate generational level<sup>62</sup>.

An example of this type of system is the *Pitjantjatjara* society of the Western Desert region: its two generational levels are known as *Nganantarka* (‘our bone’) and *Tjanamilytja* (‘their flesh’)<sup>63</sup>. These categories are enogamous: that is, each person marries another on the same generational level.

- *moiety system* (moiety meaning “divided into half”): in this system, all humans and life forms, and even inanimate natural phenomena, are divided into two groups. Everything in one moiety has its counterpart in the opposite moiety. Membership of a moiety is significant in ritual and social interaction within the language group, as well as in the making of appropriate marriages.

An example of a traditional moiety system exists in the *Gunditjama* community of Victoria: the two moieties are *Krokitch* (symbolised by the white cockatoo) and *Kaputch* (symbolised by the black cockatoo)<sup>64</sup>. These moieties are exogamous: a person from the *Krokitch* moiety must marry a person from the *Kaputch* moiety.

In a patri-moiety, children take on their father’s moiety; in a matri-moiety, children inherit their mother’s moiety.

Where divisions based on moieties and generational systems are combined to make four divisions, a *section* system is created.

<sup>60</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 18.

<sup>61</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 177.

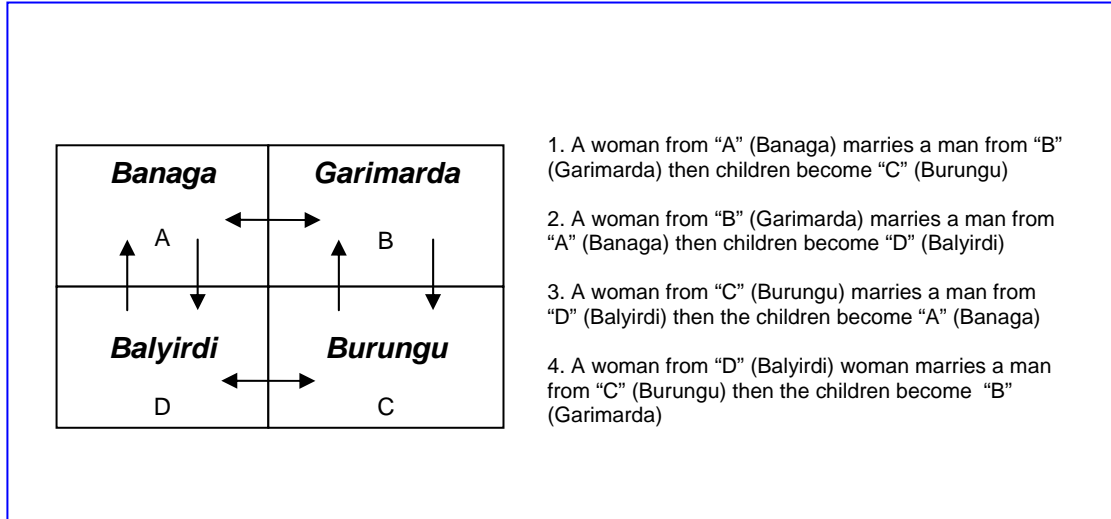
<sup>62</sup> CH Berndt and RM Berndt *The Aboriginal Australians: The First Pioneers* Pitman Publishing Pty Ltd, Carlton, 1978, p 29.

<sup>63</sup> C Bourke and B Edwards ‘Family and Kinship’ in C Bourke et al. (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 100, p 110.

<sup>64</sup> C Bourke and B Edwards ‘Family and Kinship’ in C Bourke et al. (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 100, p 107.

The *four-division section system* exists amongst the *Ngarluma* and *Nyangumarta* peoples of northern Western Australia. The *Ngarluma* section system is illustrated below. The cycle is always started by a woman, since they are considered to be the stronger sex<sup>65</sup>.

Example of a four-division section system (*Ngarluma*):



- a *six-section system*: sometimes two of the four sections are divided, creating six sections or divisions.

This system exists in the *Ngaanyatjarra* community of Western Australia. The *Ngaanyatjarra* community is divided, first, into two large sections, known as *Ngumpalurrungkatja* ('shade side') and *Tjirntulukultulpa* ('sun side'). Within *Ngumpalurrungkatja*, there are three sections: *Purungu*, *Yiparrka* and *Panaka*. Within *Tjirntulukultulpa*, there are three sections: *Tjarurru*, *Milangka* and *Karimarra*. At ceremonies the *Ngumpalurrungkatja* people sit toward the west, while the *Tjirntulukultulpa* people sit towards the east<sup>66</sup>.

In the *Ngaanyatjarra* community, marriage partners and descent are dictated in the following way:

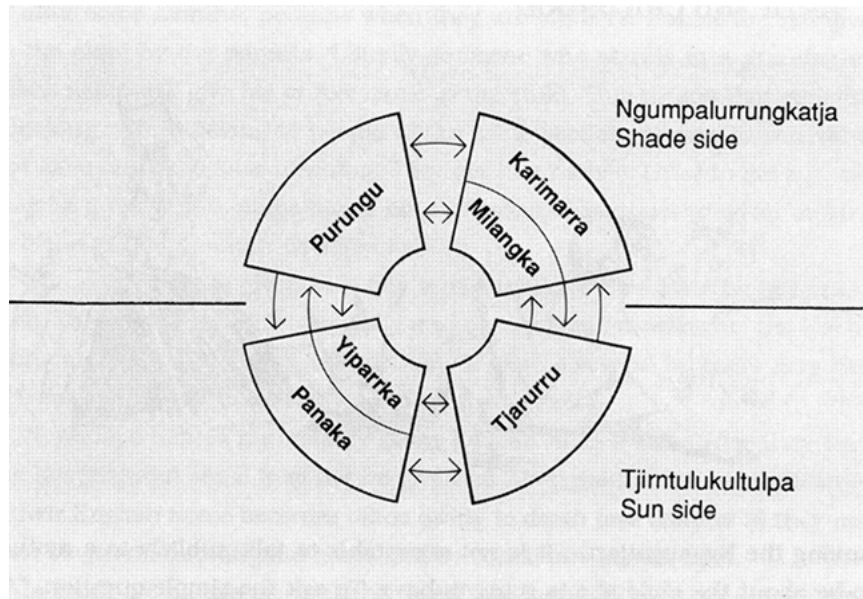
- A *Purungu* man will marry a *Milangka* or *Karimarra* woman and have *Tjarurru* children.
- A *Yiparrka* man will marry a *Tjarurru* woman and have *Milangka* children;
- A *Panaka* man will marry a *Tjarurru* woman and have *Karimarra* children;
- A *Tjarurru* man will marry a *Panaka* or *Yiparrka* woman and have *Purungu* children;
- A *Milangka* man will marry a *Purungu* woman and have *Yiparrka* children;
- A *Karimarra* man will marry a *Purungu* woman and have *Panaka* children.

The *Ngaanyatjarra* six-section system is shown in diagram form on the following page.

<sup>65</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies*. Ministry of Education, Western Australia, 1991, pp 136-137.

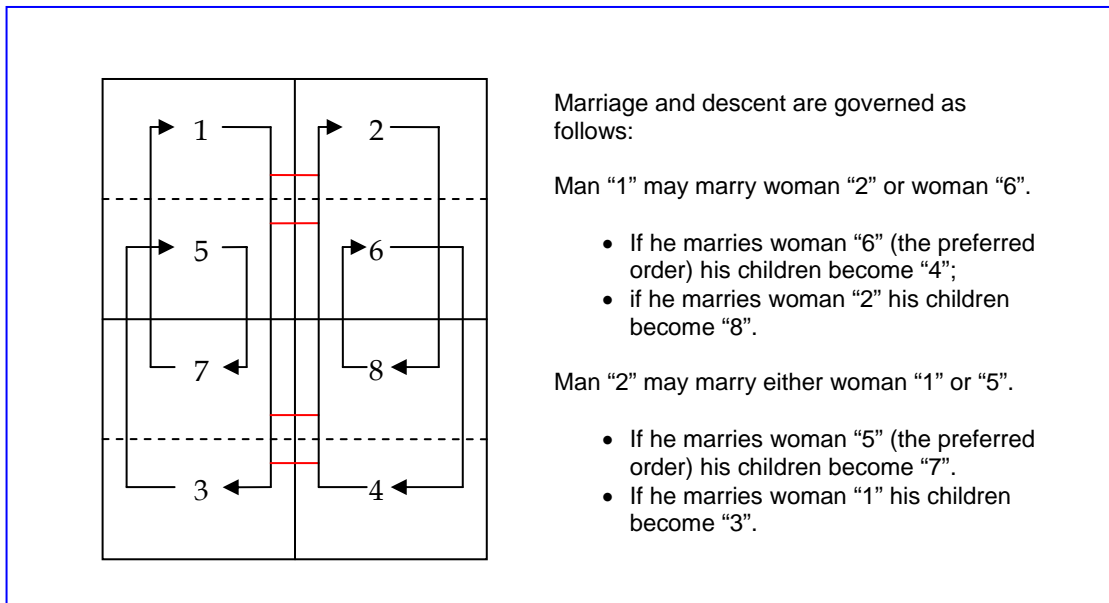
<sup>66</sup> A Glass *Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People* Institute for Aboriginal Development, Alice Springs, Northern Territory, 1990, pp 27-29.

Example of a six-section system: *Ngaanyatjarra*<sup>67</sup>



- subsection system: four sections are subdivided to form eight subsections or divisions. Examples include the *Warlpiri* community in Central Australia and the *Yolgnu* in Arnhem Land<sup>68</sup>.

Example of an eight-section/subsection system:



In Western Australia there are many diverse and complex social classification systems. Both patrilineal and matrilineal descent are common, and some groups have local totemic affiliations rather than moieties or sections.

<sup>67</sup> A Glass *Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People* Institute for Aboriginal Development, Alice Springs, Northern Territory, 1990, p 27.

<sup>68</sup> C Bourke and B Edwards 'Family and Kinship' in C Bourke et al. (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 100, p 109.

## 2.5

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### THE KINSHIP SYSTEM

In traditional Aboriginal society inter-personal relationships are governed by a complex and intricate system of rules, known as the classificatory system of kinship (or kinship system). This system is essential to physical, psychological and emotional survival in traditional Aboriginal society.

#### 2.5.1 Classificatory Kinship

- **Classificatory kinship is based upon an expanded concept of family; it provides a powerful framework for individual identity, stable relationships and group cohesion**

The kinship system is based upon an expanded concept of family, and a concomitant extension of family rights and obligations. Kinship was, and remains, the chief mechanism for organising social and economic relationships. Marriage was based upon kin relationships and produced social networks, which formed the basis of economic cooperation<sup>69</sup>.

The kinship system enables each person in a language group to know precisely where he or she stands in relation to every other person in that group, and to persons outside that group. By providing a mental map of social relationships, each person knows precisely how to behave in relation to every other person<sup>70</sup>. Social classification makes social life predictable, providing each person with essential guidelines concerning appropriate social behaviour towards others<sup>71</sup>.

The kinship system provides a powerful regulatory framework for individual identity, stable relationships and group cohesion within traditional Aboriginal societies<sup>72</sup>.

- **Classificatory terms extend to collateral relatives**

Under the kinship system classificatory terms apply to a person's collateral relatives: in Anglo-Australian society classificatory terms usually apply only to a person's lineal relatives. The governing principle is "the equivalence of same-sex siblings". Under this principle people of the same sex who belong to the same sibling line are considered to be "the same"<sup>73</sup>.

To illustrate: assume that there are two brothers, one of whom has a daughter. The brothers are "equivalent" in that the daughter regards both her biological father and her father's brother as "father". Similarly, two sisters are "equivalent": the sister of a biological mother is classified with the biological mother and called "mother". In practice, the difference between biological parents and classificatory (or "formal") parents is always recognised.

It follows that the children of classificatory fathers and mothers are regarded as classificatory brothers and sisters. Thus, one person may have a number of fathers, a number of mothers and many brothers and/or sisters.

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<sup>69</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p. 174.

<sup>70</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 16.

<sup>71</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, pp 121-130.

<sup>72</sup> AP Elkin *The Australian Aborigines* Angus and Robertson, Sydney, 1976, pp 84-85.

<sup>73</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988 p 85.

Persons on the same sibling line, but of a different sex, are regarded differently. Thus, a father's sister is "aunt" to the child, and a mother's brother is "uncle" to the child. The term for the children of "aunt" sometimes differs from the term for the children of "uncle", but both translate to "cousin"<sup>74</sup>.

The kinship system becomes increasingly complicated with more remote family members. It transcends blood relationship and social groupings to connect even distantly related people within the group. It also provides a mechanism for interaction with persons outside the group. Ultimately, even a complete stranger to the group will be accorded "kin" status in order that social interaction may occur<sup>75</sup>. Often a kinship triangle is discovered where the two apparent strangers are connected by a distant relative<sup>76</sup>.

The kinship rules govern economic as well as social matters: food gathering and sharing, betrothal, marriage and the education of children. The rules ensure that no one is isolated. Thus, orphans and widows are provided for by those persons responsible for them within the kinship system. Although some members of a community may neglect kinship duties, usually those duties are carried out according to societal expectation.

## 2.5.2 Kinship Avoidance

- **The Law prescribes that some relatives must avoid one another**

Personal relationships are strictly controlled through kinship rules which stipulate that certain relatives must avoid one another. For example, as children grow to adolescence brothers and sisters (including classificatory brothers and sisters) are expected to behave in a reserved manner towards one another. Brothers-in-law are expected to adopt a rather formal attitude to one another and maintain a degree of physical distance from one another<sup>77</sup>.

The strongest kinship avoidance rule is that which exists between a man and his mother-in-law. In its strictest form this rule prohibits a man and his mother-in-law from seeing or speaking to one another, and even from uttering each other's name. The apparent purpose of this rule is to prevent a woman competing with her mother for the affection of the same man (there may be a risk of such competition where a man is approximately the same age as his wife's mother)<sup>78</sup>.

The application of the kinship avoidance rules may be evident at traditional meetings and ceremonies. Often, people face in different directions, or sit apart, or communicate only through an intermediary. This practice usually signifies the observance of kinship rules. Sanctions for breach of kinship rules vary according to the nature of the rule and the relevant kinship relationship<sup>79</sup>.

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<sup>74</sup> CH Berndt and RM Berndt *The Aboriginal Australians: The First Pioneers* Pitman Publishing Pty Ltd, Carlton, 1978 pp 36 – 37.

<sup>75</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 125.

<sup>76</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 137.

<sup>77</sup> ALRC 'Traditional Aboriginal Society and Its Law' in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 194.

<sup>78</sup> AP Elkin *The Australian Aborigines* Angus and Robertson, Sydney, 1976, p 149.

<sup>79</sup> ALRC 'Traditional Aboriginal Society and Its Law' in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 193.



## 2.6

### ABORIGINAL CULTURE AND CUSTOMS

Traditional Aboriginal life is underpinned by strongly-defined cultural roles and mores. Once children grow to adolescence, they may be left largely to themselves, unless the group considers that they are putting themselves in danger. Marriage and fertility are considered to be women's business; spiritual affairs are the responsibility of the elders<sup>80</sup>. Cultural mores facilitate the maintenance of political, economic, cultural and social stability, and the perpetuation of custom and tradition.

#### 2.6.1 Senior Men and Women

- **Elders are ritual leaders who are selected on the basis of their personal qualities and knowledge of the Law**

Certain senior male members of traditional language groups may become Elders. Elders are initiated men who are selected to be ritual leaders upon the basis of their personal qualities (such as bravery and compassion) and upon their knowledge of the Law. Elders provide leadership in matters affecting the group, including dispute-resolution, educating the young and advising on marriage partners. In traditional Aboriginal society the advice of the Elders is usually "heeded and unquestioned"<sup>81</sup>.

Elders assume responsibility for sacred objects, spiritual matters and the performance of ritual. The Elders are vested with custodianship of the Law. Their overriding duty is to honour and maintain the Law, and to pass it down to the next generation<sup>82</sup>.

- **Women possess complementary knowledge and roles to those of men**

Historically, the traditional role and the status of women in traditional Aboriginal society was not easy to ascertain. In earlier times anthropologists concluded that men, rather than women, performed significant roles in the operation of the Law and in ritual life<sup>83</sup>. This was attributed to the fact that usually women left their own country to live in their husband's country after they married. Since ritual matters are conducted by the traditional owners of territory, it appeared that men, rather than women, exercised authority in the life of the language groups<sup>84</sup>.

More recent research has established that women possess separate sacred knowledge and carry out separate ritual ("women's business"), which complements that of the men. Women's ceremonies either overlap with men's stories (while components remain separate and secret to each group) or they relate to great female Ancestral Beings. The woman's role as a nurturer is emphasised<sup>85</sup>. Women's business may extend to other rights and duties, including land relationships. Women's ceremonies include love magic, control over reproduction, the growing up of young girls, appropriate sexual behaviour, the creation of harmony between disputing

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<sup>80</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 245.

<sup>81</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 59.

<sup>82</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 58.

<sup>83</sup> ALRC 'Traditional Aboriginal Society and Its Law' in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 194.

<sup>84</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 19.

<sup>85</sup> D Bell, "Aboriginal Women and the Religious Experience" in W.H. Edwards (ed.) *Traditional Aboriginal Society: A Reader*. MacMillan, Melbourne, 1987, pp 237-256.

females, as well as curing and healing<sup>86</sup>. The attention paid by women to health, relationships, and conflict resolution benefits the entire group.

It appears that women, like men, gain in power and prestige as they grow older, especially after childbirth: women who have borne at least two children are taught the most secret of women's business and only the oldest women are able to perform in ceremonies and handle sacred objects. Women with strong spiritual and personal qualities may achieve a status similar to, but separate from, that of Elder<sup>87</sup>. It has been observed that women with strong personalities were never outmatched by men<sup>88</sup>.

## 2.6.2 Secular Authority and Decision-Making

- **Whether secular authority vests in any particular leader has not been established**

Whether enduring secular (non-spiritual) authority vested in any particular leader in traditional Aboriginal society is a contentious point among scholars. Elkin observed that one headman usually presided unofficially at meetings, settling quarrels and making decisions affecting the group<sup>89</sup>. Hiatt and Meggitt formed the opinion that leadership was confined to the spiritual realm<sup>90</sup>. Another view is that influence was exerted by senior members of the group in a diffused, egalitarian way<sup>91</sup>. Yet another is that leadership in Aboriginal society is "situational", with individuals or "bosses" leading the way according to the type of activity being undertaken<sup>92</sup>.

- **Important decisions are reached by consensus, which process requires the taking of ample time**

In traditional Aboriginal society important decisions must be reached by the social process of consensus<sup>93</sup>. Without consensus, a decision affecting the group is unlikely to be implemented. An integral part of the decision-making process is allowing ample time for deliberation to occur. WEH Stanner emphasised that Aboriginal people need credible motivation, information and, especially, sufficient time to make a decision:

"They need time, all the time needed to work out the implications, how this will affect that and how that will affect something else. Time to consider the alternatives, time to take into account new thoughts that did not occur to them earlier. Time to strike balances between winners and gainers, time to make sure of consensus..."<sup>94</sup>

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<sup>86</sup> A Hamilton, A (1987) 'Dual Social System: Technology, Labour and Women's Secret Rites in the Eastern Western Desert of Australia' in W.H. Edwards (ed.) *Traditional Aboriginal Society: A Reader* McMillan, Melbourne, 1987, pp 34-52.

<sup>87</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 59.

<sup>88</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 20.

<sup>89</sup> AP Elkin *The Australian Aborigines* Angus and Robertson, Sydney, 1976, p 114; RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988 p 365.

<sup>90</sup> LR Hiatt *Kinship and Conflict* Canberra, Australian National University Press, 1965, p 147; MJ Meggitt *Desert People: A Study of the Walbiri Aborigines of Central Australia* University of Chicago Press, Chicago, 1965, pp 248 – 250.

<sup>91</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 20.

<sup>92</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 59.

<sup>93</sup> N Williams 'Aboriginal Decision Making and Native Title' in F McKeown (ed) *Native Title: An Opportunity for Understanding* Proceedings of Induction Course conducted by the National Native Title Tribunal at the University of Western Australia, Nedlands, 1 – 3 December 1993, p 114.

<sup>94</sup> WEH Stanner 'Aborigines and Australian Society' *Mankind* 10 (4):201-212, extracted in N Williams 'Aboriginal Decision Making and Native Title' in F McKeown (ed) *Native Title: An Opportunity for Understanding* Proceedings of Induction Course conducted by the National Native Title Tribunal at the University of Western Australia, Nedlands, 1 – 3 December 1993, p 110.

Consensus does not mean unanimity: rather, it consists of “the expression of a view to which nobody will make a strong objection”<sup>95</sup>.

Note: the Australian Law Reform Commission has commented that the existence or otherwise of Aboriginal authority figures is relevant to determining whether, how and in whom, authority to administer law should be vested in any section of modern Aboriginal society<sup>96</sup>.

### 2.6.3 Reciprocity

- **The principle of reciprocity guides mutual rights and obligations, and extends to the cultural norm of “payback” for wrongdoing**

In traditional Aboriginal society mutual rights and obligations, deriving principally from kinship obligations, are consistently observed. A primary obligation is to make gifts. Upon initiation a man is expected to make gifts (such as tools or implements) to those who initiate him; upon betrothal, he makes gifts to his future wife’s family. Usually the economic value of the gift is unimportant: the purpose of giving and receiving is to reinforce social bonds<sup>97</sup>. The requirement of reciprocity underpins most aspects of community life, including ritual, ceremony and the protection of sacred sites.

Similarly, the cultural practice of sharing food and other valued goods is based upon reciprocity principles. Each person shares with those persons from whom he or she has received benefits in the past, and from whom benefits will be received in the future. Reciprocity also governs the cultural norm of avenging wrongdoing: this is the notion of “payback” or “squaring it up”. However, payback may get out of hand, culminating in continuing, long-term feuds<sup>98</sup>.

Reciprocity, which operates on an inter-group as well as an intra-group level, strongly reinforces personal and group relationships. It operates as a system of checks and balances to maintain social equilibrium<sup>99</sup>.

### 2.6.4 Medicine Men and Sorcerers

- **Medicine men or magic healers cure illness through rituals such as “singing”**

Medicine men (or magic healers) exist in traditional language groups. Particular initiation rites must be undergone before a man obtains the necessary power to be a medicine man<sup>100</sup>. In some language groups certain women also are imbued with magical powers.

Medicine men perform a number of roles including the diagnosis and curing of illnesses (often through magical rituals). Assistance rendered by a medicine man may take the form of “singing”:

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<sup>95</sup> N Williams ‘Aboriginal Decision Making and Native Title’ in F McKeown (ed) *Native Title: An Opportunity for Understanding* Proceedings of Induction Course conducted by the National Native Title Tribunal at the University of Western Australia, Nedlands, 1 – 3 December 1993, p 110.

<sup>96</sup> ALRC ‘Traditional Aboriginal Society and Its Law’ in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 191.

<sup>97</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 17.

<sup>98</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 245.

<sup>99</sup> C Bourke and B Edwards ‘Family and Kinship’ in C Bourke et al. (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 100, p 106.

<sup>100</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988, p 331.

"Many magic men have the power to do magic feats by singing magic songs. They can sing and cause someone to become mad. They can also sing a person's head and thus make them strong. They can sing over a spear wound, singing as they put their mouth right on the wound, thus causing it to heal up quickly. They can sing a song and thus give themselves the power to travel at great speed (for instance when a car has broken down and they need to fetch help)."<sup>101</sup>

Medicine men also hold séances (to connect with the spiritual world) and conduct "inquests" into unexpected or unexplained deaths.

Much of the knowledge required for general remedies and first aid were common knowledge, particularly amongst women who were familiar with the plants and other materials that alleviated sickness or injury. In cases of chronic illness, where common remedies did not work, people sought the assistance of the medicine man (or woman). The illness was often perceived as an evil spirit or revenge magic that required sorcery to cure the patient<sup>102</sup>. Within Western Australia, medicine men are known as *Barnman* in the Kimberley and as *Mulgar* in the south-west region.

- **Sorcerers carry out acts of black magic**

Sorcerers (sometimes known as *kadaitcha* men) may or may not be medicine men. Particular initiation rites must be undergone to obtain the powers of sorcery<sup>103</sup>. A sorcerer's work is always that of black magic: it is usually carried out upon people of other tribes, unfaithful wives and alleged murderers<sup>104</sup>. The pointing-bone is the most widely known, and most widely used, tool of sorcery<sup>105</sup>.

In traditional Aboriginal society people live in fear of sorcery, although the curative powers of the medicine man may be invoked to counteract it. However, a cure may prove especially difficult in cases where the sorcerer has performed a particular ritual operation such as the removal of part of the body or soul<sup>106</sup>.

## 2.6.5 Visual Art, Literature, Songs and Dancing

- **Traditional Aboriginal visual art has spiritual or symbolic meaning for the group**

There are a number of distinct schools of traditional Aboriginal visual art, which may be created on rock facings and in caves, on wood, bark, and even on clay or sand. Broad traditional Aboriginal "art areas" exist across the Australian continent, although each language group has its own distinctive form of artistic expression.

Traditional Aboriginal visual art may be broadly described as a stylised form of communication which is inseparable from its cultural and social setting. It must possess cultural and social significance and conform to traditional expectations. Unlike some non-Aboriginal art traditions, Aboriginal visual art does not represent the response of an individual to an aesthetic urge or a means of self-expression. Much Aboriginal visual art and carving has spiritual or symbolic meaning for the group: the way in which others may care to interpret that artwork is immaterial<sup>107</sup>.

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<sup>101</sup> A Glass *Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People* Institute for Aboriginal Development, Alice Springs, Northern Territory, 1990, p 44.

<sup>102</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, pp 75-79.

<sup>103</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988, p 331.

<sup>104</sup> AP Elkin *The Australian Aborigines* Angus and Robertson, Sydney, 1976, pp 308 – 310.

<sup>105</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988, p 324.

<sup>106</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988, p 330.

<sup>107</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988, p 412.

- **Traditional Aboriginal literature, songs and dance relate to the traditional life and the Dreaming**

Traditional Aboriginal literature includes stories, poetry, songs and chants. These may relate to everything connected with the traditional life: the Dreaming stories, magic, totems, hunting, fighting, epics or mourning. In some areas up to five hundred stories are known: in others there may only be a dozen or so<sup>108</sup>. Sacred Dreaming stories are especially prized and the privilege of telling them may be strictly controlled. Keen has commented that songs, dance, and visual forms were in fact modes of communication “with complex information conveyed mimetically, iconically, and through metaphor and symbolism.”<sup>109</sup>

Usually traditional songs are simple and short, with much repetition of key phrases. The songs cover most aspects of Aboriginal life and are intended to assist the group in remembering details of the Dreaming stories and also crucial facts, such as the location of waterholes. Songs are often accompanied by clapping sticks and *didjeridus* (known as *ngaribi* in the Kimberley and as *kurmur* in the Roebourne area). Other musical instruments include hand drums, rattles and gongs<sup>110</sup>. Music is intended to provide rhythm and backing for singing. Often this rhythm is provided by hand clapping or body slapping.

Dreaming stories are also honoured through the performance art of dancing. Dances mimic the movements of Ancestral Beings, spirits, animals and humans. Dances may be performed solo or by groups; they may be open or closed to audience participation. Sometimes, but not always, dances relate to sacred matters and are performed in secret. Dance steps are often intricate and varied, rich in symbolism and significance<sup>111</sup>.

Note: the word “corroboree” (which may have derived from a New South Wales Aboriginal dialect) has passed into the English language as a word for all Aboriginal ceremonies involving singing and dancing. However, “corroboree” has been criticised as being too vague, and as lumping together the sacred and the non-sacred in an undifferentiated way<sup>112</sup>.

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<sup>108</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988, p 389.

<sup>109</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 89.

<sup>110</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988 p 371.

<sup>111</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988 p 383.

<sup>112</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988 p 381.

## 2.7

### ABORIGINAL CEREMONY AND RITUAL

According to traditional belief, Aboriginal people share the same spiritual essence with everything else in the cosmos. Nearly all of the Dreaming stories are connected to specific locations, and sometimes to sacred objects. Ceremony and ritual provide access to that spiritual world.

#### 2.7.1 The Function of Ceremony and Ritual

- **Traditional ceremonies and rituals are performed to obtain access to the Ancestral Beings and to spiritual powers**

Contact with the Ancestral Spirits, and access to spiritual powers, is sought through the performance of traditional rituals and the perpetuation of traditional customs<sup>113</sup>. Some rituals are designed to ensure the continued supply of species; others mark the passage through significant stages of life, such as puberty and death.

Many sacred ceremonies are open to the whole community and often men and women play complementary roles in them. Some important ceremonies are open only to men in the belief that the spiritual forces which the ceremonies invoke are too dangerous for women. Similarly, men are unable to attend the secret ceremonies of women. All traditional ceremonies are vital to the sacred life<sup>114</sup>: some of the ceremonies are described below.

Each adult must perform increase ceremonies<sup>115</sup> each year at the sacred site of his or her totem to enable the life force to be released. This ensures an ongoing supply of the particular natural species of which that person was a part<sup>116</sup>.

#### 2.7.2 Initiation into Adulthood

In traditional Aboriginal society childhood is short, albeit a time of great freedom. As children approach puberty they are required to undergo ritual initiation processes.

- **Girls are initiated into traditional female roles at puberty**

A girl is physically capable of fulfilling her traditional roles of food gatherer, sexual partner, bearer of children and carer of the elderly as soon as she reaches puberty. At that time she will be initiated into womanhood. After a relatively short time of seclusion from the group, during which she may be instructed in women's business, appropriate initiation ceremonies are conducted for each girl. These include ritual acts of body-cleansing, body-painting and ornamentation, and perhaps body scarification<sup>117</sup>.

<sup>113</sup> B Edwards 'Living the Dreaming' in C Bourke et al (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 77, p 85.

<sup>114</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, pp 19 – 20.

<sup>115</sup> Increase ceremonies are performed at special places to activate spirits of an animal, mineral or plant species associated with those places: TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 360.

<sup>116</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 15.

<sup>117</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988 pp 180-181.

- **Boys are initiated through socialisation processes, teaching of the Law, and tests of worthiness and courage**

Initiation is only offered to those who are considered to have the physical, emotional and intellectual maturity to respect the Law and to use it for the benefit of the group. Thus, a boy approaching puberty may be physically removed from the group to live away from it for an extended period; during that time his name may not be spoken by persons in the group. The boy's uncles (i.e. his mother's brothers) have special obligations to him in relation to discipline and initiation processes: they teach him the rights and obligations of adult males, and some of the secrets of the sacred Law<sup>118</sup>.

Male initiation combines socialisation techniques with dramatisations of ancestral action. These dramatisations reinforce the ancestral basis of law and bring Ancestral Beings into the present<sup>119</sup>. Male initiation rites include tests of worthiness and courage. Initiation ordeals may include travelling on long journeys, tooth evulsion, circumcision, nose piercing, sleep deprivation, and/or the cutting of ceremonial markings upon skin. These tests are designed to instil qualities of obedience, discipline, self-reliance and cooperativeness. Upon satisfactory completion of the tests, complex and elaborate initiation ceremonies are held in the boy's honour.

After the initiation ceremonies, young men are still regarded as novices. They are expected to sit in respectful silence at meetings held by the men. A young man gains in status by participating in further tests and ceremonies during subsequent years. As a man becomes entrusted with more secrets of the sacred Law, so he grows in power and influence<sup>120</sup>.

### 2.7.3 Betrothal and Marriage

- **Marriages are significant to the forming of alliances and betrothals occur early**

In traditional Aboriginal society marriages are significant to the forging of alliances: they are often arranged to encourage contact, interdependence and associations between neighbouring groups. Marriage ensures cooperation and the sharing of food resources between territories. Often betrothal arrangements are made when the prospective bride is very young, or possibly even unborn.

Marriage was often used as a form of exchange, often a person was given a spouse, typically a woman, in exchange for valued items such as meat<sup>121</sup>. Elopement was not tolerated; elopement challenged strict adherence to the law, and was punishable by death or exile<sup>122</sup>.

A man was not able to marry until he had undergone a significant part of the lengthy initiation process: thus, at marriage a man might be in his twenties or even thirties. Girls were usually between 14 and 20 years when they first married, and were frequently widowed at a young age. Accordingly, a man's first wife was often the widow of an older man. Polygamy was common, and as a man matured, he was allowed to take younger wives (his subsequent wives might be much younger than him). A man of high social status might be betrothed to many young girls. In some communities, additional wives were acquired when the older brother of a man died.

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<sup>118</sup> FR Myers *Pintupi Country, Pintupi Self* Australian Institute of Aboriginal Studies, Canberra, 1985, p 234.

<sup>119</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 244.

<sup>120</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, pp 98-105.

<sup>121</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 178.

<sup>122</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, pp 144-145.

Under this custom, the younger brother was expected to take in his brother's wives and children as his own, ensuring their welfare<sup>123</sup>.

A marriage might have been signified by the simple act of a couple living together and being accepted, by their kin, as being married. The mere act of a woman walking through a camp to join a man at his request may have amounted to a marriage ritual<sup>124</sup>.

#### 2.7.4 Death, Mourning and Burial

- **Death signifies a return of the spirit to the Dreaming: complex and often lengthy mourning rituals are required**

In traditional Aboriginal society death is not feared: it is the time when a person's spirit is released from the physical body to rejoin the unseen world. Death signifies a return of the spirit to the Dreaming and the eternal life-stream. It is believed that upon death a person's spirit returns to its source - its sacred totem site - to await reincarnation as a spirit child<sup>125</sup>.

Traditional mourning and grieving customs vary widely between Aboriginal language groups. However, all customs involve acts of ritual mourning, the singing of sacred dirges, and complex ceremonies. Mourning and burial rituals must be carried out properly, as they assist the spirit to return to its sacred place. Without proper ceremonies, the deceased's spirit cannot take its place in the afterlife but will be caught between death and future life<sup>126</sup>.

High levels of agitation and distress often accompany mourning rituals. The bereaved, especially wives, may even carry out ritual acts of self-harm (such as the gashing of foreheads and thighs, or inflicting burns with hot coals). The marks which are made are not random, but reflect the kin relationship of the mourners to the deceased. Once healed the scars remind the bereaved of their loss<sup>127</sup>. If the deceased is of significant status, members of other language groups will attend the mourning ceremonies to pay their respects.

Traditional burial practices vary widely: the deceased's body may be left in a rock fissure, a cave or the hollow of a tree; it may be left exposed on a platform, desiccated with smoke; cremated in a fire; or buried in a woven-branch coffin. Fires may be lit to provide comfort for the deceased's spirit. Traditional burial places are regarded as dangerous places where spirits may gather: accordingly, extreme care is taken in approaching them<sup>128</sup>.

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<sup>123</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 143.

<sup>124</sup> MJ Meggitt *Desert People: A Study of the Walbiri Aborigines of Central Australia* University of Chicago Press, Chicago, 1965, p 269.

<sup>125</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 108.

<sup>126</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 20.

<sup>127</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, pp 110-113.

<sup>128</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 115.



- **Direct reference to the deceased's death is avoided, and the deceased's name becomes taboo**

Death is a serious matter which causes immense grief and sorrow to the bereaved relatives. Great care is taken not to increase the hurt by any direct reference to the deceased's death. News of a death is conveyed indirectly by statements such as:

- "X has become one" (where Y, the husband/wife of X, has died);
- "X has become a bereaved brother/sister" (where Z, the sibling of X, has died);
- "X has become only hands" (where B, X's young baby, has died). This signifies that X no longer has a baby to carry in her hands.<sup>129</sup>

After a death, the name of the deceased person may become taboo. To speak or use the name of a deceased person indicates a lack of respect for the deceased and for the bereaved relatives, upon whom it will inflict great hurt and sorrow. Even words which sound similar to the name of the deceased person may become taboo.

Accordingly, a deceased person may be mentioned only indirectly or by reference: for example, as "X's brother" (X being the surviving person). In the case of the predictable death of a very old person or a baby, the taboo may last for as long as a year. However, if the deceased dies in the prime of life, or if his or her relatives are especially sensitive about the death, the name of the deceased may not be spoken for many years.

After the death of a family member, surviving family members may be called by new names. Each surviving person may be known by a special name which means "one whose brother (or sister/father/mother) has died". The family members may be called by these names for the rest of their lives<sup>130</sup>.

Where a name is a "shared one" (that is, where a surviving person has the same name as a deceased person) the surviving person will adopt a new name, as his or her name now has been rendered taboo. That person might also be called a special word which means "a person whose name is taboo".

- **"Sorry time" takes precedence over all other matters**

The "sorry time" of the funeral and mourning takes precedence over all other matters<sup>131</sup>. After the funeral, the family or group may move away from the area for a period. In certain communities, a re-burial or second funeral occurs some months after the first funeral.

Relatives, particularly widows, may have to commence food taboos and endure periods of silence and/or isolation from the group for up to a year<sup>132</sup>.

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<sup>129</sup> A Glass *Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People* Institute for Aboriginal Development, Alice Springs, Northern Territory, 1990, p 39.

<sup>130</sup> A Glass *Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People* Institute for Aboriginal Development, Alice Springs, Northern Territory, 1990, p 39.

<sup>131</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, pp 110, 111.

<sup>132</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 21.

## 2.8

### ABORIGINAL CUSTOMARY LAW

Traditional Aboriginal law varies in content and application from one language group to another: there are no traditional rules of universal application<sup>133</sup>. Keen, who carried out extensive studies of language groups across the continent, identified four common features of traditional Aboriginal governance:

- ancestral law was generally framed through shared doctrines, which were enacted in regional ceremonies;
- formal socialisation occurred through initiation and revelatory rituals;
- autonomous but intersecting kinship networks enforced norms and took redressive action;
- power relations lay primarily along age and gender lines<sup>134</sup>.

Some additional general propositions are discussed briefly below.

#### 2.8.1 The Law Governs both the Spiritual and the Secular

- **The Law governs the observance of sacred ritual, dictates economic activity, and maintains social order**

Traditional Aboriginal society does not distinguish between the physical and spiritual universes. Accordingly, there is no distinction between secular and spiritual rules. The rules which make up the Law govern the observance of sacred ritual and economic activity: they maintain social order and dictate the minutiae of everyday life.

Notwithstanding its inherent spirituality, the Law is not accompanied by systematic belief in gods, prayer, by sacrificial acts or through institutions such as the priesthood<sup>135</sup>.

In traditional communities children grow up accepting the Law unquestioningly. Undoubtedly the often-harsh sanctions of the Law provide additional reason for obedience (see 2.8.4, below). The dictates of the Law have been described as highly practical, representing the accumulated wisdom of hundreds of generations<sup>136</sup>.

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<sup>133</sup> ALRC 'Traditional Aboriginal Society and Its Law' in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 189.

<sup>134</sup> I Keen *Aboriginal Economy and Society: Australia at the Threshold of Colonisation* Oxford University Press, Melbourne, 2004, p 389.

<sup>135</sup> ALRC 'Traditional Aboriginal Society and Its Law' in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 190.

<sup>136</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988 pp 337-338.

## 2.8.2 Dispute Resolution

- **A variety of procedures may be invoked to resolve a dispute**

In traditional Aboriginal communities disputes are an expected element of normal social processes. Disputes, which often centre on inter-personal problems, must be distinguished from ongoing conflict: the latter indicates that traditional law has broken down<sup>137</sup>. Since disputes are considered disruptive to group harmony, a resolution to disputes is always sought<sup>138</sup>.

Different procedures may be followed in an attempt to resolve a dispute. Elders may attempt to negotiate a satisfactory outcome; immediate family members usually play an important role. Sometimes disputes may be resolved by open informal discussions, in which everyone participates. However, talk and argument may culminate in violence, which may persist until the matter is resolved<sup>139</sup>.

## 2.8.3 Customary Offences

In its 1987 Report into *The Recognition of Aboriginal Customary Law* the Australian Law Reform Commission (ALRC) emphasised the difficulty of recording Aboriginal customary offences and of customary responses to those offences. The ALRC found that the customs and practices of Aboriginal communities differed throughout Australia, and that traditional Aboriginal concepts of offending and punishment differ significantly from those of Anglo-Australian society<sup>140</sup>.

- **Many customary offences were offences of strict liability**

Under Aboriginal customary law, many offences were offences of strict liability.

- **Breaches of the sacred law may have been punishable by death**

The viewing of sacred objects, places, or ceremonies by persons not entitled to view them was a gravely serious offence: an offence was committed even if the viewing was wholly unintended. Similarly, disclosing sacred secrets to a person not entitled to know them constituted a very serious offence. The commission of such offences may have demanded the immediate death of the offender<sup>141</sup>.

- **Most crimes were personal or domestic; property crimes were rare; crimes of omission may have occurred**

Traditional inter-personal crimes included murder (including unauthorised “killing” by sorcery), the usurpation of ritual privileges or duties, insulting another person (by swearing and/or exposing of the genitals) and the breach of a taboo such as invoking the name of a dead person<sup>142</sup>.

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<sup>137</sup> N Williams ‘Aboriginal Decision Making and Native Title’ in F McKeown (ed) *Native Title: An Opportunity for Understanding* Proceedings of Induction Course conducted by the National Native Title Tribunal at the University of Western Australia, Nedlands, 1 – 3 December 1993, p 112.

<sup>138</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 62.

<sup>139</sup> ALRC ‘Traditional Aboriginal Society and Its Law’ in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 200.

<sup>140</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) Chapters 17, 21. (Accessed 5 July 2008)

<sup>141</sup> ALRC ‘Traditional Aboriginal Society and Its Law’ in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 195.

<sup>142</sup> MJ Meggitt *Desert People: A Study of the Walbiri Aborigines of Central Australia* University of Chicago Press, Chicago, 1965, pp 256-257.

Domestic crimes included elopement (running away with a person other than one's betrothed). Adultery with certain kin was viewed very seriously. An extended definition of "incest" prohibited sexual relations between a man and his classificatory mothers, sisters and his mother-in-law. It may be noted that in some groups the practice of wife-lending existed. Where this occurred, any incest taboo which might otherwise be breached in fact was not breached<sup>143</sup>. To marry someone who had the same totemic affiliation or who came from the same moiety was a serious breach of the Law<sup>144</sup>.

In traditional Aboriginal communities property crimes are rare, since everyday material objects may be borrowed readily pursuant to kinship rights. Sometimes ritual stealing occurred (such as that of twine for ceremonial purposes), but no serious redress was required or taken<sup>145</sup>.

A limited number of offences of omission exist: these include the physical neglect of certain relatives, the refusal to make gifts to certain relatives, and the refusal to educate certain relatives<sup>146</sup>.

#### 2.8.4 Punishment of Offences

In *The Recognition of Aboriginal Customary Law* the ALRC pointed out that in Anglo-Australian society lawful "punishment" connotes a response to wrongful acts. It is activated by some form of collective decision (i.e. by a person or body authorised to act in the name of the general community) and is closely regulated by rules. However, in traditional Aboriginal society punishment is perceived as a response to a particular act by the injured party or group, rather than as a response to an act which is inherently "unlawful"<sup>147</sup>.

- **Punishment usually took the form of "payback" or the avenging of wrongdoing**

Punishment was usually characterised by "payback" or "square it up" principles, on the basis that "retaliation is the essence of law."<sup>148</sup>

As noted above, many traditional offences called for very serious punishment, even death. However, specific penalties were not necessarily prescribed in respect of other, lesser offences. An appropriate punishment might be chosen from a range of punishments, following a process of argument or mediation involving the parties injured by the offence and the offender and/or the offender's supporters. In other cases Elders may have met to decide upon an appropriate punishment, which punishment may have been administered by the Elders or their delegates<sup>149</sup>.

- **Forms of customary punishments included death, corporal punishment (including spearing), shaming, initiation, compensation and banishment**

Aboriginal customary punishments took a wide variety of forms. The particular punishment to be inflicted was influenced by factors including the community's perceptions of the seriousness of the offence; the place or community in which the offence occurred; the sex, status and previous history of the offender; and the sex, status and conduct of the victim.<sup>150</sup>

<sup>143</sup> AP Elkin *The Australian Aborigines* Angus and Robertson, Sydney, 1976, p 161.

<sup>144</sup> AP Elkin *The Australian Aborigines* Angus and Robertson, Sydney, 1976, p 118.

<sup>145</sup> ALRC 'Traditional Aboriginal Society and Its Law' in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 196.

<sup>146</sup> MJ Meggitt *Desert People: A Study of the Walbiri Aborigines of Central Australia* University of Chicago Press, Chicago, 1965, p 257.

<sup>147</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 499. (Accessed 5 July 2008)

<sup>148</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988, p 360.

<sup>149</sup> ALRC 'Traditional Aboriginal Society and Its Law' in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 195.

<sup>150</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986

([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 500 (Accessed 5 July 2008).

Customary punishments included:

- death (either directly, or by sorcery or incantation);
- spearing (of greater or lesser severity);
- other forms of corporal punishment (such as burning the hairs from the offender's body);
- individual "duelling" with spears, boomerangs or fighting sticks;
- collective "duelling" involving those injured by the offence, or affected by it, and those associated with the offender;
- shaming or ridicule;
- rigorous forms of initiation or teaching;
- compensation (e.g. through adoption or marriage);
- banishment from the community<sup>151</sup>.

Banishment or exclusion from the group may have been invoked as a punishment for continual offending, or for a serious offence in respect of which death was not an appropriate penalty. Banishment is regarded as an extremely harsh punishment: it causes immense grief to the offender, who may literally waste away and die from sorrow<sup>152</sup>. Banishment may not be a traditional form of punishment, since it is wholly inconsistent with the essentially socio-centric nature of Aboriginal culture<sup>153</sup>.

Punishment by sorcery was usually invoked where physical vengeance was appropriate but not practicable. The offender would be identified during a ritual ceremony and a sorcery rite performed, or perhaps only threatened. Should the identified person have become ill, insane or die, the sorcery was deemed to have been successful<sup>154</sup>.

Ideally, once punishment had been exacted, justice would be considered to have been done and things would return to normal. However, if the punishment exacted was interpreted as retaliation, it might have invited an act of reprisal. Things might then have escalated to the point that an ongoing "blood feud" erupted and continued for many years<sup>155</sup>.

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<sup>151</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986

([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 500 (Accessed 5 July 2008).

<sup>152</sup> TK Jacob *In The Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 55.

<sup>153</sup> MJ Meggitt *Desert People: A Study of the Walbiri Aborigines of Central Australia* University of Chicago Press, Chicago, 1965, p 258.

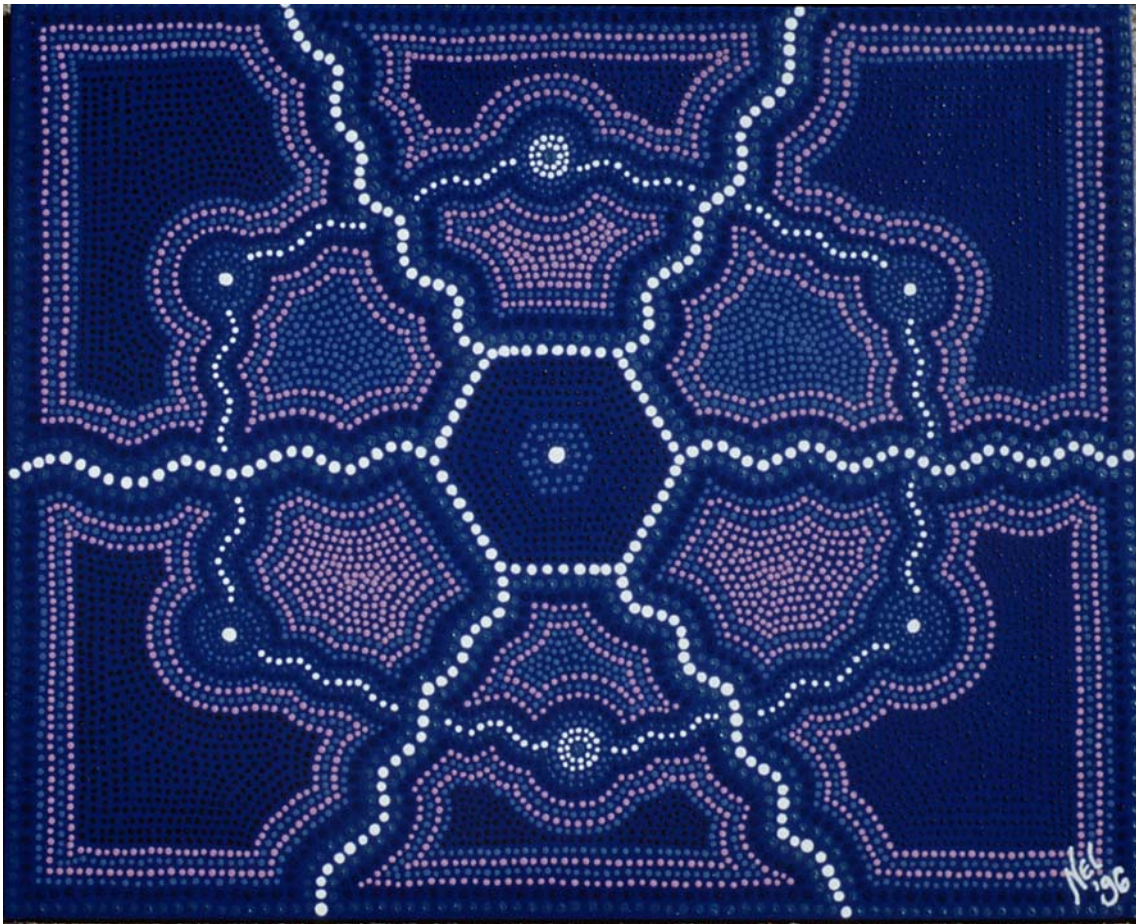
<sup>154</sup> ALRC 'Traditional Aboriginal Society and Its Law' in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 199.

<sup>155</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988, p 346.

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## Chapter Three: Aspects of Contemporary Aboriginal Australia



# Chapter Three: Aspects of Contemporary Aboriginal Australia

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Upon the recommendation of Western Australian Aboriginal advisers, the word “Aboriginal”, rather than “Indigenous” is used in this Benchbook

## **Summary of Chapter Three**

### **Aspects of Contemporary Aboriginal Australia**

#### **3.1 ABORIGINAL DEMOGRAPHY**

##### **3.1.1 Migration to Urban Areas**

- Aboriginal migration to populated centres increased greatly from the late 1940s

##### **3.1.2 Overview of Australia's Aboriginal Population**

- In 2006 Australia's estimated resident Aboriginal population was 517,000 persons, an increase of 13% increase from 2001
- In 2006 the Aboriginal population was characterised by a lower median age and larger families

##### **3.1.3 Health**

- The Aboriginal population has a relatively high prevalence of health problems and chronic diseases

##### **3.1.4 Education**

- Aboriginal education rates are improving in some sectors

##### **3.1.5 Employment**

- The Aboriginal labour force participation rate shows improving trends

##### **3.1.6 Stressors**

- Stressors may exist to a relatively large extent

#### **3.2 SOME FEATURES OF CONTEMPORARY ABORIGINAL CULTURE**

##### **3.2.1 Aboriginal Culture in Urban Areas**

- Traditional Aboriginal culture survives and practised in urban areas

##### **3.2.2 Survival of Aboriginal Languages**

- Only one third of the hundreds of original Aboriginal languages still survive
- In 2006, 12% of Aboriginal people in Western Australia said they spoke an Aboriginal language

##### **3.2.3 Use of Names**

- The use of names in Aboriginal culture remains complex, and the taboo on referring to deceased persons by name remains in some communities

### **3.3 ABORIGINAL AND ANGLO-AUSTRALIAN CULTURAL VALUES**

- 3.3.1** It appears that broad differences may exist between Aboriginal and Anglo-Australian values, including in relation to identity, life orientation, the concept of “family”, responsibility for children, social obligations, connection with land and styles of interaction



## CHAPTER THREE

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# Aspects of Contemporary Aboriginal Australia

### 3.1

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## ABORIGINAL DEMOGRAPHY

### 3.1.1 Migration to Urban Areas

- **Aboriginal migration to urban centres increased greatly from the late 1940s**

Although Aboriginal people traditionally inhabited what became the urban areas of Australia, post-colonisation migration by Aboriginal people to those populated areas increased greatly in the late 1940s. The factors giving rise to this migratory trend were both voluntary (responding to employment, sport and educational opportunities, and to health matters) and involuntary (involvement in the criminal justice system)<sup>1</sup>.

Accelerated Aboriginal migration to urban areas raised public awareness about many Aboriginal issues: in particular, health, education, housing, land rights, and employment. Those issues came to a head in the 1960s, and following the 1967 referendum, the constitutional prohibition upon the Commonwealth making laws for Aboriginal people was removed. In the early 1970s historians such as Henry Reynolds took a revisionist approach to the writing of Aboriginal history in the post-colonial era, raising public consciousness of Aboriginal dispossession and cultural dislocation to new heights<sup>2</sup>.

### 3.1.2 Overview of Australia's Aboriginal Population

- **In 2006 Australia's estimated resident Aboriginal population was 517,000 persons, an increase of 13% from 2001**

At 30 June 2006, when the most recent Census was taken, Australia's estimated resident Aboriginal population was 517,000 persons or 2.5% of the total population. Of that Aboriginal population, 90% of people were estimated as being of Aboriginal origin only; 6% were of Torres Strait Islander origin only; and 4% were of mixed Aboriginal and Torres Strait Islander origin<sup>3</sup>

In Western Australia, Aboriginal people comprised an estimated 77,900 persons (or 3.8% of the State's total population). Western Australia has the third highest estimated number of Aboriginal residents, after New South Wales (148,200 persons) and Queensland (146,400 persons). Western Australia had the highest Aboriginal growth rate (18%) in the country since the 2001 Census: the national growth rate was 13%<sup>4</sup>.

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<sup>1</sup> F Gale *Urban Aborigines* Australian National University, Canberra, 1972, p 79.

<sup>2</sup> See for example H Reynolds *Aborigines and Settlers: The Australian Experience 1788-1939*, Cassell, Melbourne, Australia, 1972; H Reynolds *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Ringwood, Victoria, 1981.

<sup>3</sup> Australian Bureau of Statistics *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, 15 August 2007, 4705.0, p 4 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008) The estimated resident population is calculated by adjusting the census count for instances in which Aboriginal status is unknown and for net undercount.

<sup>4</sup> ABS, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, 15 August 2007, 4705.0, p 4, ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

Between 2001 and 2006, the Census count of Aboriginal people had doubled: the high level of growth reflects natural increase and non-demographic factors, such as people identifying their Aboriginal origin for the first time.

The experimental estimated and project resident total Aboriginal population for 2009 is 528,645 persons (low series<sup>5</sup>) or 600,201 persons (high series<sup>6</sup>).

*Note:* the 2002 *National Aboriginal and Torres Strait Islander Social Survey* indicated that more than half of the total Aboriginal population identified with a clan, tribal or language group and that almost 70% (and, in the case of Western Australia, 75.7%) of the total Aboriginal population had attended a cultural event during the past 12 months<sup>7</sup>.

- **In 2006 the Aboriginal population was characterised by a lower median age and larger families**

In 2006 the median age of the Aboriginal population was 20 years (compared with 37 years in the non- Aboriginal population). Older Aboriginal people (those aged 65 years or older) comprised just 6% of the Aboriginal population compared with 13% of the non- Aboriginal population<sup>8</sup>.

In 2006, Aboriginal households were more likely than other households to be family households (81% compared with 68%) and less likely to be one-person households (14% compared with 23%). Among Aboriginal households, 5% were likely to be multi-family households, compared with 1% for other households. Living arrangements varied with geographical remoteness, in very remote areas, 20% of families were multi-family<sup>9</sup>.

Aboriginal households tended to be larger than other households (average of 3.3 per household, compared with 2.5, respectively). In Aboriginal households, the average number of dependant children was 1.1, compared with 0.5 in other households. Over a third of Aboriginal people (39%) lived in private occupied dwellings<sup>10</sup>.

### 3.1.3 Health

- **The Aboriginal population has a relatively high prevalence of health problems and chronic diseases**

In April 2006 the *National Aboriginal and Torres Strait Islander Health Survey* was published. The survey reported that in 2004-2005:

- 78% of Aboriginal people considered that their health to be “good to excellent”; however:
- 35% of Aboriginal people aged over 55 years reported having diabetes;
- 22% of Aboriginal people aged over 35 years reported having high blood pressure;

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<sup>5</sup> ABS, *Australian Demographic Statistics*, Dec 2007, 3101.0, p 39 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008). The low projection series assumes changes in the Aboriginal population as a result of natural increase and interstate migration only.

<sup>6</sup> ABS, *Australian Demographic Statistics*, Dec 2007, 3101.0, p 39 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008). The high projection series assumes a component of increase in the Aboriginal population observed between the 1996 and 2001 censuses which cannot be attributed to natural increase.

<sup>7</sup> ABS, *National Aboriginal and Torres Strait Islander Social Survey*, 2002 (4714.0) pp. 6, 22. ([www.abs.gov.au](http://www.abs.gov.au)) (Accessed 10 July 2008)

<sup>8</sup> ABS, *2006 Census of Population and Housing: Media Releases and Fact Sheets*, 2006, 2914.0.55.002 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>9</sup> ABS, *Population Characteristics, Aboriginal and Torres Strait Islander Australians*, 2006, 4710.0 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>10</sup> ABS, *Population Characteristics, Aboriginal and Torres Strait Islander Australians*, 2006, 4710.0 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

- the most common health problems reported by Aboriginal people were eyesight (30%); asthma (15%); back problems (13%); heart and circulatory problems (12%) and ear or hearing problems (12%);
- 10% on Aboriginal children reported having ear or hearing problems (approximately 3 times the rate of non- Aboriginal children)<sup>11</sup>.

A study of the incidence of chronic diseases among the Aboriginal population undertaken in 2004-005 revealed that, allowing for differences in the age structures of Aboriginal and non- Aboriginal populations, Aboriginal people were more than three times as likely as non- Aboriginal people to contract diabetes and more than 10 times more likely to have kidney disease. In 2004-2005, approximately 74,000 Aboriginal people reported having diabetes, cardiovascular disease or kidney disease. Aboriginal people living in remote areas had a higher incidence of those diseases than those living in non-remote areas<sup>12</sup>. Forty-seven per cent of Aboriginal people aged 35 years and older were daily smokers and 68% were overweight or obese. In non-remote areas, 82% of people in this age group had low exercise levels<sup>13</sup>.

### 3.1.4 Education

- **Aboriginal education rates are improving in some sectors**

The *Overcoming Indigenous Advantage: Key Indicators 2007* report disclosed that 2006 21% of 15 year-old Aboriginal people were not participating in school education, compared with 5% of 15 year-old non-Aboriginal people. In 2006, Aboriginal students were half as likely to as non- Aboriginal students to continue to Year 12. In 2004-2005, 22% of Aboriginal students had completed Year 12, compared with 47% of non-Aboriginal people and the proportion of Aboriginal students who achieved a Year 12 certificate had changed little between 2001 and 2005.<sup>14</sup>

However, the proportion of Aboriginal people participating in post-secondary education increased from 5% in 1994 to 11% in 2004-2005, and the proportion of Aboriginal people who achieved a Certificate 3 or above increased from 8% to 21% in the same period. In that same period, non-Aboriginal people were more than twice as likely as Aboriginal people to have completed a post-secondary course.

### 3.1.5 Employment

- **The Aboriginal Labour force participation rate shows improving trends**

Aboriginal people generally experience high unemployment rates and lower workforce participation rates than non-Aboriginal people. Limited employment opportunities and low education levels in remote communities led to the development of the Community Development and Education Programs (CDEP) scheme, which was also intended to maximise the capacity of Aboriginal communities to determine the use of their workforce.

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<sup>11</sup> ABS, *National Aboriginal and Torres Strait Islander Health Survey, Australia, 2004-2005, Media Release*, 4715.0 ([www.abs.gov.au](http://www.abs.gov.au)) (Accessed 10 July 2008)

<sup>12</sup> ABS, *Australian Social Trends, 2007: Selected Chronic Conditions among Aboriginal and Torres Strait Islander Peoples*, 4102.0 ([www.abs.gov.au](http://www.abs.gov.au)) (Accessed 10 July 2008)

<sup>13</sup> ABS, *Australian Social Trends, 2007: Selected Chronic Conditions among Aboriginal and Torres Strait Islander Peoples*, 4102.0 ([www.abs.gov.au](http://www.abs.gov.au)) (Accessed 10 July 2008)

<sup>14</sup> Steering Committee for the Review of Government Service *Provision Overcoming Indigenous Disadvantage: Key Indicators 2007* ([www.pc.gov.au/data/assets/pdf\\_file/0005/69278/kevincators2007overview.pdf](http://www.pc.gov.au/data/assets/pdf_file/0005/69278/kevincators2007overview.pdf)) pp 15-15. (Accessed 10 July 2008)

In 2006, an estimated 186,900 Aboriginal people were in the labour force (either employed or unemployed). This represents a labour force participation rate for all Aboriginal people aged 18 years and over of 59%. Of the Aboriginal people in the labour force, more lived in regional cities (78,000) than in major cities (62,700). Major cities had the highest rate of participation - 64%. Males accounted for 55% of the Aboriginal labour force in 2006<sup>15</sup>.

In 2006, an estimated 160,300 Aboriginal people were in employment. This represents half of the Aboriginal population aged 15 years and over. The employment to population ratio for Aboriginal males rose to 57% in 2006; the employment to population ratio for Aboriginal females rose to 44%<sup>16</sup>.

### 3.1.6 Stressors

- **Stressors may exist to a relatively large extent**

The 2002 *National Aboriginal and Torres Strait Islander Social Survey* revealed that Aboriginal people aged 18 years and over were 1.5 times more likely to experience at least one stressor in the previous 12 months than the non-Aboriginal community.

Approximately 82% of Aboriginal people living in non-remote areas reported stressors in the form of death of a family member or close friend, serious illness or disability and unemployment. For Aboriginal people living in remote areas, the most frequently-reported stressors, after the death of a family member or close friend, were overcrowding at home (42%) and alcohol and drug-related problems. Only 57% of the non-Aboriginal community reported experiencing at least one stressor in 2002<sup>17</sup>.

In 2002, around 15% of Aboriginal people reported risky or high alcohol consumption during the previous year. The rate was higher for males than for females (17% compared with 13%) and it peaked for males aged 45-55 years (22%) and for females aged 35-44 years (19%). The level of risky/high alcohol consumption was similar for Aboriginal people in non-remote and remote areas<sup>18</sup>.

Note: it appears that there is little comparative analysis, however, on the incidence of dysfunction, domestic and child abuse in rural, regional and urban areas and information about whether in fact those environments are less stressful for Aboriginal people.

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<sup>15</sup> ABS, *Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians: Experimental Estimates from the Labour Force Survey, 2006* 6287.0, 2006, p 8. ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>16</sup> ABS, *Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians: Experimental Estimates from the Labour Force Survey, 2006* 6287.0, 2006, p 8. ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>17</sup> ABS, *National Aboriginal and Torres Strait Islander Social Survey, 2002: Summary of Findings* 4714.0 ([www.abs.gov.au](http://www.abs.gov.au)) (Accessed 10 July 2008).

<sup>18</sup> ABS, *National Aboriginal and Torres Strait Islander Social Survey, 2002: Summary of Findings* 4714.0 ([www.abs.gov.au](http://www.abs.gov.au)) (Accessed 10 July 2008).



## 3.2

### SOME FEATURES OF CONTEMPORARY ABORIGINAL CULTURE

The impact upon Aboriginal people of colonisation, dispossession and urbanisation has resulted in the breaking down of many cultural ties, traditional practices and beliefs. In particular, urbanisation has represented a significant change in the economic and social status of Aboriginal people: it has led to wider press coverage and representation of Aboriginal viewpoints; greater public awareness of issues relating to Aboriginal people, and the arousal of a public conscience about Aboriginal housing, employment, health and education<sup>19</sup>. The mounting campaign for Aboriginal land rights gave rise, in the 1970s, to land rights legislation and, in the 1990s, to the law of native title.

The struggle for land rights, better health, education, and living conditions and for self-determination has stimulated the emergence of Aboriginal spokespersons and leaders. Such leaders have emerged in politics, the public service and other local and national organisations. This, together with a growing interest in traditional Aboriginal culture and custom, has led to the development of Aboriginal social and political groupings not wholly based upon kin or culture groups:

“A wave of feeling for ‘Aboriginal’ identity, pointing toward pan-Aboriginality, seeks to establish a common socio-cultural heritage.”<sup>20</sup>

In cultural terms, Aboriginality may be understood as having as much to do with the socio-cultural environment, one’s values and one’s life experiences as much as it does with biological descent<sup>21</sup>.

#### 3.2.1 Aboriginal Culture in Urban Areas

- **Traditional Aboriginal culture survives and is practised in urban areas**

“We are often considered by outsiders to have lost our culture and to be completely integrated into non-aboriginal life. But we have a very unique culture in our city community that reflects traditional cultural values.” (Professor Larissa Behrendt)<sup>22</sup>

In 1998 the Australian and Torres Strait Islander Commission emphasised that “the cultures of Indigenous people in Blacktown, Redfern, Fitzroy and Musgrave Park are no less ‘Aboriginal’ than the cultures of their counterparts in Cape York, Arnhem Land or the Kimberley.”<sup>23</sup>

For some Aboriginal people, urbanisation takes the form of “fringe-dwelling”, almost wholly Aboriginal communities. For others, it may mean actual or apparent absorption into non-Aboriginal society. Some Aboriginal people are highly mobile within urban areas, often moving residences in order to be near family members.

<sup>19</sup> F Gale *Urban Aborigines* Australian National University, Canberra, 1972, p 5.

<sup>20</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988, p 528.

<sup>21</sup> Australian and Torres Strait Islander Commission *As a Matter of Fact: Answering the Myths and Misconceptions About Indigenous Australians*, Office of Public Affairs, ATSIC, Canberra, 1998, p 60.

<sup>22</sup> Behrendt L “Aboriginal Urban Identity: Preserving the Spirit, Protecting the Traditional in Non-Traditional Settings” *Australian Feminist Law Journal*, v. 4, March 1995: 55-61, p 56.

<sup>23</sup> ATSIC *As a Matter of Fact: Answering the Myths and Misconceptions About Indigenous Australians*, Office of Public Affairs, ATSIC, Canberra, 1998, p 61.

Cultural survival is manifest in cultural trends, such as the “snowballing” effect of Aboriginal urban migration (when one family member moves to the city, others tend to follow in a “chain migration” pattern<sup>24</sup>); and the continued strength of the extended family, which may include many non-linear family members<sup>25</sup>.

Aboriginal people may choose to form separate social groups within the broader community. The use of kinship terms and courtesy titles (such as aunty, uncle, brother and sister) may be common in such groups. It has been observed that such practices provide important psychological and emotional support to many Aboriginal people, and reflect the centrality of family and community in modern Aboriginal society<sup>26</sup>.

### 3.2.2 Survival of Aboriginal Languages

- **One third of the hundreds of original Aboriginal languages still survive**

In 1990, published research indicated that approximately two thirds of the estimated hundreds of original Aboriginal languages were extinct or nearly extinct. Of the surviving 90 languages, only 20 could be classified as “healthy”, in that each such language is spoken by and transmitted to children. The remaining 70 surviving languages are classified as “severely threatened”<sup>27</sup>.

- **In 2006 12% of Aboriginal people spoke an Aboriginal language at home**

In the 2006 Census, 52,000 people (one in eight, or 12% of Aboriginal Australians, aged 5 years and over) spoke an Aboriginal language at home. The majority of those people (372,000 or 86%) reported speaking only English at home. Fifty-six percent of Aboriginal people living in geographically remote areas reported that they spoke an Aboriginal language; only 4% of Aboriginal language speakers live in major cities. Fifty-six percent of Aboriginal language speakers live in the Northern Territory. The most-used Aboriginal languages were Torres Strait Creole (5,800 speakers) and Kriol (3,900 speakers); *Arrernte*, *Djambarrpuynu*, *Pitjantjatjara* all had more than 2,500 speakers<sup>28</sup>.

### 3.2.3 Use of Names

- **The use of names in Aboriginal culture remains complex, and the taboo on referring to deceased persons by name remains in some communities**

The rules relating to the names by which an Aboriginal person may be called remain complex today. This applies particularly (but not exclusively) in traditional Aboriginal communities and in non-urban areas of Australia.

Where a more traditional culture is practised, an Aboriginal person may be known by several names including the relevant kinship term, a moiety name and a totem. An Aboriginal person may be referred to as “X’s son/daughter”, which may cause confusion where “X” has a number of sons or daughters, each of whom is referred to in that way. Sometimes a person is given a nickname as he or she grows older, which may derive from a physical characteristic or from a particular incident in that person’s life<sup>29</sup>.

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<sup>24</sup> F Gale *Urban Aborigines* Australian National University, Canberra, 1972, p 74.

<sup>25</sup> F Gale *Urban Aborigines* Australian National University, Canberra, 1972, p 165.

<sup>26</sup> C Bourke and B Edwards ‘Family and Kinship’ in C Bourke et al (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 100, pp 113-114.

<sup>27</sup> A Schmidt *The Loss of Australia’s Aboriginal Language Heritage* Aboriginal Studies Press, Canberra, 1990, pp 1, 2. See also **Chapter Five**.

<sup>28</sup> ABS, *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006*, 4713.0 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>29</sup> A Glass *Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People* Institute for Aboriginal Development, Alice Springs, Northern Territory, 1990, p 31.

For non-Aboriginal people, difficulties may arise where a person is referred to by a combination of names e.g. an English name, a surname and a subsection name.

“For example, [a man] might be called *Kumaranyga* (his personal name) by some people, or *Tjampu* (‘left handed’), his nick name. He may be called *Tjakamarra* (his subsection name) by others. He might be referred to as X’s uncle or Y’s father. These are all appropriate labels...”<sup>30</sup>

Accordingly, it may be difficult for a non-Aboriginal person to be certain that he or she is speaking or referring to an Aboriginal person by the correct or culturally appropriate name. Moreover, many traditional Aboriginal names (as well as other Aboriginal words) are difficult for non-Aboriginal people to spell and to pronounce. Such difficulties may be exacerbated by the fact that the sound of an Aboriginal name may be hard for non-Aboriginal people to understand.

As discussed in **Chapter Two**, in many traditional Aboriginal communities the name of a deceased person may not be mentioned for a long period after that person’s death. Today, the use of a deceased person’s name remains in some communities. To speak or use the name of a deceased person indicates lack of respect for the deceased and for the bereaved, and inflicts great hurt and sorrow upon the latter. Even words which sound similar to the name of the deceased person may become taboo.

Accordingly, a deceased person may be mentioned only indirectly or by reference: for example, as “X’s brother” (X being the surviving person). In the case of the predictable death of a very old person or a baby, the taboo may last for as long as a year. However, if the deceased dies in the prime of life, or if his or her relatives are especially sensitive about the death, the name of the deceased may not be spoken for 15 to 20 years<sup>31</sup>.

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<sup>30</sup> J de Hoog and J Sherwood *Working With Aborigines in Remote Areas* Mount Lawley College, Mount Lawley, 1979, p 78.

<sup>31</sup> A Glass *Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People* Institute for Aboriginal Development, Alice Springs, Northern Territory, 1990, p 39.

### 3.3

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## ABORIGINAL AND ANGLO-AUSTRALIAN CULTURAL VALUES

Broad differences between Aboriginal and non-Aboriginal (or mainstream) values have been identified by a Jill Byrne, a non-Aboriginal community development consultant, who worked for a number of years in the Kimberley. Some of Ms Byrne's observations of sharp distinctions between Aboriginal and Anglo-Australian values are re-produced below<sup>32</sup>.

Ms Bryne suggests that the principle "take only what you need today" is a central and enduring traditional Aboriginal value. In contrast, Anglo-Australian culture often operates under the capitalist value of "accumulate for tomorrow". Further, traditional Aboriginal society tends to be collectivist (value: "we all look after one another") whereas Anglo-Australian culture is individualist (value: "look after yourself").

Other points of comparison are briefly noted below. Note that the comments are very broadly stated and are not intended to be prescriptive in any way.

### 3.3.1. Apparent Differences between Aboriginal and Anglo-Australian Cultural Values:

- **Identity:**
  - *Aboriginal society:* a person's identity may be influenced by family and social factors. The nurturing of relationships is highly valued, as is the existence of a strong social network.
  - *Anglo-Australian society:* personal identity is typically individualistic and measured by a person's occupation, level of education and socio-economic status.
  
- **Life Orientation:**
  - *Aboriginal society:* the focus is often group-centred. In traditional groups, the past and the present are of great importance: the future may be less so. Immediate economic matters may take precedence over future ones. Often cooperation, rather than competition, is important.
  - *Anglo-Australian society:* the emphasis tends to be on individual achievement and individual rights. There is often a strong focus on the future, and perhaps the pursuit of personal happiness. Career, family and the accumulation of wealth are priorities. People are often highly competitive. Society is often diverse, stratified and status-conscious.
  
- **The Concept of Family:**
  - *Aboriginal society:* "family" consists of the extended family, often including quite distant family members. Family concerns are of primary importance, and the greater part of a person's life and his or her social activities may be conducted closely within the family group. Death or illness in the family generally takes priority over everything else.

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<sup>32</sup> J Byrnes 'A Comparison of Aboriginal and Non-Aboriginal Values' *Dissent* (3) Spring 2000 p 6 et seq.

- *Anglo-Australian society*: the basic family unit consists (perhaps) of one set of parents and children. Frequently, feelings of obligation towards those in lineal family relationships are stronger than those in collateral family relationships. Family and social relationships are not necessarily co-extensive.
- **Responsibility for Children:**
  - *Aboriginal society*: children may be perceived as the responsibility of the extended family, or even the wider social group. Older people are often referred to as “Aunty”, “Aunt”, “Uncle” or “Unc” as a mark of respect, even if they are not blood relatives<sup>33</sup>. However, children are also expected to make their own decisions from an early age.
  - *Anglo-Australian society*: parents are held responsible (or hold themselves responsible) for a child’s behaviour, advancement and well being into that child’s mid-to-late teenage years, and perhaps even beyond that time.
- **Social Obligation:**
  - *Aboriginal society*: people may conform to others’ expectations, particularly those of the immediate and extended family. No-one should be left in need. Family members are often expected to “look out” for one another.
  - *Anglo-Australian society*: is characterised by more limited relationships. There may be a sharp decline in a sense of responsibility from immediate family to other persons and to the wider community. However, charitable traits may be apparent.
- **Connection with Land:**
  - *Aboriginal society*: often a strong sense of relationship to ancestral land exists, even where people have not lived in that place. Spiritual strength is gained from being in one’s own country. Traditional people may wish to live in their own country if possible, or at least to visit it, and even to die there.
  - *Anglo-Australian society*: usually “land” has a secular and economic connotation. Although a person’s birthplace may have sentimental value, it is not necessarily of great importance otherwise. Travelling widely is valued, and living far from your birthplace is common.
- **Styles of Interaction - Direct or Indirect:**
  - *Aboriginal society*: since the greater part of a person’s life may be lived within the family group, respect is accorded to “inner” privacy, such as personal thoughts and feelings. Only certain people may be entitled to ask or to know certain matters of a personal nature. Consequently, the use of hints and invitations to volunteer information are preferred to direct questioning.
  - *Anglo-Australian society*: directness and forthrightness in conversations is valued, as is the free exchange of ideas and public discussion of issues. The asking of direct questions is quite acceptable, except in relation to personal matters.

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<sup>33</sup> Judicial Commission of NSW *Equality Before the Law: Bench Book*, 2006 ([www.jc.nsw.gov.au/benchbks/equality](http://www.jc.nsw.gov.au/benchbks/equality)) Sec 2.3.0.4. (Accessed 5 July 2008)

- **Material Possessions:**
  - *Aboriginal society:* in traditional society material goods are not highly prized, because family and spiritual matters are of the most importance. In a more contemporary context, material possessions of all kinds may be highly valued.
  - *Anglo-Australian society:* material possessions are highly prized: the acquisition and accumulation of material goods is socially sanctioned.
- **Education:**
  - *Aboriginal society:* the word “education” may refer to learning cultural and possibly spiritual ways, as well as to formal education in mainstream institutions.
  - *Anglo-Australian society:* institutional, multidisciplinary education is highly valued. Often the focus of education is to maximise career and employment prospects.
- **Public Behaviour:**
  - *Aboriginal society:* social behaviour is often public. In some traditional communities, drinking in public with friends and family is accepted. In such groups, public displays of affection between men and women may be disapproved.
  - *Anglo-Australian society:* generally speaking, there is disapproval of public drinking. However, public displays of affection between men and women are usually acceptable<sup>34</sup>.

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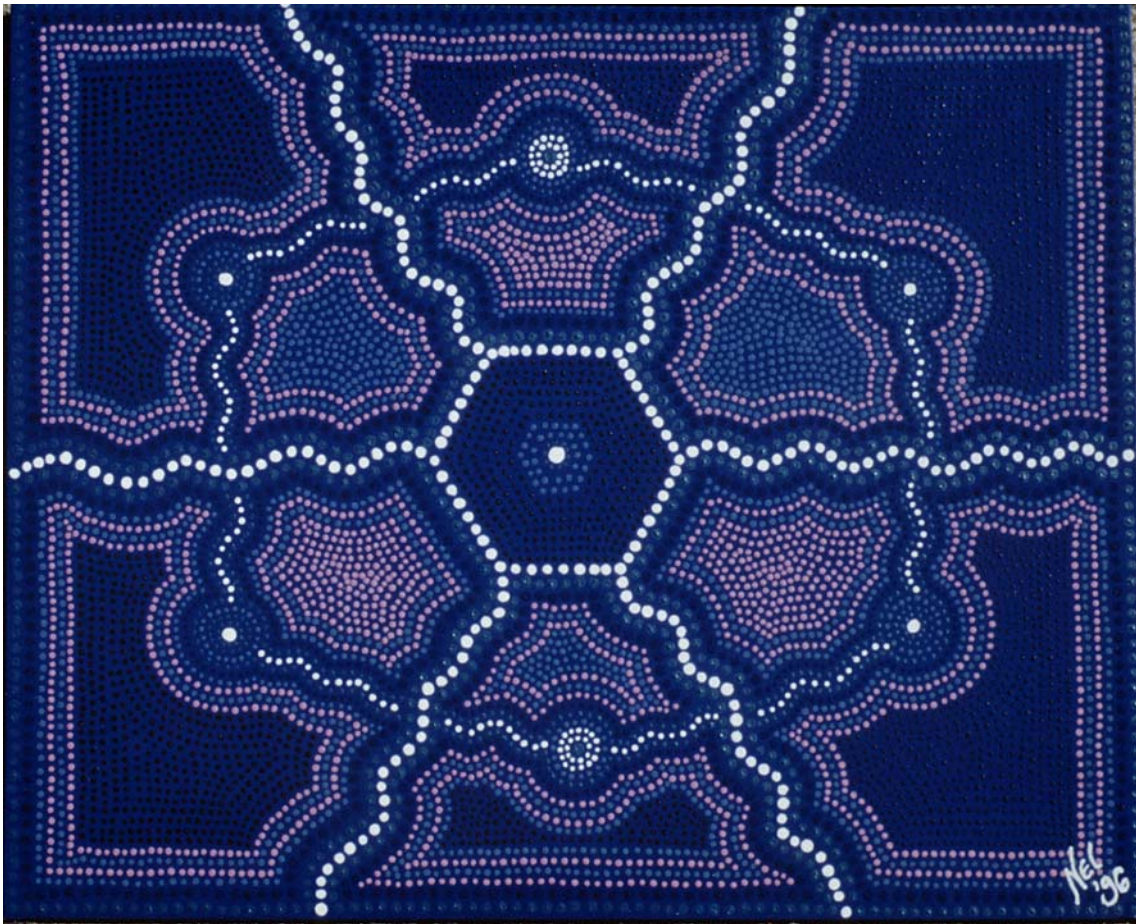
<sup>34</sup> J Byrnes ‘A Comparison of Aboriginal and Non-Aboriginal Values’ *Dissent* (3) Spring 2000 p 6, pp 6-1.

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## Chapter Four: Aboriginal People in Western Australia





# Chapter Four: Aboriginal People in Western Australia

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Upon the recommendation of Western Australian Aboriginal advisers, the word “Aboriginal”, rather than “Indigenous” is used in this Benchbook

## **Summary of Chapter Four**

# **Aboriginal People in Western Australia**

### **4.1 DEMOGRAPHIC DATA**

#### **4.1.1 Aboriginal Population/Households: 2006 Census**

- In 2006 the estimated resident Aboriginal population of Western Australia was 77,900 persons, an increase of 18% from the 2001 Census
- In 2006 34% of Aboriginal people in Western Australia lived in and around the Perth metropolitan area

#### **4.1.2 Other Data from the 2006 Census**

- A snapshot of other data is provided in relation to Aboriginal Households, Household Dwellings, Median Weekly Income, Education and Labour Force Participation Rate

### **4.2 THE CRIMINAL JUSTICE SYSTEM**

#### **4.2.1 Overview of the Crime Rate**

#### **4.2.2 Rates of Aboriginal Participation in the Criminal Justice System**

- Aboriginal people, particularly females, continue to be arrested at a highly disproportionate rate
- Rates of aboriginal victimisation remain disproportionately high
- Aboriginal juvenile offending rates and recidivism remain extremely high
- Aboriginal people remain grossly over-represented in all forms of custody

### **4.3 ABORIGINAL POLICY AND SERVICES**

#### **4.3.1 Aboriginal Justice Agreement**

- The Aboriginal Justice Agreement provides for the creation of local Aboriginal justice groups, with broad representation, throughout Western Australia

#### **4.3.2 Aboriginal Policy and Support Services**

- A range of Western Australian and Commonwealth Government initiatives operate to support the Aboriginal community

#### **4.4 TRADITIONAL LANGUAGE REGIONS AND GROUPS**

##### **4.4.1 Language Regions and Groups**

- There are five Aboriginal language regions in the State of Western Australia, in which 99 separate language groups have been identified
- There are five broad Aboriginal language regions in the State of Western Australia:
  - the South West Region;
  - the North West Region;
  - the Kimberley Region;
  - part of the Desert Region;
  - part of the Fitzmaurice Regions.
- Brief overview of the matters relating to the five language regions, including geography, contact with white settlers, survival of culture and the names and locations of the traditional language groups

##### **4.4.2 Survival of Aboriginal Languages**

- Four Aboriginal languages within Western Australia have been identified as being “healthy” or “strong”: these are *Yinjibarndi* (Fortescue River area), *Nyangumarda* (Telfer area), *Jaru* (Halls Creek area) and “Western Desert” dialects

#### **4.5 KEY LEGISLATIVE MEASURES 1886 – 2008**

- Since the late nineteenth century a range of legislative measures have been enacted for the governance and protection of Aboriginal people (summary table of key legislation provided)



# Aboriginal People in Western Australia

## 4.1

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### DEMOGRAPHIC DATA

The Census of Australia's population on 30 June 2006 revealed stark demographic differences between Aboriginal and non-Aboriginal Western Australians. The summary below is drawn from data contained in those two surveys.

#### 4.1.1 Aboriginal Population/Households: 2006 Census

- **In 2006 the estimated resident Aboriginal population of Western Australia was 77,900 persons, an increase of 18% from the 2001 Census**

As at 30 June 2006 the estimated resident Aboriginal population in Western Australia was 77,900 persons, representing an estimated 3.8% of the State's total population<sup>1</sup>. Western Australia had the third highest estimated number of Aboriginal residents, after New South Wales and Queensland. Western Australia indicated the highest growth rate in its Aboriginal population in the country since the 2001 Census (18%); the national growth rate was 13% since the 2001 Census<sup>2</sup>.

In 2006 the median age of all West Australians was 36 years, while the median age of West Australia's Aboriginal population was 21 years. Nineteen per cent of the non-Aboriginal population was aged under 15 years, compared with 36.5% of the Aboriginal population<sup>3</sup>.

- **In 2006 34% per cent of Aboriginal people in Western Australia lived in and around the Perth metropolitan area**

In 2006, according to the Remoteness Structure utilised by the Australian Bureau of Statistics<sup>4</sup> (ABS), 34% of the Aboriginal population of Western Australia lived in and around Perth, compared with a 31% national rate. Forty-one percent of Aboriginal people in Western Australia lived in Remote or Very Remote areas (compared with 24% nationally)<sup>5</sup> and the remainder in regional areas.

The distribution of Western Australia's Aboriginal population according to the ABS' Remoteness structure is shown in the map on the following page<sup>6</sup>:

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<sup>1</sup> Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, 15 August 2007, 4705.0, p 4. The estimated resident population is calculated by adjusting the census count for instances in which Aboriginal status is unknown and for net undercount. (Note: in 2006 a total of 58,711 people in Western Australia identified themselves as Indigenous: ABS, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, 15 August 2007, 4705.0, p 19) ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008).

<sup>2</sup> ABS, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, 15 August 2007, 4705.0, Table 1 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

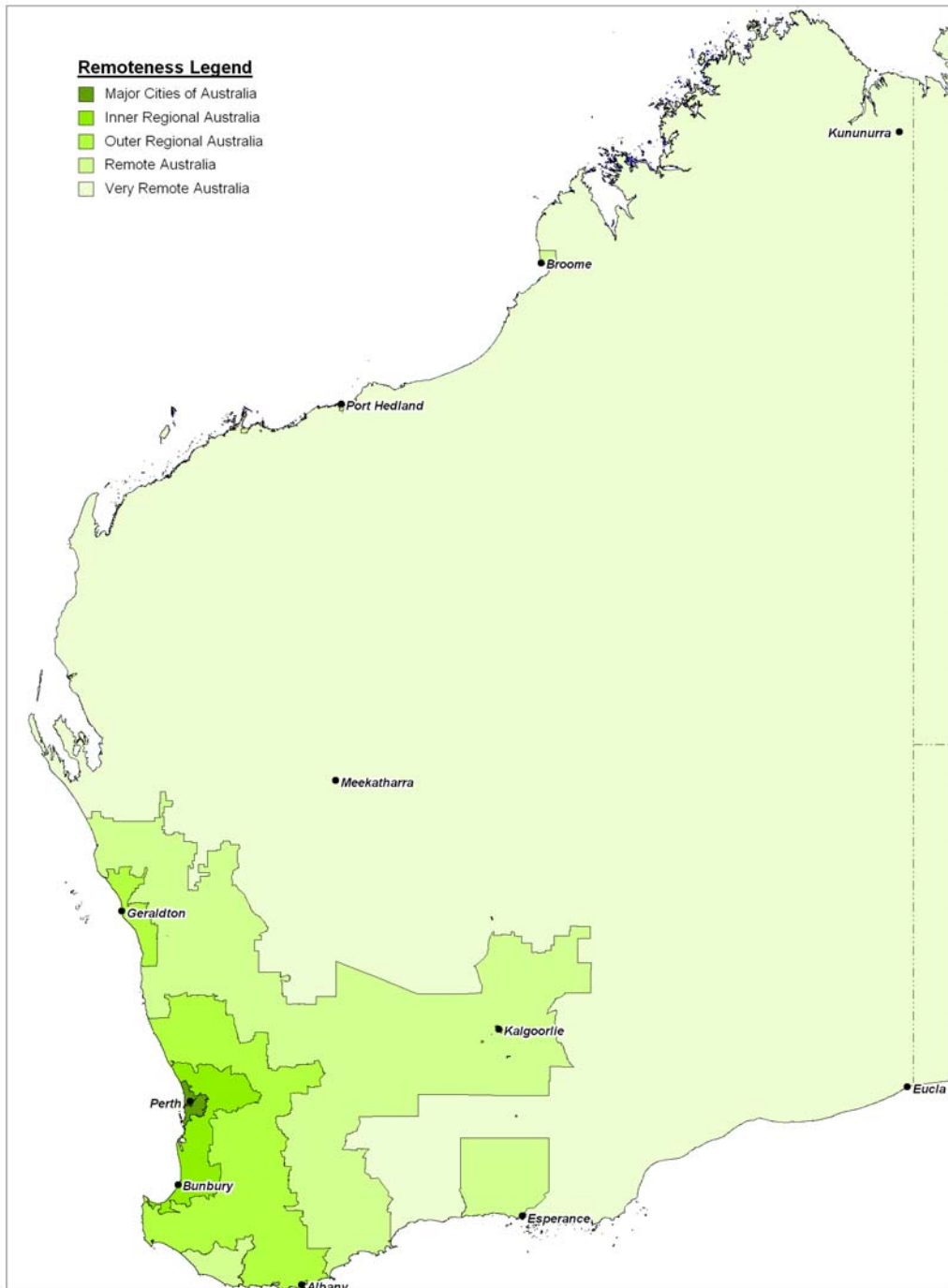
<sup>3</sup> ABS, *Australian Demographic Statistics*, Dec 2007, 3101.0, pp 41-44 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008).

<sup>4</sup> ABS' Census Geography Paper 03/01 - *ASGC Remoteness Classification: Purpose and Use* June, 2003 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008). The remoteness structure reflects Census collection districts with common characteristics.

<sup>5</sup> ABS, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, 15 August 2007, 4705.0, p 6 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>6</sup> The map depicting the Remoteness Structure was kindly provided by Mr Peter Bowen, Manager, Geospatial Unit, National Native Title Tribunal, Perth, Western Australia.

### Accessibility/Remoteness Index of Australia (ARIA) Western Australia



**Data Statement**

Remoteness areas are based on the Accessibility/Remoteness Index of Australia (ARIA) developed by the Department of Health and Ageing (Aust Gov't) and the National Key Centre For Social Applications of GIS (GISCA).  
Jurisdictional boundaries and coastline sourced from Geoscience Australia

Produced by Geospatial Services, NNTT  
27 June 2008

#### 4.1.2 Other Data from the 2006 Census

- **Households**

In 2006 the average Aboriginal household in Western Australia comprised 3.5 persons, compared with 2.5 persons for Anglo-Australian/other households. Seven and a half per cent of the Aboriginal population reported sharing a dwelling with more than one family (the proportion was higher in remote communities), compared with only 1% of non-Aboriginal families<sup>7</sup>.

- **Household dwellings**

In 2006 the majority of Aboriginal households in Western Australia (62%) lived in rented dwellings: this compares with only 26% of non-Aboriginal households. Seventy per cent of all non-Aboriginal householders owned or were purchasing their own home, compared with 30% of Aboriginal households<sup>8</sup>.

- **The median weekly income**

In 2006 the median weekly income for an Aboriginal person aged 15 years and over (\$254) in Western Australia was approximately half that of a non-Aboriginal person (\$507) of the same age group<sup>9</sup>.

- **Education**

In 2006 53% of Aboriginal persons in Western Australia aged 15 to 17 were students, compared with 78% of the total population in that age group. Three per cent of the Aboriginal population was enrolled at a tertiary institution, two thirds of whom were female<sup>10</sup>. This compares favourably with the national rate (see **Chapter Three**, at **3.1.4**).

- **Labour force participation rate**

In 2006 the Aboriginal employment participation rate in Western Australia was 60%; the unemployment rate was 13% and the employment to population ratio was 54%<sup>11</sup>. These rates are similar to the national rates (see **Chapter Three**, at **3.1.5**).

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<sup>7</sup> ABS, *2006 Census Community Profile Series: Western Australia- Indigenous Profile* 2002.0, 2007, Table I 22a ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>8</sup> ABS, *2006 Census Community Profile Series: Western Australia- Indigenous Profile* 2002.0, 2007, Table I 18a ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>9</sup> ABS, *2006 Census Community Profile Series: Western Australia- Indigenous Profile* 2002.0, 2007, Table I 12 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>10</sup> ABS, *2006 Census Community Profile Series: Western Australia- Indigenous Profile* 2002.0, 2007, Table I 10 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>11</sup> ABS, *Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians: Experimental Estimates from the Labour Force Survey, 2006* 6287.0, 2006, p 16. ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)



## 4.2

### THE CRIMINAL JUSTICE SYSTEM

#### 4.2.1 Overview of the Crime Rate

The *Crime and Justice Statistics for Western Australia: 2005* (the latest statistics available) indicate that in 2005 in 2005 273,735 separate offences were reported to police. The rates of robbery and assault in Western Australia were above the national average: overall rates of sexual assault were lower and burglary had decreased by 41% since 2001<sup>12</sup>.

In 2000 the highest level of violence in Western Australia, including the highest rate of sexual offences, had been recorded in the Kimberley. About three-quarters of all crime reported in the State occurred in the metropolitan area, and Perth recorded the highest rate of robbery offences. In 2005 violent offence rates (directly relating to high levels of Aboriginal victimisation) were highest in the Kimberley, Pilbara, South East and Central regions. Perth recorded the highest incidences of robbery offences, the Kimberley region had the highest rate of sexual offences (as it had in 2000), and the highest rate of property offences was recorded in the Central region<sup>13</sup>.

#### 4.2.2 Rates of Aboriginal Participation in the Criminal Justice System

- **Aboriginal people, particularly females, continue to be arrested at a highly disproportionate rate**

In 2000 improved data-retrieval methods permitted a higher degree of accuracy in the assessment of the extent of Aboriginal involvement in the criminal justice system. The research since that time clearly demonstrates that Aboriginal people in Western Australia continue to be disproportionately involved in crime, both as offenders and victim. The latter applies particularly to Aboriginal females.

Since 1990, the number of arrests for non-Aboriginal persons in Western Australia has remained relatively steady. Conversely the rate at which Aboriginal people were arrested has continued to climb. In 1990 Aboriginal people were 7 times more likely than non-Aboriginal people to be arrested; that had increased to a factor of 10 in 2000. In 2005 that rate had decreased to eight times that of the non-Aboriginal population; however, for offences against the person, the arrest rate was 19 times that of the non-Aboriginal population. The arrest rate of Aboriginal women increased significantly: from 1,381 per 100,000 in 1991 to 2,744 in 100,00 in 2005<sup>14</sup>. In many cases the arrests related to good order offences or suspected driving offences. However, Aboriginal women were more than 34 times more likely than non-Aboriginal women to be arrested for crimes against the person<sup>15</sup>.

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<sup>12</sup> NSN Loh, M.G. Maller, J.A. Fernandez, A.M. Ferrante, & M.R.J. Walsh *Crime and Justice Statistics for Western Australia: 2005*, The University of Western Australia Crime Research Centre, 2007 p vii ([www.crc.law.uwa.edu.au/data/page/38151/stats\\_report\\_2005\\_without\\_maps.pdf](http://www.crc.law.uwa.edu.au/data/page/38151/stats_report_2005_without_maps.pdf)). (Accessed 10 July 2008)

<sup>13</sup> NSN Loh, M.G. Maller, J.A. Fernandez, A.M. Ferrante, & M.R.J. Walsh *Crime and Justice Statistics for Western Australia: 2005*, The University of Western Australia Crime Research Centre, 2007 p vii ([www.crc.law.uwa.edu.au/data/page/38151/stats\\_report\\_2005\\_without\\_maps.pdf](http://www.crc.law.uwa.edu.au/data/page/38151/stats_report_2005_without_maps.pdf)). (Accessed 10 July 2008)

<sup>14</sup> NSN Loh, M.G. Maller, J.A. Fernandez, A.M. Ferrante, & M.R.J. Walsh *Crime and Justice Statistics for Western Australia: 2005*, The University of Western Australia Crime Research Centre, 2007 p vii ([www.crc.law.uwa.edu.au/data/page/38151/stats\\_report\\_2005\\_without\\_maps.pdf](http://www.crc.law.uwa.edu.au/data/page/38151/stats_report_2005_without_maps.pdf)). (Accessed 10 July 2008)

<sup>15</sup> NSN Loh, M.G. Maller, J.A. Fernandez, A.M. Ferrante, & M.R.J. Walsh *Crime and Justice Statistics for Western Australia: 2005*, The University of Western Australia Crime Research Centre, 2007 p 46 ([www.crc.law.uwa.edu.au/data/page/38151/stats\\_report\\_2005\\_without\\_maps.pdf](http://www.crc.law.uwa.edu.au/data/page/38151/stats_report_2005_without_maps.pdf)). (Accessed 10 July 2008)

- **Rates of Aboriginal victimisation remain disproportionately high**

In 2000, based on crimes reported to the police, the victimisation rate of Aboriginal persons was more than five times that of non-Aboriginal persons. In 2002, 26% of Aboriginal persons living in Western Australia reported being a victim of physical or threatened violence; most assaults involved the unemployed and those in the 15-24 age group<sup>16</sup>. A 2001 study of assaults against Aboriginal women revealed that in 53% of the cases the offender was known to the victim, and in 69% of those cases the violence was “domestic” that is, the offender was the spouse or partner of the victim<sup>17</sup>.

- **Aboriginal juvenile offending rates and recidivism remain high**

In its detailed study *Pathways through Justice: A Statistical Analysis of Offender Contact with the WA Juvenile Justice System. Final Report* the Crime Research Centre at the University of Western Australia, reported that in the period 1995-2002 Aboriginal juveniles aged 10-12 years were more than 10 times more likely than non-Aboriginal juveniles to enter the justice system. The majority of Aboriginal offenders are likely to enter the system for offences against property and good order offences compared with non-Aboriginal juveniles who commit property, drug and driving offences. The number of Aboriginal female juveniles arrested was approximately 10% higher than that of non-Aboriginal, and represented about half of all contacts with the criminal justice system.

In a two year period the rate of Aboriginal recidivism was 59%, compared with 36% rate for non- Aboriginal offenders; that 14% of Aboriginal recidivists progressed to detention, compared with 4% of non- Aboriginal recidivists and that one in every five Aboriginal contacts each year is a first offender, while the remaining four are repeat offenders<sup>18</sup>.

During the period July 2005 - June 2006 90% of juveniles dealt with under the law in regional and remote areas were Aboriginal<sup>19</sup>.

- **Aboriginal people remain grossly over-represented in all forms of custody**

In 1991 the *Royal Commission into Aboriginal Deaths in Custody* reported that Aboriginal people were more than 20 times as likely as non-Aboriginal people to be taken into custody, a rate described by the Royal Commissioner as “grossly disproportionate”<sup>20</sup>. In 2007, in Western Australia, the rate was 27 times (3,886 per 100,000 adult population)<sup>21</sup>. The percentage of Aboriginal persons in adult prisons rose to a peak of 43% in June 2007, and has not fallen below 35% since November 2003<sup>22</sup>. Thus, 17 years after the Royal Commission, the rate at which Aboriginal people are taken into custody remains grossly disproportionate.

<sup>16</sup> ABS, *National Aboriginal and Torres Strait Islander Social Survey*, 2002 (4714.0) p 15 ([www.abs.gov.au](http://www.abs.gov.au)) (Accessed 10 July 2008)

<sup>17</sup> H Blagg *Crisis Intervention in Aboriginal Family Violence: Summary Report* Crime Research Centre, University of Western Australia, 2000, p 5. Dr Blagg reported that the rate of violence directed towards “family” in general was higher in Aboriginal than in non-Aboriginal communities, constituting 22.6% of homicides and 17.2% of serious assault in Aboriginal communities, compared with 14.8% and 4.4% respectively in non-Aboriginal communities.

<sup>18</sup> AM Ferrante, NSN Loh, M.G. Maller. *Pathways through Justice: A Statistical Analysis of Offender Contact with the WA Juvenile Justice System. Final Report*, The University of Western Australia Crime Research Centre, 31 July 2004, pp 16, 35, 38, 52-57 ([www.crc.law.uwa.edu.au/bodycopy.php?f=115066](http://www.crc.law.uwa.edu.au/bodycopy.php?f=115066)). (Accessed 10 July 2008). See also *Indigenous Young People with Cognitive Disabilities and Australian Juvenile Justice Systems – A Report by the Aboriginal and Torres Strait Islander Social Justice Commissioner*, Human Rights and Equal Opportunity Commission: Sydney, 2005 ([www.hreoc.gov.au/social\\_Justice/publications/cognitive.htm](http://www.hreoc.gov.au/social_Justice/publications/cognitive.htm)) (Accessed 10 July 2008).

<sup>19</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) p 86. (Accessed 5 July 2008)

<sup>20</sup> RCIADIC, [www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/2.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/2.html), para 2. (Accessed 10 July 2008)

<sup>21</sup> ABS, *Prisoners in Australia* 4517.0, Dec 2007 p 18 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008). In March 2008 the rate was (3,554 per 100,000 adult population): ABS, *Corrective Service, Australia, March 2008: Summary of Findings* 4512.0, 2008 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>22</sup> Department of Corrective Services, Government of Western Australia, *Monthly Graphical Report, July 2008*, p 4 ([www.correctiveservices.wa.gov.au/files/AG\\_Report\\_0807.pdf](http://www.correctiveservices.wa.gov.au/files/AG_Report_0807.pdf)). Accessed 10 July 2008)

In 2005 Aboriginal persons accounted for 45% of prison receivals, but frequently were imprisoned for much shorter sentences than non-Aboriginal persons, indicating a greater throughput. In 2005 Aboriginal prisoners accounted for 65% of offences against the person and 58% of offences for property damage. In 2005 Aboriginal women accounted for 8% of prison receptions, a third of which were resulted from fine default<sup>23</sup>. In 2005 the Aboriginal juvenile detention rate (555.3 per 100,000 Aboriginal juveniles) was 44 times higher than that of the non-Aboriginal rate juveniles. It was the highest in Australia, and almost double the national rate<sup>24</sup>.

The Chief Justice of Western Australia, the Hon Wayne Martin, has described the gross over-representation of Aboriginal people in the Western Australian criminal justice system as “one of the greatest issues confronting that system”, the importance of which was impossible to overstate in terms of developing appropriate social policy<sup>25</sup>.

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<sup>23</sup> NSN Loh, M.G. Maller, J.A. Fernandez, A.M. Ferrante, & M.R.J. Walsh *Crime and Justice Statistics for Western Australia: 2005*, The University of Western Australia Crime Research Centre, 2007 p ix ([www.crc.law.uwa.edu.au/data/page/38151/stats\\_report\\_2005\\_without\\_maps.pdf](http://www.crc.law.uwa.edu.au/data/page/38151/stats_report_2005_without_maps.pdf)). (Accessed 10 July 2008)

<sup>24</sup> NSN Loh, M.G. Maller, J.A. Fernandez, A.M. Ferrante, & M.R.J. Walsh *Crime and Justice Statistics for Western Australia: 2005*, The University of Western Australia Crime Research Centre, 2007 p vii ([www.crc.law.uwa.edu.au/data/page/38151/stats\\_report\\_2005\\_without\\_maps.pdf](http://www.crc.law.uwa.edu.au/data/page/38151/stats_report_2005_without_maps.pdf)). (Accessed 10 July 2008)

<sup>25</sup> *State of Western Australia v Richards* [2008] WASCA 134 at [3], [5].

## 4.3

### ABORIGINAL POLICY AND SERVICES

#### 4.3.1 Aboriginal Justice Agreement

- **The Aboriginal Justice Agreement provides for the creation of local Aboriginal justice groups, with broad representation, throughout Western Australia**

Recommendations 2 and 3 of the *Royal Commission into Aboriginal Deaths in Custody: National Report* proposed the establishment of independent Aboriginal Justice Advisory Committees in each State and Territory. In 1992 an Aboriginal Justice Advisory Council was established in Western Australia to give interim effect to those recommendations; this Council was disbanded in July 2002.

In 2004 an *Aboriginal Justice Agreement (AJA)*<sup>26</sup>, led by the Department of the Attorney-General for Western Australia, was established. The co-signatories to the AJA are the Aboriginal Legal Service of Western Australia, the Western Australia Police Services (WAPS), the Department of Indigenous Affairs (DIA), the Department of Community Development and Department of Corrective Services. The Aboriginal Services Department of the Department of the Attorney-General<sup>27</sup> coordinates and facilitates the implementation of the AJA.

Since its inception in 2004, 56 local justice forums have been created pursuant to the AJA throughout the State, comprising representatives of the Aboriginal community and any Government or non-government agency involved in Aboriginal justice issues. Each justice forum is tasked with producing a justice plan which addresses the priority justice issues in a particular area and is capable of responding to changing needs. To date, a number of regional and local plans had been signed off, including the *Ngaanyatjarra*, *Kalumburu Warakurna* and *Warburton* plans and the Kimberley Custodial Plan<sup>28</sup>, and further plans are being progressed. In addition, a number of joint community justice initiatives have been sponsored. These included the introduction of Aboriginal Street Patrols, which have proved highly effective both in regional and metropolitan areas.

#### 4.3.2 Other Policy and Support Services

- **A range of Western Australian and Commonwealth Government initiatives operate to support the Aboriginal community**

A range of Western Australian and Commonwealth Government initiatives have been introduced to improve social, cultural and economic outcomes for Aboriginal people in the State, and to better support the Aboriginal community<sup>29</sup>. These include:

- The Aboriginal Legal Service of Western Australia and the National Network of Indigenous Women's Legal Services provide legal assistance to Aboriginal people;
- The Aboriginal Services Department of the Department of the Attorney-General administers the Aboriginal Alternative Dispute Resolution Service;

<sup>26</sup> Available at [www.justice.wa.gov.au/W/wa\\_aboriginal\\_justice\\_agreement.aspx](http://www.justice.wa.gov.au/W/wa_aboriginal_justice_agreement.aspx) (Accessed 10 July 2008)

<sup>27</sup> See [www.justice.wa.gov.au/A/aboriginalpolicyservices.aspx](http://www.justice.wa.gov.au/A/aboriginalpolicyservices.aspx). (Accessed 10 July 2008)

<sup>28</sup> *Kimberley Custodial Plan*, Dept of Justice, Perth, October 2005. Available at ([www.correctiveservices.wa.gov.au/files/Kimberley\\_Custodial\\_Plan\\_Report1.pdf](http://www.correctiveservices.wa.gov.au/files/Kimberley_Custodial_Plan_Report1.pdf)). (Accessed 10 July 2008)

<sup>29</sup> See also N Morgan and J Motteram, *Aboriginal People and Justice Services: Plans, Programs and Delivery*, LRCWA Project No 9, Background Paper No 7 (December 2004) ([www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-07.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-07.pdf)) at 293. (Accessed 10 July 2008)

- The Aboriginal Health Council of WA (ACHWA) acts as a forum for Aboriginal controlled health care, develops networks, and provides research, policy development and strategic planning. AHCWA advocates for health care services and implements Aboriginal programs. The Derbarl Yerrigan Health Service is staffed by Aboriginal health workers, home and community-care workers care aids, registered nurses, doctors and case workers;
- The Freedom from Fear Campaign addresses problems of domestic violence. The Women's Council for Domestic and Family Violence Services (WA) represents 50 refuges in Western Australia, 20 of which are in rural and remote areas from the Kimberley to the South West regions;
- The Geraldton Family and Domestic Violence Project (a joint initiative of the Department of the Attorney General, the Department of Corrective Services and the Geraldton Community) is designed to reduce family and domestic violence through diversionary and treatment programs, the focus of which is the culturally-appropriate Barndimalgu Court;
- The Aboriginal Alcohol and Drugs Service (formerly the Noongah Alcohol and Drug Service) provides counselling and training for Aboriginal people affected directly or indirectly by alcohol and substance abuse.
- The Aboriginal Alternative Dispute Resolution Service provides an alternative to using legal action to resolve disputes, including neighbourhood disputes;
- The *Jungarni-Jutiya* Alcohol Action Council - Aboriginal Corporation provides services designed to reduce the amount of substance abuse in Halls Creek;
- Yorgum Aboriginal Corporation is an Aboriginal community-based organisation offering a family violence assistance program;
- The Aboriginal Visitors Scheme provides support and counselling for Aboriginal detainees in prisons, juvenile detention centres and police lock-ups;
- *Better Planning: Better Services* fosters improvements in the Western Australian public sector's engagement with Aboriginal (and other) Western Australians;
- The Kimberley Interpreter Service and the Wangka Maya Aboriginal Language Centre in the Pilbara provide Aboriginal language interpreting services;
- The Indigenous Co-ordination Centre promotes the distinct identity of Indigenous Australians and to preserve Indigenous cultural heritage;
- The Commonwealth Government runs the Aboriginal Hostels Limited which provides temporary accommodation services and meals to Aboriginal people.

Note: in July 2006 the State of Western Australia and the Commonwealth signed a Bilateral Agreement on Indigenous Affairs. This Agreement establishes a framework for intergovernmental cooperation to secure wide-ranging improvements for Aboriginal people, including in respect of law and order and public safety.<sup>30</sup>

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<sup>30</sup> See [www.dia.wa.gov.au/Our-Business/Partnerships/Bilateral-Agreement/](http://www.dia.wa.gov.au/Our-Business/Partnerships/Bilateral-Agreement/) (Accessed 10 July 2008)

## 4.4

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### WESTERN AUSTRALIAN ABORIGINAL LANGUAGE REGIONS

#### 4.4.1 Traditional Language Regions Groups in Western Australia

- **There are five Aboriginal language regions in the State of Western Australia**

Between 1988 and 1994 researchers from the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) undertook an intensive mapping exercise of Aboriginal language regions within Australia. The researchers identified 19 separate language regions within Australia which were broadly congruent with natural environmental regions and drainage basins<sup>31</sup>. Within those 19 regions are many hundreds of distinct language groups and languages.

The AIATSIS researchers identified 99 traditional language groups within five language regions in the State of Western Australia. Those five regions are:

- the South West Region;
- the North West Region;
- the Kimberley Region;
- part of the Desert Region;
- part of the Fitzmaurice Regions.

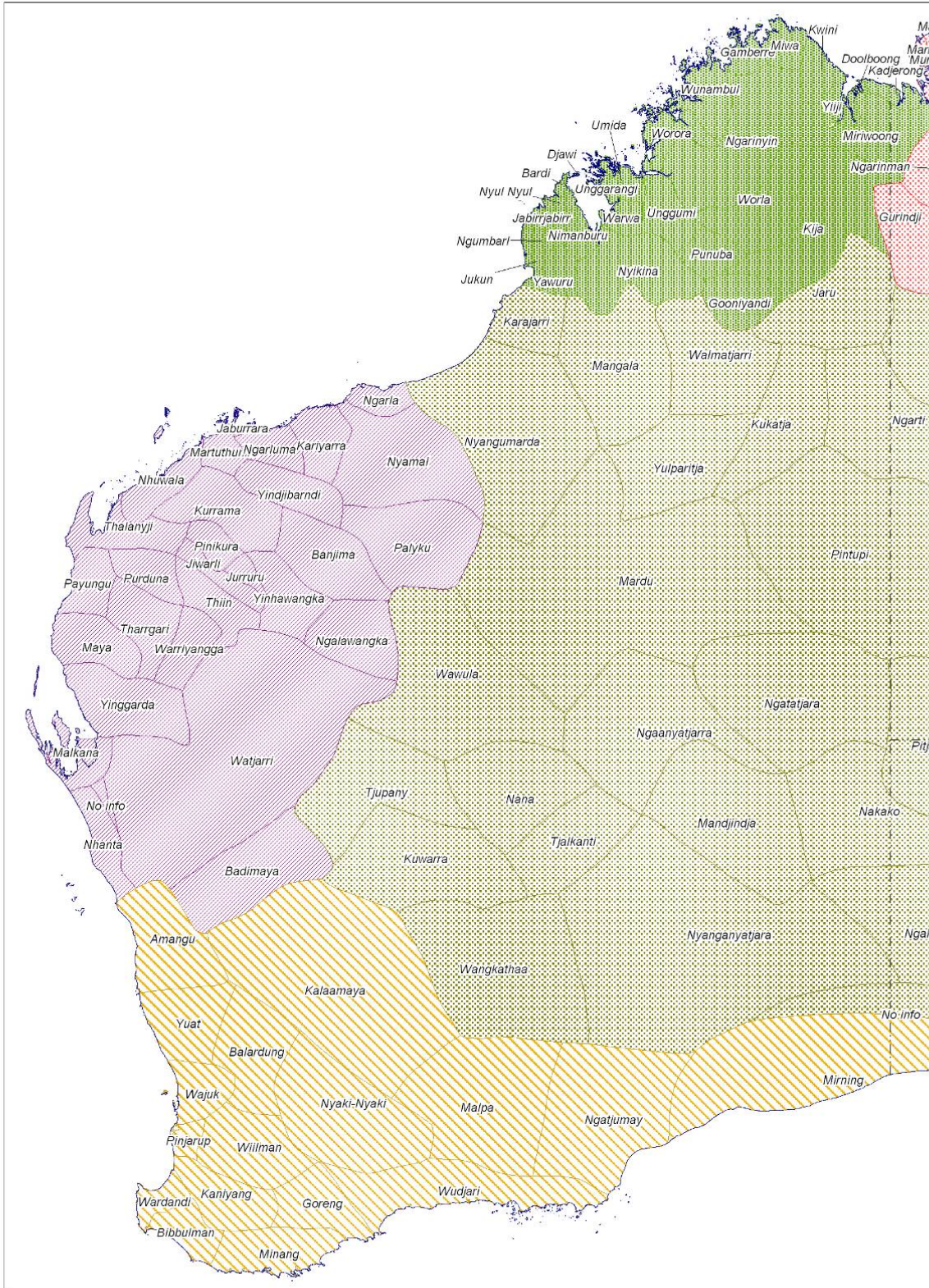
A map depicting the language regions and traditional language groups of Western Australia appears on the following page<sup>32</sup>. A broad summary of some of the physical and cultural features of the language regions, and a note of the names of the language groups, is contained in the succeeding pages.

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<sup>31</sup> D Trigger 'Some Aspects of Cultural Diversity Throughout Indigenous Australia' in F McKeown (ed) *Native Title: An Opportunity for Understanding* Proceedings of Induction Course conducted by the National Native Title Tribunal at the University of Western Australia, Nedlands, 1 – 3 December, 1993, p 29. For information on tribal groupings following Tindale, 1974, see [www.samuseum.sa.gov.au/orig/tindale/hdms/tindaletribes/about.htm](http://www.samuseum.sa.gov.au/orig/tindale/hdms/tindaletribes/about.htm). (Accessed 10 July 2008)

<sup>32</sup> The map depicting Horton language boundaries kindly provided by Mr Peter Bowen, Manager, Geospatial Unit, National Native Title Tribunal, Perth, Western Australia.

### Tribal/Language Groups as published by D.R.Horton (1994) within Western Australia



**Data Statement**  
Tribal/Language boundaries sourced from SKM and (c) AIATSIS  
Jurisdictional boundaries and coastline sourced from Geoscience Australia

Produced by Geospatial Services, NNTT  
27 June 2008

- **Overview of the South West Region**

- *Geography*: This area largely consists of woodland area, with abundant food and other resources. The easternmost areas are arid, ultimately giving way to desert. Historically, because of its natural advantages, this area supported the densest Aboriginal population in the State.
- *Culture*: Much of this region is the homeland of peoples who speak the various dialects of the *Noongar* (*Nyungar* or *Nyungah*) language. At the northern boundary of this region the country becomes known as *Yamatji* (or *Yamadji*) country.
- *Contact with white settlers*: Intensive contact with white settlers commenced in 1825 with the establishment of a military base in King George Sound. By 1830 dispossession of the *Noongar* people commenced in earnest as white settlers pushed into the interior regions of the country. In 1832 the “Battle of Pinjarra”, a massacre of Aboriginal people, took place.
- *Survival of culture*: Despite almost complete dispossession by white farmers and traders, Aboriginal communities remain strong in the small regional towns. Inter-connected family groupings remain the basis of Aboriginal communal life, even though many members have dispersed from the region.
- *Traditional language groups*: There are 17 traditional language groups within the South West Region, which are listed below.

Note: \* indicates that the group’s language boundary extends into South Australia.

- *Mirning\** (Madura, Eucla, Deakin, Nullarbor area)
- *Ngatjumay* (Balladonia area)
- *Malpa* (Kambalda, Lake Lefroy, Lake Cowan, Norseman, Lake Dundas, Johnston Lakes area)
- *Wudjari* (Ravensthorpe, Esperance, Cape Pasley areas)
- *Nyaki-Nyaki* (Newdegate, Lake Grace, Corrigin, Merriden, Kellerberrin areas)
- *Goreng* (Jerramungup, Gnowerangerup, Katanning areas)
- *Minang* (Mount Barker, Denmark, Albany, Cape Vancouver area)
- *Bibbulman* (Manjimup, Pemberton, Blackwood River area)
- *Wardandi* (Cape Leeuwen, Augusta, Margaret River, Cape Naturaliste, Busselton area)
- *Kaniyang* (Bunbury, Harvey, Collie and Kojonup area)
- *Wiilman* (Wagin, Narrogin, Williams, Pingelly area)
- *Pinjarup* (Pinjarra, Mandurah, Waroona area)
- *Wajuk* (Perth, Rockingham, Kwinana, Yanchep, Toodyay area)
- *Balardung* (Beverley, York, Northam, Goomalling, Wyalkatchem, Quairading, Wongan Hills area)
- *Yuat* (Moore River, Gingin, Moora, Dalwallinu, Jurien area)
- *Kalaamaya* (Southern Cross, Mukinbudin, Lake Moore, Lake Barlee area)
- *Amangu* (Geraldton, Dongara, Eneabba, Three Springs, Mullewa, Morowa area).



- **Overview of the North West Region**
  - *Geography*: the North West Region comprises two major districts, the Gascoyne and the Pilbara. A number of islands, including Dirk Hartog Island and the Dampier Archipelago lie off the western coast; the coastal plains are flat and low-lying; inland from the coastal plains are low tablelands.
  - *Culture*: the country in the southern area of this region is often described as *Yamatji* country. Rock paintings are an important part of traditional culture. Places such as Gallery Hill and Depuch Island contain many examples of early rock art.
  - *Contact with white settlers*: Port Hedland, the first coastal town in this area, was established to service the pastoral industry. Many Aboriginal people worked in the pastoral industry, often, but not always, under very poor working conditions. Others were “blackbirded” to work on pearling vessels. In 1872 sixty Aboriginal people were killed at the “Massacre at Flying Foam Passage”. Racial tensions became extremely high in the early 1980s following the death of a teenager, John Pat, in police custody in Roebourne.
  - *Survival of culture*: during the period 1946-48 Aboriginal stockman maintained a strike against their working conditions in the pastoral industry. Subsequently a number of outstation communities, such as Yandearra and Strelley, were established, often on freehold or leasehold title. Some outstations in the Pilbara range in size from 56,000 to 484,000 ha.
  - *Traditional language groups*: there are 28 traditional language groups within the North West Region, which are listed below.
    - *Badimaya* (Mount Magnet area)
    - *Watjarri* (Wilga Mia, Murchison River area)
    - *Nhanta* (Northampton, Kalbarri area)
    - *Malkana* (Dirk Hartog Island, Denham, Hamelin area)
    - *Yingardda* (Carnarvon, Shark Bay, Gascoyne Junction, Wooramel area)
    - *Maya* (Cape Cuvier, Lake McLeod area)
    - *Payunga* (area north of *Maya*)
    - *Tharrgari* (area south-east of *Payunga*)
    - *Thalanji* (Exmouth Gulf, North West Cape, Learmonth area)
    - *Purduna* (area south-east of *Thalanji*)
    - *Wariyangga* (area east of *Tharrgari*)
    - *Thiin* (area north of *Wariyangga*)
    - *Jiwarli* (area north of *Thiin*)
    - *Jurruru* (area north of *Jiwarli*)
    - *Pinikura* (area north-west of *Jiwarli*)
    - *Yinhawangka* (Paraburdoo area)
    - *Ngalawangka* (area east of *Yinhawangka*)
    - *Banjima* (Tom Price, Wittencoom area)
    - *Kurramma* (Pannawonica, Hamersley Range area)
    - *Nhuwala* (Onslow area)
    - *Martuthunira* (Dampier area)
    - *Jaburrara* (Karratha, Dampier Archipelago area)
    - *Yinjibarndi* (Fortescue River area)
    - *Ngarluma* (Roebourne, Whim Creek area)
    - *Palyku* (Jigalong, Newman area)
    - *Nyamal* (Marble Bar, Gallery Hill, Shay Gap area)
    - *Kariyarra* (Port Hedland area)
    - *Ngarla* (Goldsworthy area)

- **Overview of the Desert Region**

- *Geography*: much of the Desert Region is low-rainfall, with arid conditions and sandy desert in the Gibson Desert, Great Victoria Desert and Nullarbor Plain areas. However, there are also mountain ranges near the South Australian and Northern Territory borders. The population density is very low.
- *Culture*: people in the western areas may describe themselves as *Wongi* (or *Wonga*). There is a rich art culture: waterholes figure prominently in traditional songs, stories and paintings.
- *Contact with white settlers*: the first non-Aboriginal people to move into the Desert Region were pastoralists and missionaries. The discovery of gold in Kalgoorlie in 1893 transformed the economy of the region, although for the most part Aboriginal people did not receive the benefits.
- *Survival of culture*: many former mission stations and pastoral properties have come under Aboriginal control. To some extent the traditional art is commercially exploited today, creating a local economic base.
- *Traditional language groups*: there are 26 traditional language groups within the Desert Region, as listed below.

Note: \* indicates that the group's language boundary extends into South Australia;  
° indicates that the group's language boundary extends into the Northern Territory.

- *Wangkatha* (Kalgoorlie-Boulder, Menzies, Lake Rebecca, Lake Ballard, Leonora and Lake Carey area)
- *Nganganyatjara* \* (Warburton area)
- *Ngalea* \* (Rawlinna and areas north)
- *Nakako* \* (area north of *Ngalea*)
- *Pitjantatjara* \* (Petermann Range area)
- *Mandjindja* (Great Victoria Desert area)
- *Tjalkanti* (Laverton and areas north to Lake Wells)
- *Nana* (area north-west of *Tjalkanti*)
- *Tjupany* (Meekatharra, Lake Annean, Wiluna area)
- *Wawula* (Carnarvon Range, Little Sandy Desert area)
- *Mardu* (Lake Disappointment area)
- *Ngaanyatjarra* (Warburton area)
- *Ngatatjara* (area north of *Ngaanyatjarra*)
- *Pintupi* ° (Lake McDonald, Lake McKay area)
- *Ngarti* ° (Balgo area)
- *Warlpiri* ° (north-east of *Ngarti*)
- *Kuwarra* (Leinster area)
- *Nakako* (area east of *Mandjindja*)
- *Kukatja* (area west of *Ngarti*)
- *Yulparitja* (area north of *Mardu*)
- *Nyangumarda* (Telfer, Throssell Ranges area)
- *Karajarri* (Bidyadanga area)
- *Mangala* (Great Sandy Desert area)
- *Walmatjarri* (area east of *Mangala*)
- *Jaru* (Halls Creek area)

- **Overview of the Kimberley Region**

- *Geography*: the most north-westerly part of the Kimberley Region consists of rugged terrain with tropical summer rains, high summer temperatures and woodland vegetation. The southern part of the region comprises arid desert.
- *Culture*: this region is extremely complex culturally and linguistically. It is famous for its artistic culture, featuring the Bradshaw, *Wandjina* and *Gurangara* rock art, as well as rare bark paintings.
- *Contact with white settlers*: although the explorer Dampier first discovered the Kimberley in the 17<sup>th</sup> century, it was one of the last areas to be colonised, due to its distance from other population areas and its difficult terrain. In the 1880s pastoralists from the eastern seaboard drove cattle into the west Kimberley, and graziers brought sheep from the coast into the east Kimberley. A brief gold rush in the late nineteenth century created settlements such as Hall's Creek.
- *Survival of culture*: in the last half of the twentieth century traditional Aboriginal culture was severely affected by the building of the Ord River Dam near Kununurra, which flooded a huge expanse of country and many important sites. Later, the discovery of diamonds in the Lake Argyle area created further industrial development.
- *Traditional language groups*: the 27 traditional language groups within the Kimberley Region are listed below.

Note: ° indicates that the group's language boundary extends into the Northern Territory.

- *Jukin* (Broome area)
- *Yawuru* (area south of *Jukin*)
- *Ngumbarl* (area north-west of *Jukun*)
- *Jabirrabirr* (Cape Baskerville area)
- *Nyul Nyul* (area north of *Jabirrabirr*)
- *Bardi* (Lombardina, Cape Leveque area)
- *Djawi* (islands in King Sound)
- *Nimanburu* (King Sound area)
- *Nyikina* (Derby, Looma, Noonkanbah, Fitzroy Crossing area)
- *Warwa* (King Sound area)
- *Unggarangi* (area north-west of *Warwa*)
- *Umida* (Koolan Island area)
- *Unggumi* (area east of *Warwa*)
- *Punuba* (Fitzroy River area)
- *Gooniyandi* (south-east of *Punuba*)
- *Worla* (King Leopold Ranges, Durack Range area)
- *Ngarinyin* (Drysdale River area)
- *Worora* (Augustus Island, Collier Bay, Prince Regent River area)
- *Wunambul* (Bonaparte Archipelago, Bigge Island area)
- *Gamberre* (Cape Bougainville, Kalumburu area)
- *Miwa* (Cape Londonderry area)
- *Kwini* (area south-east of *Miwa*)
- *Yijji* (area south-east of *Kwini*)
- *Doolboong* (Wyndham, Ord river area)
- *Kadjerong* ° (area east of *Doolboong*)
- *Miriwoong* ° (Kununurra, Lake Argyle area)
- *Kija* ° (Lake Argyle, Turkey Creek area)

- **The Fitzmaurice Region**
  - **Summary:** a relatively small portion of the language area of the *Gurindji* people of the Northern Territory extends into Western Australia. Most of the *Gurindji* language area is located in the Fitzmaurice Region in the north-west of the Northern Territory.

#### 4.4.2 Survival of Aboriginal Languages in Western Australia

- **Four Aboriginal languages are identified as being “healthy” or “strong”**
  - *Yinjibarndi* (Fortescue River area);
  - *Nyangumarda* (Telfer area);
  - *Jaru* (Halls Creek area); and
  - Western Desert dialects.

In research findings published in 1990, only four Aboriginal languages within Western Australia were identified as being “healthy” or “strong” (meaning a language which is actively transmitted to and used by children<sup>33</sup>). Of those, only one, *Yinjibarndi* is contained within the North West Region: it is spoken in the Fortescue River area.

The remaining “healthy” languages are spoken in the Desert Region: *Nyangumarda* (Telfer, Throssell Ranges area), *Jaru* (Halls Creek area) and four varieties of the language described as “Western Desert”: *Mandjindja* (Great Victoria Desert area) *Mardu* (Lake Disappointment area), *Ngaanyatjarra* (Warburton area) and *Kukatja* (area west of *Ngarti*)<sup>34</sup>.

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<sup>33</sup> A Schmidt *The Loss of Australia’s Aboriginal Language Heritage* Aboriginal Studies Press, Canberra University of Western Australia, Nedlands, 1 – 3 December 1993, p 29

<sup>33</sup> A Schmidt *The Loss of Australia’s Aboriginal Language Heritage* Aboriginal Studies Press, Canberra University of Western Australia, Nedlands, 1 – 3 December 1993, pp 1, 2.

<sup>34</sup> A Schmidt *The Loss of Australia’s Aboriginal Language Heritage* Aboriginal Studies Press, Canberra University of Western Australia, Nedlands, 1 – 3 December 1993, p 4. Note that the English spelling of Aboriginal words, including the names of languages, may vary quite markedly from source to source.

## 4.5

### KEY LEGISLATIVE MEASURES

#### 1886—2008

- **Since the late nineteenth century a range of legislative measures have been enacted for the governance and protection of Aboriginal people**

In 1886 the *Aborigines Protection Act 1886* (50 Vic No 25) established the Aborigines Protection Board. Responsibility for matters relating to the health, welfare and advancement of Aboriginal people within the colony was vested in that Board.

In the succeeding decades more than one hundred statutes affecting Aboriginal people were enacted in Western Australia<sup>35</sup>. A useful summary of the early legislation is contained in the judgment of Owen J in *Judamia v State of Western Australia*<sup>36</sup>. See also the discussion of early history by the High Court in *Western Australia v Commonwealth (Native Title Case)*<sup>37</sup>.

The *Aborigines Act 1905* (WA) and the *Native Administration Act 1936* (WA) introduced measures which are now widely condemned. Pursuant to the former law, the Chief Protector of “aboriginal people” was empowered to effect measures for the relief, protection and control of Aboriginal persons.

Under the *Native Administration Act 1936* (WA) every “native child” (which term was defined in a convoluted way by reference to bloodline) was made the legal ward of the Commissioner for Native Administration. The Minister was empowered to remove any Aboriginal person *inter alia* from a reserve, district or hospital. Accordingly, many families were dispersed and fragmented. The Act imposed a permit system for entry into certain towns and regulated matters such as marriage, health, employment and the management of money or property. Aboriginal people camped near towns could be moved on by the local “protector”, usually a policeman. However, exemption from the operation of the *Native Administration Act 1936* (WA) could be obtained by Aboriginal persons who renounced their Aboriginality. Such renunciation required the abandoning of links with Aboriginal family, culture, language and traditions. The severance process compounded the suffering of many Aboriginal people who had been forcibly removed from their traditional country.

In 1954 the *Native Welfare Act 1954* (WA) repealed the most draconian statutory measures, but under its provisions the removal of children still occurred.

The first “progressive” law enacted in respect of Aboriginal people was the *Aboriginal Affairs Planning Authority Act 1972* (WA), which, among other things, created the Aboriginal Affairs Planning Authority and created the Aboriginal Lands Trust. It also introduced certain protective provisions for Aboriginal people involved in criminal proceedings.

A detailed examination of general laws enacted in relation to Aboriginal people in Western Australia is not possible here. However, the major enactments which have governed or impacted upon the lives of Aboriginal people in Western Australia are noted in the table on the next page.

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<sup>35</sup> See the discussion in J McCorquodale *Aborigines and the Law: A Digest* Australian Studies Press, Canberra, 1987.

<sup>36</sup> Unreported, WA Sup Ct, 23 January 1995, No 950137.

<sup>37</sup> (1995) 183 CLR 373.

LEGISLATION	MAIN FEATURES
<i>Aborigines Protection Act 1886</i>	<ul style="list-style-type: none"> <li>Established the Aboriginal Protection Board (APB) with responsibility for Aboriginal health &amp; welfare</li> </ul>
<i>Aborigines Act 1897</i>	<ul style="list-style-type: none"> <li>APB replaced by an Aboriginal Dept (AD) with similar responsibilities; appointed the Chief Protector (CP)</li> </ul>
<i>Aborigines Act 1905 (WA)</i>	<ul style="list-style-type: none"> <li>Law for the "better protection and care" of Aborigines;</li> <li>CP became guardian of all Aboriginal and "half-caste" children under 16 years; could remove "orphaned" or "needy" children to missions</li> <li>Police and justices of peace had extensive powers</li> </ul>
<i>Native Administration Act 1936 (WA)</i>	<ul style="list-style-type: none"> <li>AD replaced by Dept of Native Affairs (DNA): CP replaced by a Commissioner, who became the legal guardian of all Aboriginal people under 21 years;</li> <li>Permitted the removal of Aboriginal people to any reserve, district, hospital or institution.</li> </ul>
<i>Native (Citizenship Rights) Act 1944 (WA)</i>	<ul style="list-style-type: none"> <li>Permitted Aboriginal people to apply for citizenship if they relinquished traditional connections.</li> </ul>
<i>Native Welfare Act 1954 (WA)</i>	<ul style="list-style-type: none"> <li>This law repealed much of the discriminatory measures, but still permitted the removal of children;</li> <li>DNA replaced by Dept of Native Welfare (DNW).</li> </ul>
1967 Amendments to Australian Constitution	<ul style="list-style-type: none"> <li>Section 51 (xxvi) Constitution amended; removal of prohibition on the Commonwealth Govt to legislate for Aboriginal people;</li> <li>Section 127 Constitution repealed; Aboriginal people to be counted in the Census.</li> </ul>
<i>Aboriginal Affairs Planning Authority Act 1972 (WA)</i>	<ul style="list-style-type: none"> <li>DNW replaced by Aboriginal Affairs Planning Authority; Aboriginal Lands Trust created;</li> <li>Responsibility for Aboriginal education, health, housing etc devolved to mainstream Departments.</li> <li>s 4(2) AAPAA contained clauses from the old protection and surveillance era.</li> </ul>
<i>Aboriginal Heritage Act 1972 (WA) / Aboriginal Heritage (Marandoo) Act 1992 (WA)</i>	<ul style="list-style-type: none"> <li>Law to facilitate the protection of Aboriginal sacred and significant sites.</li> </ul>
<i>Aboriginal Councils and Associations Act 1976 (Cth) / Aboriginal Communities Act 1979 (WA)</i>	<ul style="list-style-type: none"> <li>Establishment of Aboriginal councils</li> <li>Councils empowered to assist Aboriginal communities to manage and control their community lands</li> <li>Provided for the incorporation and regulation of Aboriginal and Torres Strait Islander corporations</li> </ul>
<i>Aboriginal Education (Supplementary Assistance) Act 1989 (Cth)</i>	<ul style="list-style-type: none"> <li>Financial assistance to encourage Aboriginal students to complete secondary &amp; tertiary education.</li> </ul>
<i>Council for Aboriginal Reconciliation Act 1991 (Cth)</i>	<ul style="list-style-type: none"> <li>Established Reconciliation Council with mandate to heal societal divisions, promote a united Australia.</li> </ul>
<i>Aboriginal and Torres Strait Islander Act 1991 (Cth)</i>	<ul style="list-style-type: none"> <li>Established Aboriginal and Torres Strait Islander Commission (ATSIC) a representative body;</li> </ul>
<i>Native Title Act 1993 (Cth) / Land Titles Validation Act 1995 (WA)</i>	<ul style="list-style-type: none"> <li>Establishment of native title regime following <i>Mabo</i>; extensive validation of extinguished native title and limitation of the <i>Racial Discrimination Act 1975 (Cth)</i>.</li> </ul>
<i>Native Title Amendment Act 1993 (Cth) / Land Titles Validation (Amend) Act 1998 (WA)</i>	<ul style="list-style-type: none"> <li>Imposed more restrictive native title regime</li> </ul>
<i>Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (Cth)</i>	<ul style="list-style-type: none"> <li>Abolished ATSIC</li> <li>Abolished regional councils</li> </ul>
<i>Aboriginal and Torres Strait Islander Act 2005 (Cth)</i>	<ul style="list-style-type: none"> <li>Continued the Torres Strait Regional Authority, and set up Indigenous Business Australia and the Indigenous Land Corporation</li> </ul>
<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i>	<ul style="list-style-type: none"> <li>Provides for a new regime for the incorporation and regulation of Aboriginal and Torres Strait Islander corporations</li> </ul>
<i>Native Title Amendment Act 2007 (Cth) / Native Title Amendment (Technical Amendments) Act 2007 (Cth)</i>	<ul style="list-style-type: none"> <li>Amendments introduced to encourage resolution of native title claims by agreement, and to enhance the mediation provisions of the <i>Native Title Act</i> and the role of the Native Title Representative Bodies</li> </ul>

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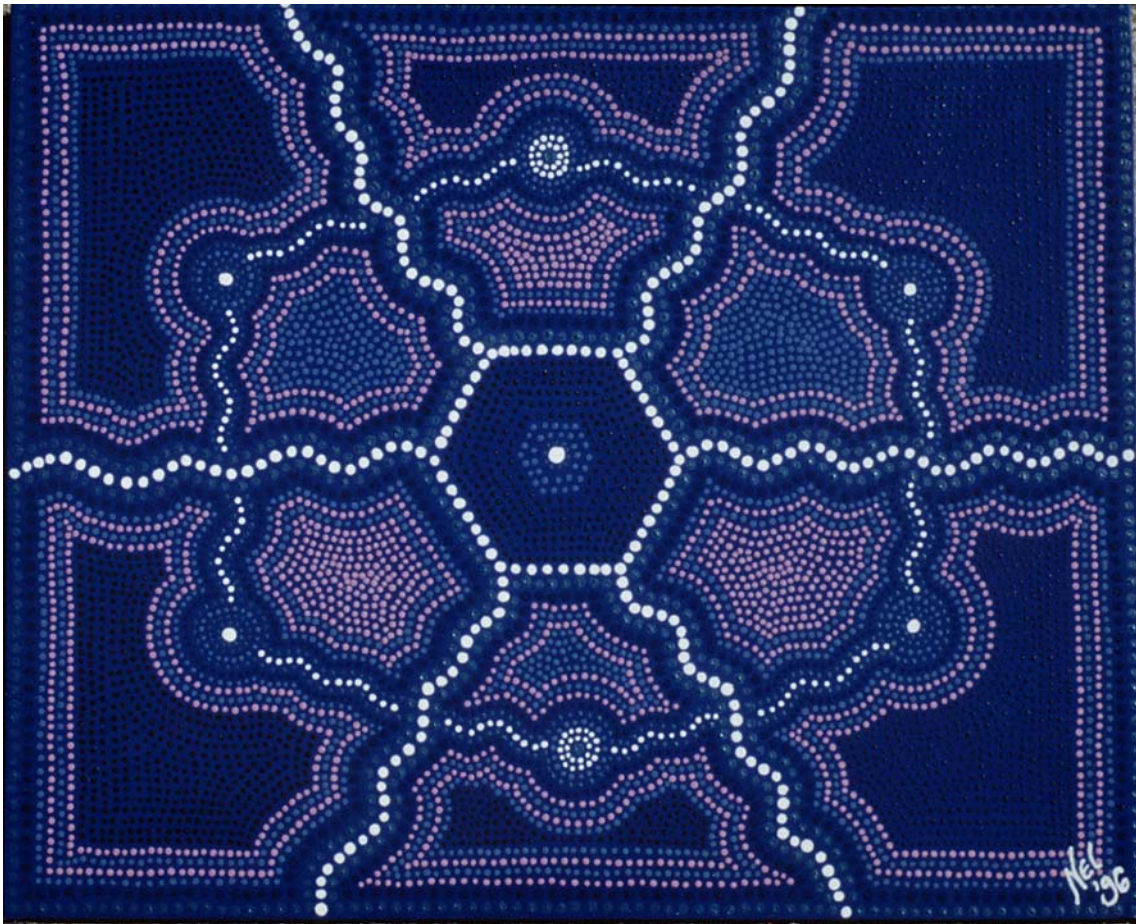
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# Chapter Five: Language and Communication



# Chapter Five: Language and Communication

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Upon the recommendation of Western Australian Aboriginal advisers, the word "Aboriginal", rather than "Indigenous" is used in this Benchbook

## Summary of Chapter Five

# Language and Communication

### 5.1 ABORIGINAL LANGUAGES AND DIALECTS

#### 5.1.1 Survival of Aboriginal Languages

- Approximately 90 Aboriginal languages are still being spoken in Australia
- In 2006 12% of Aboriginal people reported that they spoke an Aboriginal language at home

#### 5.1.2 Features of Aboriginal Languages

- All Aboriginal languages contain a complex consonant system

#### 5.1.3 Example of an Aboriginal Language: *Ngaanyatjarra*

- *Ngaanyatjarra* , which is spoken in the Western Desert region reflects the environment within which the people live
- Linguistically and conceptually *Ngaanyatjarra* is very different from English
- *Ngaanyatjarra* has no formal system of quantification
- *Other Ngaanyatjarra* language concepts relate to seasons and colours
- *Ngaanyatjarra* has adapted/borrowed certain English words

### 5.2 MODERN ABORIGINAL LANGUAGES AND DIALECTS

#### 5.2.1 Kriol and Torres Strait Creole

- Kriol is a form of pidgin English spoken in northern Australia
- Torres Strait Creole, which is related to Kriol, is the most widely spoken indigenous language

#### 5.2.2 Aboriginal English

- Aboriginal English dialects, which range from “light” to heavy”, are commonly spoken
- The use of Aboriginal English may create significant communication problems

## **5.3 COMMUNICATION STYLES**

### **5.3.1 Characteristics of Communication within Aboriginal Society**

- The avoidance of direct eye contact demonstrates politeness and respect
- Silence plays an important and valued role in communication
- Aboriginal people use sign language quite widely
- Aboriginal people prefer to communicate indirectly, rather than to ask direct questions

### **5.3.2 Cultural Barriers to Effective Communication**

- In Aboriginal culture, family or kin relationships are accorded primacy
- An Aboriginal person may have difficulty in answering questions which are put directly
- Gratuitous concurrence (or the tendency to agree with a particular proposition or question, regardless of whether the speaker in fact does agree with it) may be a particular problem

### **5.3.3 Specific Language Difficulties**

- Aboriginal people may experience problems in understanding English, both linguistically and conceptually (these are listed and explained)
- Aboriginal people may experience difficulty in specifying numbers, time or distances

## **5.4 COMMUNICATING EFFECTIVELY WITH SPEAKERS OF ABORIGINAL ENGLISH**

### **5.4.1 Suggested “Do’s”**

- Speak slowly and clearly
- Use an ordinary tone of voice
- Use the name by which the speaker wishes to be addressed
- Use an indirect approach to the asking of questions (three suggestions)
- Check with the speaker of Aboriginal English to establish if he or she understands the legal words being used
- Show respect and consideration at all times
- Simplify the use of words
- Be careful of “I don’t know” responses

#### **5.4.2 Suggested “Dont’s”**

- Don’t attempt to speak Aboriginal English
- Don’t use complex sentences or figurative speech
- Don’t ask negative questions
- Don’t use “either-or” questions
- Don’t use technical legal words unless it is essential
- Don’t use terminology and descriptors which may cause offence

**Note: Interpreting and Interpreters are discussed in Chapter Six**

## CHAPTER FIVE

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# Language and Communication

## 5.1

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### TRADITIONAL ABORIGINAL LANGUAGES

There is evidence that prior to the British colonisation of the continent in 1788 several hundred Aboriginal languages and dialects were spoken in Australia.

#### 5.1.1 Contemporary Aboriginal Language Use

- **Approximately 90 Aboriginal languages are still being spoken**

Research indicates that approximately only 90 (one third) of the hundreds of original Aboriginal languages have survived to modern times. Of those, only 20 languages can be classified as “healthy”, in that each such language is spoken by and transmitted to children<sup>1</sup>.

- **In 2006 12% of Aboriginal people reported that they spoke an Aboriginal language at home**

In the 2006 Census 52,000 people (or 12% of Aboriginal Australians, aged 5 years and over) reported speaking an Aboriginal language at home. Fifty-six percent of Aboriginal people living in geographically remote areas reported that they spoke an Aboriginal language; only 4% of Aboriginal language speakers lived in major cities<sup>2</sup>.

#### 5.1.2 Features of Aboriginal Languages

- **All Aboriginal languages contain a complex consonant system**

All Aboriginal languages contain a complex consonant system, and fewer vowels than English. Where:

“English has only three places where the passage of air can be closed off – the lips (as in *b* and *p*), the tip of the tongue against the gum ridge (*d* and *t*), and the back of the tongue against the soft palate (*g* and *k*). Many Australian languages have six such places, as many as any language in the world. They also use back of the tongue against the teeth, blade of tongue against the hard palate, and tip of tongue turned back onto the roof of the mouth (a retroflex sound similar to languages in India). Australian languages often have six corresponding nasal sounds (where as English just has *m* and *n*). Another notable feature is that they have two rhotic or *r*-sounds, one like the Australian English *r* and also a trill as in Scottish English. Sometimes there can be as many as four *l*-sounds. The sibilants or fricatives *s* and *sh* are universally absent in Australian languages. There are two semi-vowels, *y* and *w*. Most of the languages have only three vowels – *i*, *a* and *u* – but a few have four or more.”<sup>3</sup>

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<sup>1</sup> A Schmidt *The Loss of Australia's Aboriginal Language Heritage* Aboriginal Studies Press, Canberra, 1990, pp 1, 2. See also **Chapter Three**, at 3.2.2.

<sup>2</sup> Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006*, 4713.0 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 11 July 2008) See also **Chapter Three**, at 3.2.2.

<sup>3</sup> DJ Mulvaney & J Kamminga *Prehistory of Australia*. Allen & Unwin, NSW, 1999, pp 70-71

Further:

“Words show case, tense and mood by the addition of meaningful segments, which make for very long words. Nouns and verbs have markers on them that indicate who does what to whom, when it is done, and how. New words are derived by adding other meaningful segments.”<sup>4</sup>

The traditional Aboriginal hunter-gather-cultivator lifestyle resulted in languages possessing a “semantic homogeneity”. Many languages (including *Ngaanyatjarra*, which is described below) “distinguish classes of nouns, which have classifiers marking them as, for instance, edible flesh or vegetable, male or female”<sup>5</sup>.

### 5.1.3 Features of a Traditional Aboriginal Language - *Ngaanyatjarra*

- ***Ngaanyatjarra*, which is spoken in the Western Desert region, reflects the environment within which people live**

The *Ngaanyatjarra* language group is located in the Western Desert region of Western Australia. *Ngaanyatjarra* is one of the few remaining “healthy” or “strong” Aboriginal languages in Western Australia, in that its speakers are able to communicate entirely in the language.

- **Linguistically and conceptually *Ngaanyatjarra* is very different from English**

The *Ngaanyatjarra* language contains:

- No ‘f’, ‘h’, ‘s’, ‘v’, ‘x’, or ‘z’ sounds; so “we had a fight” translates to “we ‘ad a bight”;
- Three ‘t’ sounds (symbolised ‘t’, ‘tj’ and ‘rt’); eg “kutja”;
- Two ‘r’ sounds (symbolised ‘r’ and ‘rr’); rr is similar to the Scottish “r”;
- Four ‘n’ sounds (symbolised ‘n’, ‘rn’, ‘ny’ and ‘ng’) such as “Noongar”.

*Ngaanyatjarra* has a different word order from English. For example, a translation of the sentence “We went to that big water-hole over there” appears as follows:

<i>Majpitjangu-latju</i>	<i>kapi</i>	<i>nyarra</i>	<i>purlkanya-ku</i>
Went-we	water	that	big-to

Often, one *Ngaanyatjarra* word has a number of different meanings in English. A non-Aboriginal person may not know that those different meanings exist. Examples of *Ngaanyatjarra* words with multiple meanings in English include the following:

<i>Wanka</i>	means	“alive”, “awake” and also “uncooked”
<i>Pungku</i>	means	“will hit” and “will kill”
<i>Nyinaku</i>	means	“will sit”, “will stay” and “will live”
<i>Pina</i>	means	“ear” and “mind”
<i>Mirri</i>	means	“unconscious” and “dead”

On the other hand, sometimes one English term has a number of different meanings in *Ngaanyatjarra*. For example:

“will hit”	(1)	<i>pungku</i> (will hit from nearby, using stick or hand)
	(2)	<i>yatulku</i> (will hit with a missile)
“to choke”	(1)	<i>lirrintanka</i> (to choke another person)
	(2)	<i>ngakalku</i> (to choke on something stuck in the throat)

<sup>4</sup> DJ Mulvaney and J Kamminga *Prehistory of Australia*. Allen & Unwin, NSW, 1999, p 71.

<sup>5</sup> DJ Mulvaney and J. Kamminga *Prehistory of Australia*. Allen & Unwin, NSW, 1999, p 71.



The following examples show that linguistic and conceptual differences between *Ngaanyatjarra* and English can be very significant:

"[I]f one was cross-questioning a child...*nyuntulu-muntan pungu* ? 'Did you hit him? (from nearby)' the child might honestly answer 'no' because he had *yaturnu* 'hit him with a stone'....

[T]he [translated] statement 'a man has just died in the camp' may cause some consternation if what was meant was 'a man has just fainted in the camp'."<sup>6</sup>

- ***Ngaanyatjarra* has no formal system of quantification**

*Ngaanyatjarra*, like many traditional Aboriginal languages, has no formal system of quantification (numbers, time, distance, quantity etc). For example:

- **Numbers:** in the *Ngaanyatjarra* language, numerical concepts consist only of:

<i>Kutja</i>	one
<i>Kutjarra</i>	two
<i>Marnkurra</i>	three or 'a few'
<i>pimi</i>	'many'.

Larger numbers can be made by combining the smaller numbers e.g. *kutjarra-kutjarra* ('four') or *kutjarra-marnkurra* ('five').

- **Time:** *Ngaanyatjarra* words relating to time do not correspond to English words.

For example, the English word "now" often means "right at this moment". There are two *Ngaanyatjarra* words for "now": *kuwarri* and *walykunya*. According to the context in which those words

For example, the English word "now" often means "right at this moment". There are two *Ngaanyatjarra* words for "now": *kuwarri* and *walykunya*. According to the context in which those words are used, they may mean any one of the following: "within the hour"; "sometime today"; "this week"; or "current times" (as opposed to "former times").

- **Time spans:** time spans are referred to by natural phenomena. Thus, years are calculated by numbers of "hot seasons" (or more recently, by Christmases; months are counted by lunar months (*kirnara*). Weeks are counted by the number of Sundays (*wiiki*), and days by the number of sleeps (*ngurra*, camp)<sup>7</sup>.

Time spans are measured by the peak of the period. Thus, 15 months would be referred to as *kurli kutjarra* (two years) if it included two hot seasons.

Traditionally, *Ngaanyatjarra* people do not celebrate birthdays or count years for the purpose of calculating age.

<sup>6</sup> A Glass *Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People*, Institute for Aboriginal Development, Alice Springs, Northern Territory, 1990, p 17.

<sup>7</sup> A Glass *Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People*, Institute for Aboriginal Development, Alice Springs, Northern Territory, 1990, p 18.

- **Other Ngaanyatjarra language concepts relate to seasons and colours**

- **Seasons:** the year is broken into four seasons:

<i>Kurli</i>	“hot season”
<i>Wiltjanyina</i>	“sitting in the shade time”
<i>Nyirnga</i>	“cold season”
<i>pirriya-pirriya</i>	“windy season”

- **Colours:** *Ngaanyatjarra* colour terms correspond to the natural environment. Thus:

<i>yukiri-yukiri</i>	green ('like grass')
<i>yilkari-yilkari</i>	blue ('like sky')
<i>mantaly-mantalpya</i>	brown ('earthy')
<i>yirnantji- yirnantji</i>	yellow ('like acacia blossom')

- ***Ngaanyatjarra* has adapted/borrowed certain English words**

Since the sound systems of *Ngaanyatjarra* and English are so different, *Ngaanyatjarra* adaptations of English words are difficult to understand. Since no *Ngaanyatjarra* words end in a consonant, extra vowels or the suffix *-pa* will be added to an English word. This, for example, “town” becomes *tawunpa*.

## 5.2

### MODERN ABORIGINAL LANGUAGES AND DIALECTS

#### 5.2.1 Modern Aboriginal Languages: Kriol and Torres Strait Creole

- **Kriol is a form of pidgin English spoken in northern Australia**

Kriol (or Roper River Creole) is a form of pidgin English which is spoken as a first language in northern areas of Western Australia, the Northern Territory and possibly in Queensland<sup>8</sup>. Kriol is recognised as being linguistically different from other creole languages (hence its distinct spelling). Although the majority of Kriol words are English, the structure, grammar, spelling and sound of Kriol are unique. Accordingly, Kriol is not readily understood by most English speakers. Kriol is the second most widely spoken indigenous language in Australia, with 3,900 speakers.

- **Torres Strait Creole is related to Kriol, and is the most widely spoken indigenous language in Australia**

Torres Strait Islander people have developed a related creole language. This language is usually known as "Torres Strait Creole" but may also be referred to in other terms, including "Broken" Creole. Torres Strait Creole is the most widely spoken indigenous language in Australia, with 5,769 speakers<sup>9</sup>.

#### 5.2.2 Modern Aboriginal Dialects: Aboriginal English

- **Aboriginal English dialects, which range from "light" to heavy", are commonly spoken**

Many Aboriginal people speak dialects of English known as "Aboriginal English" or "non-standard English" (Aboriginal English). Usually such dialects are spoken in a domestic or familiar social environment. Aboriginal English dialects constitute a continuum, ranging from those close to English (the acrolect or "light" Aboriginal English) to those close to Aboriginal Kriol (the basilect or "heavy" Aboriginal English). The differences between standard and Aboriginal English are found in every area of language: sounds or accent, grammar, vocabulary, meaning, use and style<sup>10</sup>. Some Aboriginal people are "bi-culturally competent", adept at switching between Standard English and Aboriginal English<sup>11</sup>. However, many people are not:

"The number of Aboriginal English speakers who are truly bi-culturally competent is very small. The extent of bi-cultural competence...depends to a significant extent on the individual's experience in mainstream domains, such as education and employment...[E]xperience with Aboriginal students in tertiary education indicates that even many of them lack significant bicultural competence."<sup>12</sup>

Problems associated with the grammatical structure, word usage and the meanings of words in Aboriginal English are likely to create a significant risk of misunderstandings and miscommunication in the legal system.

<sup>8</sup> R Amery and C Bourke 'Australian Languages: Our Heritage' in C Bourke et al (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, p 138.

<sup>9</sup> ABS, *2006 Census of Population and Housing: Media Releases and Fact Sheets*, 2006, 2914.0.55.002 ([www.abs.gov.au](http://www.abs.gov.au)). (Accessed 10 July 2008)

<sup>10</sup> D Eades *Aboriginal English and the Law* The Queensland Law Society Inc, 1992, p 25.

<sup>11</sup> R Amery and C Bourke 'Australian Languages: Our Heritage' in C Bourke et al (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, p 138.

<sup>12</sup> D Eades *Aboriginal English and the Law* The Queensland Law Society Inc, 1992, p 1.

## 5.3

### COMMUNICATION STYLES

In Aboriginal society, as with all cultural groups, there are different attitudes and practices in relation to:

- forms of greeting and leave-taking;
- use of names and titles;
- deference to authority or seniority;
- eye contact;
- silence;
- sexual matters;
- modesty;
- shaming;
- swearing;
- physical touch;
- directness in speech and in asking questions;
- the right to seek and the obligation to impart knowledge.

#### 5.3.1 Characteristics of Communication in Aboriginal Society

- **The avoidance of direct eye contact demonstrates politeness and respect**

An Aboriginal person may interpret direct eye contact with non-intimates as a sign of rudeness, lack of respect or even aggression. In Aboriginal society the avoidance of direct eye contact is intended to demonstrate politeness and respect<sup>13</sup>. In particular, a traditional Aboriginal person may avoid eye contact with persons of authority, such as police, court officers, magistrates or judges.

However, in Anglo-Australian society direct eye contact is usually perceived as a sign of confidence, honesty and politeness. The avoidance of eye contact may be interpreted as sign of dishonesty, insecurity, or lack of interest or respect<sup>14</sup>.

- **Silence plays an important and valued role in communication**

Silence is an important and valued part of communication between Aboriginal persons. Silence may indicate a desire to think about a matter, or a desire to become comfortable with a social situation. It may simply be a way of enjoying another's company in a non-verbal way.

In a court room situation silence may be an indication that:

- the witness lacks authority to speak on the subject, in the presence of a particular person(s) (e.g. as determined by kinship rules);
- the same question(s) may have been answered before;
- the person is uncomfortable with the discussion because they: (a) do not support the proposition; or (b) do not understand the question, but are too embarrassed to ask for clarification<sup>15</sup>.

However, in non-Aboriginal society silence tends to be negatively valued. Among non-intimates, silence may cause embarrassment and/or indicate that communication

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<sup>13</sup> D Eades *Aboriginal English and the Law* The Queensland Law Society Inc, 1992, p 47.

<sup>14</sup> Departments of Justice et al *Aboriginal English in the Courts* Queensland Government 2000 ([www.justice.qld.gov.au/printversion/663.htm](http://www.justice.qld.gov.au/printversion/663.htm)). (Accessed 10 July 2008)

<sup>15</sup> See also Supreme Court of Queensland *Equal Treatment Benchbook*, 2005

([www.courts.qld.gov.au/The\\_Equal\\_Treatment\\_Bench\\_Book/S-ETBB.pdf](http://www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf)) p 112. (Accessed 5 July 2008)

has broken down. In a legal context, silence may be viewed as being consistent with evasion, insolence, confusion, ignorance and/or guilt<sup>16</sup>.

- **Aboriginal people use sign language quite widely**

Sign language and gestures remain significant aspects of communication with traditional Aboriginal culture groups<sup>17</sup>. Sign language may be especially important in hunting and mourning practices.

More broadly, signs and gestures are common to Aboriginal people throughout Australia, particularly those which are intended to identify relatives or other people. For example:

- touching a nipple means “mother”;
- two arms, crossed over and held in front of the body(as if in handcuffs) means “policeman”<sup>18</sup>.

Other, more subtle gestures are also common. In particular, movements of the eye, head and lips may be used to indicate direction of motion, or the location of a person or of an event being discussed. Such gestures, which may be common even among urban Aboriginal people, may not be noticed by non-Aboriginal people<sup>19</sup>.

Touch is commonplace between Aboriginal people, either to initiate conversation or in place of conversation. However, uninvited touch by a non-Aboriginal person may be interpreted as a sign of aggression.

- **Aboriginal people prefer to communicate indirectly, rather than to ask direct questions**

In Aboriginal culture, the privacy of another person’s thoughts and feelings are respected. Indirectness is the preferred method of interaction amongst Aboriginal groups. In traditional Aboriginal society personal or significant information is sought as part of a two-way exchange. It is characterised by the volunteering of information and then hinting for a response, which response might disclose the information sought.

Thus, important information is not usually sought by the asking of direct questions<sup>20</sup>. However, direct questions in relation to “background” matters, such as that of a visitor’s relationship to another person, are acceptable.

### 5.3.2 Cultural Barriers to Effective Communication

“Politeness and deference is signalled extensively in Aboriginal communities by softness of speech, silence or averting the gaze – in the courtroom, this has been taken as sullenness or stupidity.”<sup>21</sup>

Certain powerful cultural principles may operate to hamper effective communication between Aboriginal and non-Aboriginal people, even when the Aboriginal person

<sup>16</sup> D Eades *Aboriginal English and the Law* The Queensland Law Society Inc, 1992, p 55.

<sup>17</sup> J de Hoog and J Sherwood *Working With Aborigines in Remote Areas* Mount Lawley College, Mount Lawley, 1979, p 78.

<sup>18</sup> Departments of Justice et al *Aboriginal English in the Courts* Queensland Government 2000 ([www.justice.qld.gov.au/printversion/663.htm](http://www.justice.qld.gov.au/printversion/663.htm)). (Accessed 10 July 2008)

<sup>19</sup> D Eades *Aboriginal English and the Law* The Queensland Law Society Inc, 1992, p 71.

<sup>20</sup> Thoughts and feelings may comprise the only real area of personal privacy for Aboriginal people, many of whom live in close physical proximity with one another, and spend significant time maintaining family and social relationships: D Eades *Aboriginal English and the Law* The Queensland Law Society Inc, 1992, 1992, pp 10-11.

<sup>21</sup> D Nash “Aborigines in Court: Foreigners in Their Own Land” (1979) 4 *Legal Services Bulletin*, 105-7, p 106, quoted in J Kearins “Factors Affecting Aboriginal Testimony (1991) 16(1) *Legal Services Bulletin* February 1991: 3-6, p 4.

appears to speak English reasonably well<sup>22</sup>. Dr Diana Eades, an anthropological linguist, has identified a number of barriers to effective communication between Aboriginal and non-Aboriginal people. These are outlined below.

- **In Aboriginal culture, family or kin relationships are accorded primacy**

Family and kin relationships are usually accorded priority in an Aboriginal person's life. That primacy may affect the capacity of an Aboriginal person to give evidence in court, particularly against relatives. It may distort notions of individual responsibility for actions, or create inappropriate feelings of responsibility or guilt<sup>23</sup>.

- **An Aboriginal person may have difficulty in answering questions which are put directly**

As indicated above, indirectness is the preferred method of interaction in Aboriginal culture. In particular, Aboriginal people may have difficulty with direct questions which:

- predetermine the answer (e.g. "yes/no" questions);
- require a person, place, date or time to be identified; or
- require a detailed description; or
- discourage a narrative-style answer.

These difficulties may be exacerbated in adversary-style court proceedings, in which questions tend to be direct and one-sided (that is, the questioner contributes nothing to the exchange). An Aboriginal person may experience difficulty in answering direct questions even in evidence in chief<sup>24</sup>.

The application of the rules of evidence are likely to further impede effective communication with an Aboriginal person. Proceedings can be impeded further by a witness' reluctance to ask for clarification, this is often signified by a period of silence as the witness waits for clarification. To ask for clarification of a question may be seen as humiliating<sup>25</sup>.

- **Gratuitous concurrence (or the tendency to agree with a particular proposition or question, regardless of whether the speaker in fact does agree with it) may be a particular problem**

The term "gratuitous concurrence" refers to the tendency of a speaker to agree with a proposition or question which is put to him or her, regardless of whether the speaker truly agrees with that proposition or question. The speaker may not even have understood the proposition or question which has been put. An Aboriginal person is likely to "gratuitously concur" with a proposition put to him or her by a non-Aboriginal person, especially when the questioner is (or appears to be) in a position of authority. Gratuitous concurrence is to be characterised properly as a relationship issue, rather than a language issue<sup>26</sup>.

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<sup>22</sup> See also R. Trudgen *Why Warriors Lie Down and Die*, Aboriginal Resource and Development Service, Darwin, 2000.

<sup>23</sup> D Eades *Aboriginal English and the Law* The Queensland Law Society Inc, 1992, p 92.

<sup>24</sup> Departments of Justice et al *Aboriginal English in the Courts* Queensland Government 2000 ([www.justice.qld.gov.au/printversion/663.htm](http://www.justice.qld.gov.au/printversion/663.htm)). (Accessed 10 July 2008)

<sup>25</sup> Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, p 114 (<http://www.courts.qld.gov.au/practice/etbb.htm>).

<sup>26</sup> Departments of Justice et al *Aboriginal English in the Courts* Queensland Government 2000 ([www.justice.qld.gov.au/printversion/663.htm](http://www.justice.qld.gov.au/printversion/663.htm)). (Accessed 10 July 2008)

An Aboriginal person may gratuitously agree with a questioner as a means of conveying readiness for cooperative interaction:

“Aboriginal English speakers often agree to a question even if they do not understand it. That is, when Aboriginal people say “yes” to a question it often does not mean “I agree with what you are asking me”. Instead, it often means “I think that if I say ‘yes’ you will see that I am obliging, and socially amenable and you will think well of me, and things will work out well between us.”<sup>27</sup>

However, gratuitous concurrence may also signal feelings of hopelessness or resignation to the futility of a particular situation<sup>28</sup>.

In *The Recognition of Aboriginal Customary Law* the Australian Law Reform Commission (ALRC) discussed the difficulties experienced by many Aboriginal people in cross-examination. The ALRC considered that Aboriginal deference to authority “can lead to a propensity to give answers thought to be expected rather than to state what actually occurred”:

“This is a result both of Aboriginal courtesy and custom, but also of the long history of Aborigines working in subservient situations.”<sup>29</sup>

Recently, in *Cotchilli v State of Western Australia*<sup>30</sup> McKechnie J stated:

“I am conscious of the difficulties that face Indigenous persons giving evidence and also that some Indigenous persons may tend to defer to authority, offering answers they think are expected, rather than the truth. This applies of course in court and in interviews with the police.”<sup>31</sup>

### 5.3.3 Specific Language Difficulties

- **Many Aboriginal people experience considerable linguistic and conceptual problems in communicating in English**

As shown in the discussion of the *Ngaanyatjarra* language (see 5.1.3, above) traditional Aboriginal languages do not contain formal systems of quantification. In traditional Aboriginal society, matters are specified or described in terms of geographical, climatic or social events or situations<sup>32</sup>.

It is not uncommon for Aboriginal people from remote or regional areas to experience difficulty in specifying numbers, time or distances. Such people may use quantitative estimates vaguely, inaccurately or inconsistently; or may avoid using them altogether<sup>33</sup>.

Ms Dagmar Dixon (formerly Coordinator of Interpreter Programs at Central Metropolitan TAFE in Perth) has made the following observations<sup>34</sup>:

<sup>27</sup> D Eades *Aboriginal English and the Law* The Queensland Law Society Inc, 1992, p 26.

<sup>28</sup> Departments of Justice et al *Aboriginal English in the Courts* Queensland Government 2000 p 14 ([www.justice.qld.gov.au/printversion/663.htm](http://www.justice.qld.gov.au/printversion/663.htm)) (Accessed 10 July 2008)  
*Equal Benchbook*, 2005 ([www.courts.qld.gov.au/The\\_Equal\\_Treatment\\_Bench\\_Book/S-ETBB.pdf](http://www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf)) (Accessed 5 July 2008)

<sup>29</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 546. (Accessed 5 July 2008)

<sup>30</sup> [2008] WASC 103.

<sup>31</sup> *Cotchilli v State of Western Australia* [2008] WASC 103 at [13].

<sup>32</sup> Departments of Justice et al *Aboriginal English in the Courts* Queensland Government 2000 p 15 ([www.justice.qld.gov.au/printversion/663.htm](http://www.justice.qld.gov.au/printversion/663.htm)). (Accessed 10 July 2008)

<sup>33</sup> Departments of Justice et al *Aboriginal English in the Courts* Queensland Government 2000 p 15 ([www.justice.qld.gov.au/printversion/663.htm](http://www.justice.qld.gov.au/printversion/663.htm)). (Accessed 10 July 2008)

<sup>34</sup> Ms Dixon developed and taught Aboriginal interpreter Diploma programs in the Kimberley, Pilbara and Goldfields, as well as in Perth, until 2002. Ms Dixon points out that although her observations are particularly applicable to speakers of Aboriginal languages, they apply also to speakers of Kriol and to some speakers of Aboriginal English.

- An Aboriginal person's capacity to speak English should not be confused with his or her capacity to fully comprehend what is being said. Aboriginal people (like non-Aboriginal people) may experience considerable difficulty in understanding professional or bureaucratic "jargon". Aboriginal people may also experience difficulty in comprehending unfamiliar concepts or language terms.
- Often the lives of Aboriginal people are principally concerned with everyday, practical matters. This is borne out by the fact that Aboriginal languages usually deal with concrete, rather than abstract, matters.

"Examples: the abstract question of 'How do you plead, guilty or not guilty?' is generally expressed in concrete terms such as 'Did you do it or did you not do it?', or 'Tell everything' is expressed as 'Tell no lies'."

- Aboriginal languages do not contain the concept of "understanding" (as in "comprehension"): the nearest is that of "knowing" (as in "being aware of");
- Aboriginal languages usually do not contain collective nouns. Thus, rather than use the word "animal" -

"The speaker must use the specific word for a particular animal, such as "*marlu*" (Wangatha for kangaroo) or "*nhimi*" (Wangatha for dog)."

- Many English words have no Aboriginal equivalent, e.g. -

"The Aboriginal word "*paarlpa*" (Wangatha language) is used for "blood vessel". "tendon", "sinew" and any other "stringy bit" in the body.

The Wangatha word "*pika*" covers everything from pain to any type of injury and illness with the differentiation made by the context in which the word is used. E.g. "She had bruises on her back" is expressed by "She was [*pika* + punching] on her back" and "He was wounded on the leg" by "He had [*pika* + spear] on the leg".

- It may be impossible for an Aboriginal person to answer questions with sufficient precision:

"For example, whether something happened, say

- at 5:30 or 5:45 p.m. ("*on sundown*")
- 500 or 800 km ("*far*") or 10 or 20 km ("*not far*") away
- with 15 or 25 people ("*big mob*") present."

- A number of English words used by Aboriginal people have a different meaning from the English meaning.

"For example, "*cheeky*" means "hot" (as in food); "*camp*" means "to live"; "*kill*" may simply mean "to hurt."

- Each Aboriginal community has its own taboo words which must not be spoken under any circumstances. Taboo words are often everyday words e.g. the word "skin" is taboo in a certain Western Australian community.
- Aboriginal English is spoken more widely throughout the State than is commonly realised by non-Aboriginal people.



## 5.4

### COMMUNICATING EFFECTIVELY WITH ABORIGINAL ENGLISH SPEAKERS

“Even among urban and country town people whose only language is English, interesting differences (from standard English) occur: this means that standard English must be learned more or less as a second language....

In courts of law in Western Australia it is thus unlikely that even urban Aborigines will understand all that is said, or that their speech will be properly understood.”<sup>35</sup>

Many Aboriginal people, whether they live in urban, regional or remote locations speak a dialect of English known as “Aboriginal English” (Aboriginal English), particularly in a domestic or familiar social environment. Such dialects range from “light” English (closest to standard English) to “heavy” Aboriginal English. As noted earlier, Standard and Aboriginal forms of English differ in sounds or accent, grammar, vocabulary, meaning, use and style<sup>36</sup>.

In its Report No 96, *Sentencing: Aboriginal Offenders*, the Law Reform Commission of New South Wales (LRCNSW) reported that communication difficulties, both in language and style, occur in the courts of New South Wales between speakers of Aboriginal English and those speaking Standard English. The NSWLRC expressed concern that miscommunication between such speakers may give rise to miscarriages of justice. The LRCNSW called for persons to be trained as courtroom facilitators to prevent such communication problems arising<sup>37</sup>. Other commentators have called for interpreters for Aboriginal English speakers in court proceedings<sup>38</sup>.

In the following pages, a number of strategies are suggested to promote effective communication with Aboriginal people who are Aboriginal English (rather than Standard English) speakers.

#### 5.4.1 Suggested “Do’s”

A number of strategies for communicating effectively with speakers of Aboriginal English are suggested below.

- **Speak slowly and clearly**

When communicating with a speaker of Aboriginal English who is not fluent in Anglo-Australian English, it is important to speak slowly and clearly. The use of simple words, simple sentence structure, and slow (but not patronising) speech, is best.

- **Use an ordinary tone of voice**

An ordinary tone of voice, and everyday manner of speech, should always be used. Loud voices and/or harsh tones of voice suggest rudeness, aggression, or lack of respect. Especially in the courtroom context, a loud voice and/or a harsh tone may intimidate a speaker of Aboriginal English to the point that he or she is unable to respond.

- **Use the name by which the speaker wishes to be addressed**

<sup>35</sup> J Kearins “Factors Affecting Aboriginal Testimony (1991) 16(1) *Legal Services Bulletin* February 1991: 3-6, p 5.

<sup>36</sup> D Eades *Aboriginal English and the Law* The Queensland Law Society Inc, 1992, p 25.

<sup>37</sup> New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96, (2000) Ch. 7, 7.32-7.33.

<sup>38</sup> See for example D Nash “Aborigines in Court: Foreigners in Their Own Land” (1979) 4 *Legal Services Bulletin*, 105-7, p 106, quoted in J Kearins “Factors Affecting Aboriginal Testimony (1991) 16(1) *Legal Services Bulletin* February 1991: 3-6, p 5.

At the earliest opportunity, find out the name by which the speaker of Aboriginal English wishes to be addressed and use that name. (As discussed in **Chapter Three**, an Aboriginal person may be known by several names.). It might be useful to note down the phonetic spelling of the name.

- **Use an indirect approach to asking questions: for example –**

1. **Hint and wait:** this involves a two-part process:

- (i) hint at the information which you are seeking: for example:

“I’m wondering whether you were at that house”; or  
“I need to know whether you were at that house”;

- (ii) allow the Aboriginal person sufficient time to consider the hint given, and to respond. It is important not to become impatient or to push for a quick response<sup>39</sup>.

2. **Make a statement and await confirmation or denial:** this method is similar to the first. It requires the questioner to:

- (i) volunteer appropriate information, for example:

“It seems as if you were at that house”; or  
“I think that maybe you were at that house”; or  
“Maybe you were at that house”; then -

- (ii) remain silent, and wait for confirmation or denial of the statement.

Note: this approach must be used carefully. If this approach merely disguises a direct question, it is likely to trigger “gratuitous concurrence”<sup>40</sup>.

3. **Frame a question as a statement:** this may be the most effective method. It requires the question to be framed as a simple utterance, with a rising intonation. For example:

“You were outside that house?”; or  
“You were outside that house, eh ?”,

A variation on this approach is to make a statement, then follow it with a short question, such as:

“You were outside that house. Is that right ?”<sup>41</sup>

Then allow sufficient time for the answer to be given.

- **Check with the speaker of Aboriginal English to establish if he or she understands the legal words used**

It is important to seek feedback from the speaker of Aboriginal English that he or she understands the legal words which have been used in court proceedings. A recent report highlighted the lack of awareness that common legal terms are not necessarily understood by speakers of Aboriginal English. (One example involved a young man who failed to attend court after being granted bail: his understanding was that he had been “bailed out’ of trouble and that was the end of the matter”<sup>42</sup>.)

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<sup>39</sup> Departments of Justice et al *Aboriginal English in the Courts* Queensland Government 2000, p 13 ([www.justice.qld.gov.au/printversion/663.htm](http://www.justice.qld.gov.au/printversion/663.htm)). (Accessed 10 July 2008)

<sup>40</sup> D Eades *Aboriginal English and the Law* The Queensland Law Society Inc, 1992, p 51.

<sup>41</sup> D Eades *Aboriginal English and the Law* The Queensland Law Society Inc, 1992, p 43.

<sup>42</sup> Aboriginal Resource and Development Services Inc. (ARDS), *An Absence of Mutual Respect*, ARDS, Winnellie NT, 2008, p 25.

### 5.4.2 Suggested “Do’s”

- **Show respect and consideration at all times**

The demonstration of respect and consideration for persons who are not fluent in standard Australian English is of paramount importance. A raised voice and/or obvious exasperation may make the speaker of Aboriginal English feel frightened, confused and angry.

- **Simplify the use of words**

Use simple words wherever possible: for example say “about” rather than “regarding” or “concerning”; say “start” rather than “commence”; say “go” rather than “proceed”; say “to” rather than “towards”.

Use simple verb tenses such: “you say” not “you are saying”; and “she had” not “she had had”.

- **Be careful of “I don’t know” responses**

The response “I don’t know” may simply mean that it is inappropriate for the Aboriginal person to provide information in that way, or there may be issues of shame or modesty involved. Issues of modesty and shame often arise when a man asks a woman questions of a sexual nature. If “I don’t know” responses become common place, try a different approach e.g. consider whether it is necessary to ask the witness to repeat their understanding of the question, direction etc; check any written statement taken from the witness against his or her educational background and awareness of Anglo-Australian culture.

- **Don’t attempt to speak or to correct Aboriginal English**

Don’t attempt to speak Aboriginal English. Attempts by non-Aboriginal English speakers to speak Aboriginal English may be interpreted as mocking or patronising<sup>43</sup>.

Similarly, don’t “correct” the speech of a speaker of Aboriginal English.

- **Don’t use complex sentences or figurative speech**

Don’t use long and/or complex sentence constructions (including “I put it to you that...”) Similarly, don’t use figurative speech. An expression such as “as clear as mud”, or “raining cats and dogs” may confuse a speaker of Aboriginal English.

- **Don’t use negative questions**

Don’t ask negative questions, such as “You didn’t do that, did you ?” or “Is that not true?” Such questions may easily confuse a speaker of Aboriginal English.

- **Don’t use “either-or” questions**

“Either-or” type questions (that is, questions which ask the respondent to choose between one of two alternatives) may be confusing. Often, the answer given by an Aboriginal person will refer to the second alternative which has been suggested. Thus, rather than asking “Were you at the house or at the pub?” it may be better to say:

“Maybe you were at the house. Maybe you were at the pub. Tell me where you were then?”. Alternatively, simply ask “Where were you then?”

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<sup>43</sup> J de Hoog and J Sherwood *Working With Aborigines in Remote Areas* Mount Lawley College, Mount Lawley, 1979, p 74.

- **Don't use technical legal words or "jargon" unless it is essential**

Avoid the use of technical legal words or "jargon" unless it is absolutely essential. Substitute the word "law" for "statute" or "legislation". Say "X would like to ask you some questions" rather than "X will now cross examine you".

- **Don't use terminology and descriptors that may cause offence**

It is important to use terminology and descriptors that do not cause offence and/or sound discriminatory to Aboriginal people<sup>44</sup>. Do not use ethnic identifiers such as "Aboriginal" or "Indigenous" unless it is necessary e.g., when ethnicity is relevant to the matter in question. If this is the case, be as specific as possible, use the term "Aboriginal person" rather than "Aborigine".

Only use terms such as *Noongar* or *Martu* when they are used by that community and you have checked that it is appropriate for you to do so in the particular context.

Aboriginal people commonly use the word 'mob' to describe "my people", "my social group". Similarly the terms "whitefella" or "blackfella" are frequently used by Aboriginal people. However, it may be offensive for other people to use these terms without permission.

As provided for by s 26 *Evidence Act 1906* (WA)<sup>45</sup> intervention may be appropriate if others in court (for example, those conducting cross-examination) say anything that is, or could be understood as, discriminatory, stereotyping or culturally offensive.

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<sup>44</sup> The points provided here are taken from Judicial Commission of NSW *Equality Before the Law: Bench Book*, Sydney, 2006 ([www.jc.nsw.gov.au/benchbks/equality](http://www.jc.nsw.gov.au/benchbks/equality)) Sec 2.3.3.4. (Accessed 5 July 2008)

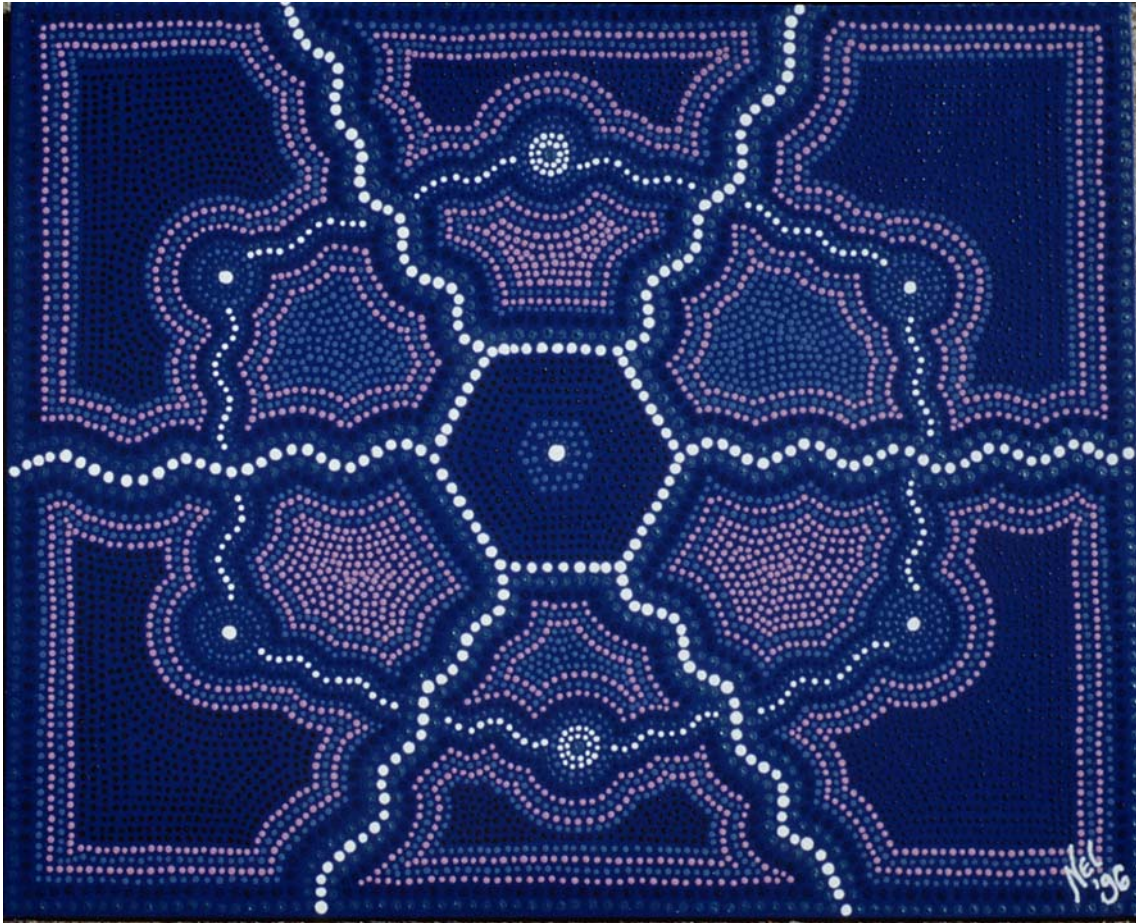
<sup>45</sup> Section 26 *Evidence Act 1906* (WA) empowers the court to disallow a question put to a witness in cross-examination, or inform the witness that the question need not be answered, if the question is misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

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## Chapter Six: Pre-Trial Matters



# Chapter Six: Pre-Trial Matters

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Upon the recommendation of Western Australian Aboriginal advisers, the word "Aboriginal", rather than "Indigenous" is used in this Benchbook



## Summary of Chapter Six

### Pre-Trial Matters

#### 6.1 BAIL

##### 6.1.1 Bail Issues: RCIADIC and LRCWA Recommendations

- In 1991 RCIADIC highlighted the difficulties experienced by many Aboriginal people in obtaining bail and/or meeting bail conditions including:
  - bail being denied because of problems of language and understanding
  - bail being denied because of insufficient assets
  - cumbersome, bureaucratic procedures in bail supervision
  - the need, in cases involving Aboriginal accused persons from remote communities, to travel large distances to and from a court
  - inadequate police resources, especially in rural areas, resulting in delays
  - addiction issues
  - the inflexibility or inappropriate nature of the bail system for Aboriginal people
- RCIADIC recommended that bail legislation be amended so that the grant of bail to Aboriginal accused persons not be restricted inappropriately and that the operation of bail legislation be monitored closely
- An example of an apparent failure to understand bail conditions is evident in *Wassa v Norman* (1982) 14 NTR 13
- In 2006 the LRCWA commented that many of the disadvantages which many Aboriginal people suffer in respect of bail continue to exist and made a number of recommendations to address those disadvantages (*Recommendations 29-34*)

##### 6.1.2 Difficulties Experienced in Obtaining Bail: the *Bail Act 1982 (WA)*

- Particular difficulties arising from the operation of the *Bail Act 1982 (WA)* include:
  - Requirements as to sureties
  - Requirement of a "suitable place" for home detention
  - Lack of a static address
  - Requirement of a "responsible person" for children

##### 6.1.3 Particular Hardships of Detention for Aboriginal Persons

- A number of factors may particularly disadvantage Aboriginal accused persons remanded in custody:
  - separation from family
  - detention far from home
  - addiction issues
  - failure to prepare properly for trial

##### 6.1.4 The *Bail Amendment Act 2008 (WA)*

- The *Bail Amendment Act 2008* introduces a number of substantive, procedural and administrative reforms to the *Bail Act 1982*, including for bail applications to be heard by videolink

### **6.1.5 The “Exceptional Circumstances” Requirement for Bail in Serious Cases**

- The circumstances of Aboriginal accused persons from remote communities may constitute “exceptional circumstances”: *Unchango v R* (Unrep., WA Sup Ct, Lib. No. 980346, 12 June 1998)

### **6.1.6 Bail and Customary Punishment Considerations**

- A number of legal issues arise in respect of an Aboriginal accused person being released on bail to undergo customary punishment
- Different judicial views have been expressed about the release on bail of an accused for customary punishment reasons: *R v Jungarai* (1981) 9 NTR 30; *Barnes v R* (1997) 96 A Crim R 593; *Ebatarinja v R* [2000] NTSC 26; *Re Anthony* (2004) 179 FLR 354
- In Western Australia, subject to the constraints of the *Bail Act*, the question of whether an Aboriginal accused may be released on bail for customary punishment appears to be open

### **6.1.7 Bail and the *Cross-Border Justice Act 2008* (WA)**

- The scheme of the *Cross-Border Justice Act 2008* addresses issues relating to the administration of justice in the cross-border regions of WA, SA and the NT

## **6.2 FITNESS TO PLEAD**

### **6.2.1 Physical Impairment**

- Physical impairment, such as deaf-muteness may render an accused unable to understand the proceedings or to make a proper defence: *Ebatarinja v Deland* (1998) 194 CLR 444; *R v A.T.* (Unrep, NT Sup Ct, Thomas J, No 62 of 1992, 26 October 1992)

### **6.2.2 Cultural or Language Barriers**

- Provisions in the *Criminal Procedure Act 2004* including s129 CPA deal with an accused’s capacity to understand the charge or plea
- At common law, an inability to understand the plea and its consequences may render an Aboriginal accused unfit to plead

## **6.3 INTERPRETERS**

### **6.3.1 The Right to an Interpreter**

- The *Criminal Investigation Act 2006* confers limited rights to an interpreter
- Section 75 (3)(b) *Criminal Procedure Act 2004* (WA) (CPA) provides for a court of summary jurisdiction to be adjourned so that the services of an interpreter can be obtained: *Frank v Police* [2007] SASC 288
- The requirement that the trial be fair may mandate that an interpreter be provided for an Aboriginal accused: *Ebatarinja v Deland* (1998) 194 CLR 444
- International human rights instruments, such as *International Covenant on Civil and Political Rights*, confer the right of an accused to an interpreter

### **6.3.2 Interpreting - Practical Difficulties**

- Determining competency in English
- Lack of trained interpreters
- Inability to obtain the services of an interpreter
- The alienating effect of the court environment
- The use of untrained interpreters
- Lack of conceptual equivalence for words or phrases
- Language/semantic differences
- Resource implications
- The interpreter's conduct

### **6.3.3 Calls for Accredited Aboriginal Interpreter Training Programs**

- There have been calls to address the current shortage of accredited Aboriginal interpreters and interpreting training programs in Western Australia

## CHAPTER SIX

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# Pre-Trial Matters

### 6.1

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#### BAIL

In its *Aboriginal Customary Laws: Discussion Paper* the Law Reform Commission of Western Australia (LRCWA) deplored the “unacceptable”<sup>1</sup> rate of Aboriginal adult and juvenile remand prisoners in Western Australia (35% and 78% respectively). In 2001, in a review of the *Bail Act*, it had been observed that the level of Aboriginal overrepresentation in custody on remand was similar to the level of over-representation of Aboriginal people sentenced to imprisonment<sup>2</sup>.

#### 6.1.1 Bail Issues: RCIADIC and LRCWA Recommendations

- **In 1991 RCIADIC highlighted the difficulties experienced by many Aboriginal people in obtaining bail and/or meeting bail conditions**

In 1991 the Report of the *Royal Commission into Aboriginal Deaths in Custody*<sup>3</sup> (RCIADIC) highlighted the difficulties which many Aboriginal accused persons experience in obtaining bail and/or in meeting bail conditions, including:

- bail being denied because of problems of language and understanding, which might also arise from disabilities such as hearing loss;
- an inability to obtain bail because of insufficient assets;
- cumbersome, bureaucratic procedures in the supervision of bail;
- the need, in cases involving Aboriginal accused from remote communities, to travel large distances to and from a court;
- inadequate police resources, especially in rural areas, resulting in lack of provision for early processing of bail;
- the inflexibility or inappropriate nature of bail system to the conditions of life of Aboriginal people<sup>4</sup>.

RCIADIC recommended that governments consider the revision of any legislative criteria which “inappropriately restrict the granting of bail to Aboriginal people”; it also recommended that governments closely monitor the operation of bail legislation to ensure that entitlement to bail is recognised in practice<sup>5</sup>.

It has been suggested that the failure of Aboriginal accused persons to attend court, is rarely deliberate<sup>6</sup>. An Aboriginal accused may be aware of bail conditions but nevertheless fail to meet them:

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<sup>1</sup> Law Reform Commission of Western Australia *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)) p 191. (Accessed 3 July 2008).

<sup>2</sup> LRCWA *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)) p 191, citing Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* Perth, Dept of Justice, August 2001, p 46. (Accessed 3 July 2008)

<sup>3</sup> *Royal Commission into Aboriginal Deaths in Custody: National Report* Vols. 1-11, AGPS, Canberra, 1991 ([www.austlii.edu.au/au/other/IndigLRes/rciadic/](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/)). (Accessed 6 July 2008)

<sup>4</sup> RCIADIC, Vol 3, Chapter 21, [www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/33.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/33.html) esp 21.4.22, para 21.4.5. (Accessed 6 July 2008)

<sup>5</sup> RCIADIC, Vol 3, Chapter 21 ([www.austlii.edu.au/au/special/rsiproject/rsilibrary/rciadic/national/vol3/39.html](http://www.austlii.edu.au/au/special/rsiproject/rsilibrary/rciadic/national/vol3/39.html)) para 21.4.27, Recommendations 91(b) and 89. (Accessed 6 July 2008)

<sup>6</sup> LRCWA *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)) p 192. (Accessed 3 July 2008)

- for cultural reasons (e.g. the obligation to attend a funeral);
- for practical reasons, including a lack of transport;
- by simply forgetting to attend, perhaps because of pressing and/or difficult issues in their lives;
- for financial reasons/difficulties.

Often, failure to meet bail conditions may be underpinned by factors such as alcohol or other substance abuse. The accused may simply be resigned to the fact that “sooner or later the police will pick me up”.

In *Wassa v Norman*<sup>7</sup> an Aboriginal defendant who had failed to report to police was found 150m from the police station. There was nothing to suggest that the defendant had intended to breach bail conditions: rather, it appeared that he had simply forgotten to attend. The magistrate estreated the defendant's recognizance of \$5000 and directed that he be held in custody. An appeal was successful, Forster J finding that the magistrate had failed to consider his statutory power to suspend forfeiture of the recognizance.

An Aboriginal accused may be released upon bail far from his or her home without sufficient funds to return there. Such a person may become stranded in circumstances which encourage his or her socialisation with inappropriate persons. As a result, the Aboriginal accused may “get into trouble” again very quickly.

Where an Aboriginal accused is convicted of breaching bail, having failed to attend court, the future granting of bail to that accused may be affected. This negatively-reinforcing cycle is a significant factor in the disproportionate remanding in custody of adult Aboriginal accused.

- **In 2006 the LRCWA commented that many of the disadvantages which many Aboriginal people suffer in respect of bail continue to exist and made a number of recommendations to address those disadvantages**

In 2006, in its *Aboriginal Customary Laws: Final Report* the LRCWA expressed deep concern that the difficulties highlighted by RCIADIC in 1991 continue to be experienced. The LRCWA commented that, in particular, many Aboriginal people are unable to obtain surety bail, but that if they did, they still might not attend court for reasons including:

- lack of transport;
- poor literacy skills;
- language barriers;
- an inability to understand the legal language of the bail undertakings;
- a general sense of alienation from the criminal justice system<sup>8</sup>.

The LRCWA acknowledged that officers of the Aboriginal Legal Service of Western Australia (ALSWA) endeavour to explain bail conditions to Aboriginal accused, but noted that not all accused persons are represented by the ALSWA and some are not represented at all<sup>9</sup>.

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<sup>7</sup> (1982) 14 NTR 13.

<sup>8</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), p 159 (Accessed 5 July 2008). See also LRCWA *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)) pp 190- 191. (Accessed 3 July 2008).

<sup>9</sup> LRCWA *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)) p 198, fn 75. (Accessed 3 July 2008)

The LRCWA recommended that the *Bail Act 1982* (WA) be amended to provide:

- that an accused may be released on bail if a “responsible person” who is acceptable to the court enters into an undertaking that the accused will attend court (*Recommendation 29*<sup>10</sup>);
- that when setting the amount of a surety undertaking that the financial means of any proposed surety be taken into account (*Recommendation 30*);
- that an accused may make application to a magistrate for bail by telephone
- in certain circumstances, including where police bail has been refused (*Recommendation 31*);
- that non-custodial bail facilities be developed for children in remote and rural locations (*Recommendation 32*);
- that the court may have regard to the cultural background of the accused (*Recommendation 33*);
- that the court may have regard to any known Aboriginal customary law or other cultural issues that are relevant to bail (*Recommendation 34*).<sup>11</sup>

The LRCWA also endorsed the recommendation made in the *Review of Best Practice and Innovative Approaches to Bail*<sup>12</sup> that police officers make greater use of notices to attend court rather than arresting children<sup>13</sup>.

### 6.1.2 Difficulties in Obtaining Bail: the *Bail Act 1982* (WA)

#### ▪ **Requirements as to sureties**

Part VI of the *Bail Act* contains requirements as to sureties and to surety undertakings: see ss 38, 39 *Bail Act*. These provisions may operate to disqualify many prospective sureties or to render them unacceptable. Many Aboriginal people do not own real property, significant savings, investments or other substantial assets which can be secured.

Note: Courts have taken a variety of measures to deal with those restrictions. These include:

- reducing the monetary value of bail and surety undertakings to a level appropriate for applicants with a low income or few assets;
- by imposing other conditions, such as reporting to an appropriate authority, in lieu of requiring a surety.

#### ▪ **Requirement of a “suitable place” for home detention**

Bail may also be granted subject to a home detention condition, the requirements of which are set out in Cl 3 Pt D Sch 1 *Bail Act*. However, the place at which an accused will reside while subject to the home detention condition must be “a suitable place”<sup>14</sup>.

<sup>10</sup> Dr Kate Auty SM of the Kalgoorlie Magistrates Court has recommended that appropriate training be given to potential “responsible persons” to ensure the effectiveness of such orders.

<sup>11</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), pp 161- 168 (Accessed 5 July 2008).

<sup>12</sup>Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* Perth, Dept of Justice (August 2001).

<sup>13</sup> LRCWA *Aboriginal Customary Laws: Discussion Paper* Project 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)) p 194. (Accessed 3 July 2008).

<sup>14</sup> Cl 3 (2)(b) Pt D Sch 1 *Bail Act*.

In practice the requirement that an Aboriginal accused reside in “a suitable place” may be difficult to satisfy. Overcrowded conditions or a lack of appropriate support persons for the applicant, or even the lack of a telephone at the premises, may mean that a proposed place of residence is deemed unsuitable.

- **Lack of a static address**

“Quite a number of Aboriginal accused persons have a non-static address. I suggest that the bail condition state that the accused person is *to reside with aunty ‘X’ or uncle ‘Y’ at “name of township”*. The local police in the smaller townships often know the whereabouts of the more stable residents.”<sup>15</sup>

- **Requirement of a “responsible person” for children**

Children under the age of 17 years can be released on bail only if a “responsible person” signs an undertaking: Cl 2(2), Pt C Sch 1 *Bail Act*.

The Department of Corrective Services established a number of supervised bail programs in a number of remote locations, including the Kimberley, Pilbara and Goldfields. Under these programs, children unable to find a “responsible person” for the purposes of the *Bail Act* could reside at an approved hostel facility rather than being brought to Perth. In 2006 only one of those programs (the Goldfields program) was still operating and the remainder of the programs were under review<sup>16</sup>. However, in its Annual Report for 2006/07, the Department of Corrective Services stated that “most [supervised bail] placements are with family and extended family”<sup>17</sup>.

**Note:** the court can assist Aboriginal applicants for bail by clearly explaining the bail conditions and the implications of breach of those. In particular, the applicant should be made aware of the importance of complying with s 28(2)(b) *Bail Act* (that is, the need to appear at the time and place specified), or to notify counsel in advance if there is a problem in this regard. In this way, the accused may avoid being charged with a breach of bail.

### 6.1.3 Particular Hardships of Detention in Custody for Aboriginal Persons

- **A number of factors may particularly disadvantage Aboriginal accused persons remanded in custody:**
  - *separation from family:* many Aboriginal people are highly socio-centric, and therefore an Aboriginal accused is likely to find separation from family and support persons particularly traumatic;
  - *detention far from home:* an Aboriginal accused may be detained in custody so far from his or her home that visits by family are difficult or impossible, causing the accused further stress and alienation. This is particularly problematic for juveniles from regional or remote communities who must be brought to Perth for detention in custody.

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<sup>15</sup> Magistrate Liz Langdon, email correspondence to the author, 16 July 2007.

<sup>16</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), pp 164-165 (Accessed 5 July 2008). See also N Morgan and J Motteram, *Aboriginal People and Justice Services: Plans, Programs and Delivery*, LRCWA Project No 9, Background Paper No 7 (December 2004) ([www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-07.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-07.pdf)) at 293. (Accessed 11 July 2008)

<sup>17</sup> Department of Corrective Services, *Annual Report 2006-2007*, (2007), p 43.

Recently, the Children's Court issued Practice Direction No 2 of 2008 in an effort to reduce the movement of juveniles from their communities<sup>18</sup>. The Chief Justice of Western Australia has also convened a working group to identify ways of reducing the need to transport persons in custody;

- *addiction issues*: where an Aboriginal accused is addicted to alcohol and/or other substances, the symptoms of withdrawal from the addictive substance tend to magnify the ordeal of separation;
- *failure to prepare properly for trial*: the personal demoralisation and distress suffered by an Aboriginal accused remanded in custody may make it especially difficult for that accused to actively prepare his or her defence<sup>19</sup>.

#### 6.1.4 The *Bail Amendment Act 2008 (WA)*

- The *Bail Amendment Act 2008 (WA)* introduced a number of substantive, procedural and administrative reforms to the *Bail Act 1982 (WA)*

The enactment of *Bail Amendment Act 2008 (WA)*, which was assented to on 31 March 2008, was informed by the findings and recommendations of RCIADIC, the LRCWA's *Aboriginal Customary Law Reference* and by the many reviews of the *Bail Act* which have taken place during the past decade.

The *Bail Amendment Act* provides for applications for bail to be heard by videolink or, if necessary, by audiolink<sup>20</sup>. This measure, which is designed to address in particular the difficulties experienced in regional or remote locations, facilitates the review by a magistrate of bail applications or bail conditions and permits a judicial officer to ensure that any detention or proposed transportation of Aboriginal persons is warranted<sup>21</sup>.

In addition, the amending legislation provides for:

- interstate sureties to enter into undertakings using videolink and electronic transmission;
- the clarification of matters which must be taken into account in determining whether an applicant is suitable to be a surety;
- the service of notices by email or fax;
- the dispensation with bail, by judicial officers only, in relation to minor offences;
- the removal of the need, where bail has been refused, to consider bail afresh for every adjournment;
- the publication of reasons for granting bail to an accused who is already on bail or an early release order;
- the grant of post-conviction bail, to encourage early pleas of guilty and to facilitate sentence diversion programs;
- applications for review of bail decisions to be made to the court which made the decision;
- a formal process of appeal to the Court of Appeal.

<sup>18</sup> Practice Direction No 2 of 2008 requires that an accused juvenile first be brought before the relevant Regional Magistrate how ever possible (including by video or audiolink) and if no such Regional Magistrate is available then by video or audiolink to a Magistrate or Judge in Perth.

<sup>19</sup> In *R v Scobie* (2003) SASR 77 Gray J criticised the detention in custody of a traditional Pitjantjatjara man for 10½ months pending the hearing of an order for preventative detention.

<sup>20</sup> Section 66B, *Bail Act 1982 (WA)*.

<sup>21</sup> LRCWA *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), pp 163-164. (Accessed 5 July 2008)



The *Bail Amendment Act 2008* also extends the time for initial appearance<sup>22</sup> from 7 to 30 days, which will enable accused persons to enter their initial appearances before a magistrate. This is expressly intended to address concerns first raised by the RCIADIC relating to the possibility of Aboriginal accused persons in regional/remote areas being kept in custody due to the large distances that often need to be travelled to answer bail. The changes are intended also to facilitate the appearance of Aboriginal people charged with serious offences before a magistrate at first instance.

Note: information relating to the making of practical arrangements for bail-related applications by video or audio link is contained in **Appendix C** to **Chapter Seven**.

### 6.1.5 “Exceptional Circumstances” Requirement for Bail in Serious Offences

- **The circumstances of Aboriginal accused persons from remote communities may constitute “exceptional circumstances” for the grant of bail in serious cases**

**Case: *Unchango v R* (Unrep, WA Sup Ct, Templeman J, 12 June 1998)**

Facts: the applicant for bail, an Aboriginal woman from Kalumburu, had been charged with murder. If bail were to be refused, the applicant would be detained on remand at Bandyup Prison near Perth for more than six months. The applicant proposed to remain at a diocesan treatment and recovery centre at Turkey Creek pending the trial.

Held: application granted. Templeman J noted that the applicant was in a stable relationship, and had six children; although she had a criminal record, this comprised minor offences. His Honour commented that it would be extremely undesirable for the applicant to be taken a great distance away from her family and her traditional community for an extended period. Evidence was given that, were the applicant to reside at the diocesan centre, there was little risk of that she would be subjected to a “payback” attack. Templeman J concluded that the applicant did not need to be kept in detention for her own protection<sup>23</sup> and that the circumstances of the case were sufficiently “exceptional”<sup>24</sup> to justify the grant of bail. His Honour released the applicant on a personal undertaking subject to the conditions that she reside at the diocesan centre and report regularly to the authorities.

Note: in *Walley v State of Western Australia*<sup>25</sup> Miller J held that the circumstances of a young Aboriginal woman charged with the wilful murder of her husband, including the fact that she had four children aged under eight years, were not sufficiently exceptional to justify her release on bail.

### 6.1.6 Bail and Customary Punishment Considerations

The nature of customary Aboriginal punishment is discussed in **Chapter Two**. The courts have accepted that the function of customary punishment is to avenge wrongdoing, to free the perpetrator and his or her family from guilt and to restore peace between the victim and the perpetrator<sup>26</sup>. Customary punishment may take the form of the infliction of physical punishment by one or more members of the offender’s Aboriginal community, or it may take other forms such as shaming or banishment. An offender may be willing to submit to physical punishment, despite the fact that in its extreme forms serious injuries may result.

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<sup>22</sup> Sched 1, Part C, Cl 7 *Bail Act 1982* (WA).

<sup>23</sup> See Sched 1 Part C, Cl 1(b) *Bail Act 1982* (WA).

<sup>24</sup> See *Lim v Gregson* (1989) WAR 1 at 15 per Malcolm CJ; *WCVB v The Queen* (1989) 2 WAR 279.

<sup>25</sup> Unrep, WA Sup Ct, MCR 45 of 2006, 11 January 2007.

<sup>26</sup> See for example *R v Jungarai* (1981) 9 NTR 30 at 31 per Forster J; *R v Minor* (1992) 2 NTLR 183 at 185 per Asche CJ, at 193 per Mildren J.

- **A number of legal issues arise in respect of an accused Aboriginal person being released on bail to undergo customary punishment**

Where an Aboriginal accused is willing to undergo customary punishment, legal issues arise first, in respect of the power of the courts to facilitate that accused's release on bail where physical harm will be inflicted; and secondly, in respect of the extent to which an accused can consent to the deliberate infliction of harm. In respect of the former, it has been pointed out that not all physical retribution is necessarily unlawful<sup>27</sup>: however, courts should not facilitate the commission of an unlawful act<sup>28</sup>. In respect of the latter, it appears at common law that a person may not consent to the infliction of punishment which will result in bodily harm<sup>29</sup>.

The *Bail Act 1982* (WA) requires the court, when deciding whether to grant bail, to consider whether the accused needs to be kept in custody for his or her own protection<sup>30</sup>.

- **Different judicial views have been expressed about the release on bail of an accused for customary punishment reasons**

In *The Recognition of Aboriginal Customary Law*<sup>31</sup> the Australian Law Reform Commission (ALRC) commented that a court should not necessarily prevent an Aboriginal accused from being released upon bail for the purpose of undertaking customary punishment:

"A court should not prevent a defendant from returning to his or her own community (with the possibility or even the likelihood that the defendant will face some form of traditional punishment) if the defendant applies for bail, and if the other conditions for bail are met. In fact it is not unusual for bail to be granted... to enable a defendant to return to his or her community to resolve through traditional processes the dispute the offence has caused.. .... [S]ubject to [the requirements that the defendant not be a risk to the community and there is not a risk of him or her absconding]...the courts will not necessarily decline bail.... To do so would be a form of paternalism and might....exacerbate the situation in the defendant's community."<sup>32</sup>

The ALRC noted in particular the decision of Forster CJ in *R v Jungarai*<sup>33</sup>: see below.

#### **Case: *R v Jungarai* (1981) 9 NTR 30**

**Facts:** the Aboriginal accused, who suffered from alcohol-related amnesia, had been charged with murder. He applied for bail for the express purpose of undertaking customary punishment. The accused could not recall the circumstances of the offence but it appeared that he might have been provoked.

**Held:** application granted. Forster CJ took into account first, that under Aboriginal law and custom, the accused was responsible for the victim's death; secondly, it was probable that the customary punishment would consist of a single ceremonial spearing in the leg, and a period of banishment from the community; thirdly, the families of the accused and the victim were in a state of mutual hostility which was likely to continue until the accused was punished under customary law; and fourthly, the accused was anxious to be released in order to undertake the punishment. His Honour commented:

<sup>27</sup> *R v Minor* (1992) 2 NTLR 183 at 185 per Asche CJ.

<sup>28</sup> *R v Minor* (1992) 2 NTLR 183 at 196 per Mildren J.

<sup>29</sup> *R v Donovan* [1934] All E Rep 207 at 210 per Swift J. Cf *R v Brown* [1993] 2 All ER 75 at 79.

<sup>30</sup> Sched 1 Part C, Cl 1(b) *Bail Act 1982* (WA).

<sup>31</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 54. (Accessed 5 July 2008)

<sup>32</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 506. (Accessed 5 July 2008)

<sup>33</sup> (1981) 9 NTR 30.

"The accused is willing, indeed anxious, to undergo this punishment and feels deeply his inability to do so in order that peace between the families may be restored. So long as the matter is not 'finished up' by ritual spearing there will be considerable trouble between the two families and the ordinary harmony which prevails in the Warrabri community will be disrupted. It is possible, if not likely, that in times of stress or intoxication the hostility between the families will erupt in serious violence in which people may be killed...I accept that once the ritual spearing has taken place, peace will be restored between the families and the community."<sup>34</sup>

Forster CJ emphasised that the present case "should not be regarded as a precedent in the sense that a mere assertion of similar facts from the bar table will be sufficient....to justify a similar order in every case":

"...Aboriginal customs vary greatly from place to place and, of course, the circumstances of killings must differ."<sup>35</sup>

Forster CJ expressed "neither approval nor disapproval of the course to be taken by the family of the deceased" for the purpose of dealing with the bail application, and commented that it appeared irrelevant, for present purposes, whether or not the proposed action constituted an offence: "what will almost certainly happen is simply, for present purposes, an important fact to be considered."<sup>36</sup>

### **Case: *R v Minor* (1992) 2 NTLR 183**

In *R v Minor*<sup>37</sup> (a sentencing case) Mildren J considered the question of whether a person could consent to an assault against him or her. His Honour concluded that an assault "authorised" by a "victim" would be unlawful only if the person committing the assault intends to kill or cause grievous harm: a spearing in the thigh would not necessarily amount to grievous bodily harm. Mildren J commented:

"The reason why courts do not usually condone payback is because it is a form of corporal punishment, carried out by persons not employed by the State to impose punishment: not because the imposition of punishment is necessarily unlawful."<sup>38</sup>

Mildren J stated that he had no doubt that "it would be quite wrong for a sentencing judge to structure his sentence so as to actually facilitate an unlawful act."<sup>39</sup>

In *Barnes v R* (see below) Bailey J declined to follow the approach of the courts in *R v Jungarai* and *R v Minor*.

### **Case: *Barnes v R* (1997) 96 A Crim R 593**

**Facts:** the Aboriginal applicant had been charged with the murder of his nephew. He applied for bail in order to undertake customary punishment for the peace and well being of the community, and for his own well-being. Evidence was given that the applicant would be repeatedly punched, speared, and hit with boomerangs, with a small shield for protection.

**Held:** application refused. Bailey J distinguished *R v Jungarai* on the grounds that it had been handed down before the *Bail Act 1982* (NT) had come into force, and that the customary punishment proposed in case before him was much harsher than that which had been anticipated in *R v Jungarai*. Though approving the view expressed by Mildren J in *R v Minor* that a judgment should not facilitate the commission of an unlawful act, Bailey J distanced himself from the view expressed by Mildren J in *R v Minor* that an assault "authorised" by a "victim" would be unlawful only if the person committing the assault intends to kill or cause grievous harm<sup>40</sup>. Bailey J stated:

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<sup>34</sup> *R v Jungarai* (1981) 9 NTR 30 at 31.

<sup>35</sup> *R v Jungarai* (1981) 9 NTR 30 at 32.

<sup>36</sup> *R v Jungarai* (1981) 9 NTR 30 at 32.

<sup>37</sup> (1992) 2 NTLR 183.

<sup>38</sup> *R v Minor* (1992) 2 NTLR 183 at 195-196.

<sup>39</sup> *R v Minor* (1992) 2 NTLR 183 at 196.

<sup>40</sup> *R v Minor*, 2 NTLR 183 at 196 per Mildren J.

“In the absence of full argument, I express no view as to whether a person can lawfully consent to an assault falling short of one intended to cause grievous bodily harm.”<sup>41</sup>

The approach taken by Bailey J in *Barnes v R* was distinguished by Mildren J in *Ebatarinja v R* (see below).

**Case: *Ebatarinja v R* [2000] NTSC 26**

Facts: the Aboriginal defendant had been charged with an aggravated dangerous act causing death while under the influence of alcohol. The victim was the defendant’s wife. The defendant intended to plead guilty, but pending the facts of the case being agreed, applied for bail in order to have customary punishment administered to him. The Director of Public Prosecutions opposed the application because of concerns that the defendant, who had failed to answer bail on four previous occasions, would not appear.

Held: application granted. Mildren J noted that the defendant was particularly concerned that if he were not free to undertake customary punishment, that either the relatives of the deceased would punish one of the accused’s relatives, or the Aboriginal elders would use Aboriginal magic to kill him. His Honour commented that the defendant was suffering significant anxiety because of his beliefs, which were honestly and genuinely held.

Mildren J distinguished *Barnes v R* on the grounds that in that case, first, the charge was murder with the burden of proof as to the entitlement to bail resting upon the defendant, and secondly, evidence had been given of the nature of the proposed punishment. In the instant case, there was no evidence that the deceased’s family members intended to carry out any customary punishment; rather, it appeared that they were undecided about the matter. Accordingly, there was no evidence that the defendant might be unlawfully assaulted. His Honour accepted that, by granting bail, the deceased’s family might be “galvanized” into making a decision one way or the other. Mildren J also accepted that if the deceased’s family decided to carry out corporal punishment by way of customary punishment then the defendant wished to undergo it “but it is not clear what the form of the punishment will be and for that matter, whether or not it will be unlawful”. His Honour also accepted that the defendant’s health might be at risk were he not to be granted bail. In granting bail, Mildren J noted that arrangements had been made with the Wardens Office to collect the defendant from his outstation, and to return him to court to answer bail.

Mildren J stated that he accepted that courts should not grant bail in order to facilitate the commission of an unlawful act. However, his Honour found that in this case, there was no evidence that any unlawful act was likely to occur.

**Case: *Re Anthony* (2004) 179 FLR 354**

Facts: the applicant for bail, a 23 year old Walpiri Aboriginal man from Lajamanu, had been charged with the manslaughter of his wife.

Held: application granted, upon condition that the applicant not attend Lajamanu, where there was a real risk of him being subjected to customary punishment. The Chief Justice of the Northern Territory, Martin CJ, stated that without the imposition of this condition the granting of bail “would be an impermissible order involving significant risk of facilitating the infliction of unlawful physical violence upon the applicant”<sup>42</sup>.

<sup>41</sup> *Barnes v R* (1997) 96 A Crim R 593 at 596-597.

<sup>42</sup> (2004) 179 FLR 354 at [43].

However, Martin CJ also expressed the view that circumstances might arise in which it would be permissible and appropriate for a court to grant bail on terms that would allow lawful customary punishment to occur. His Honour stated that it would be “necessarily impossible” to attempt to define such circumstances, but examples might include “minor physical punishment to which the offender is capable in law of consenting”<sup>43</sup>. His Honour continued:

“If the court is satisfied that for cultural reasons such lawful punishment would be of benefit to the applicant, the victim, the victim’s family and the particular community, in my view it would be permissible for a court to structure orders in a way that would allow for the opportunity for such punishment to be inflicted.”<sup>44</sup>

- **In Western Australia, subject to the constraints of the *Bail Act*, the question of whether an Aboriginal accused may be released on bail for customary punishment appears to be open**

As noted above, the *Bail Act 1982* (WA) requires the court, when deciding whether to grant bail, to consider whether the accused needs to be kept in custody for his or her own protection<sup>45</sup>.

Within those constraints, the question of whether an Aboriginal accused may be released on bail for the purpose of receiving customary punishment appears to be open. However, it is suggested that the application of the principles of *Ebatarinja v R*<sup>46</sup> should be approached with great caution.

In a submission to the *Aboriginal Customary Laws Reference*, the Law Society of Western Australia suggested a series of pre-conditions which might be imposed were an accused person to be released on bail to receive customary punishment; one of these pre-conditions was that the court must be satisfied that the proposed punishment is not unlawful<sup>47</sup>.

In its *Aboriginal Customary Laws: Final Report*, the LRCWA concluded that the court cannot release an accused on bail where that punishment would constitute an offence against Australian law. However, it supported the view that a court should release an accused even where it is aware that the accused may be physically punished, so long as the punishment is not unlawful<sup>48</sup>.

Note: judicial refusal to permit physical customary punishment has been criticised on the grounds that it overlooks the social utility of such punishment and the fact that, for some Aboriginal people, customary punishment may be more humane than incarceration<sup>49</sup>.

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<sup>43</sup> (2004) 179 FLR 354 at [26]

<sup>44</sup> (2004) 179 FLR 354 at [26]

<sup>45</sup> Sched 1 Part C, Cl 1(b) of the *Bail Act*.

<sup>46</sup> [2000] NTSC 26.

<sup>47</sup> Law Society of Western Australia, Submissions in relation to Background Paper No 1, 9 December 2004, 6, noted in LRCWA *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)) p 201. (Accessed 3 July 2008)

<sup>48</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) p 170 (Accessed 5 July 2008).

<sup>49</sup> Editorial, “A Defence of Consent to Indigenous Customary Punishment” (2003) 27 Crim LJ 299; S Bielefele “The Culture of Consent and Traditional Punishments under Customary Law” (2003) 7 *Southern Cross University Law Review* 142. See also Judge HH Jackson ‘Can the Judiciary and Lawyers Properly Understand Aboriginal Concerns?’ *Brief*, Law Society of Western Australia, May 1997, p12; P Vincent *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper 11 (February 2005) p 570. ([www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-15.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-15.pdf)) (29 March 2008).

### 6.1.7 Bail and the *Cross-Border Justice Act 2008* (WA)

- **The scheme of the *Cross-Border Justice Act* addresses issues relating to the administration of justice in the cross-border regions of WA, SA and the NT**

The purpose of the *Cross-Border Justice Act 2008* (WA) is to respond to the difficulties in the administration of justice in remote border regions, and is therefore of particular significance to Aboriginal people. The “cross-border regions” are those regions which straddle the borders of Western Australia (WA), South Australia (SA) and the Northern Territory (NT). It appears that offenders in remote regions of Central Australia have been able to take advantage of State and Territory borders to elude police or avoid court appearances. This practice has exacerbated problems of domestic violence, child abuse, substance abuse and repeat offending in the cross-border region.

The cross-border scheme will enable police officers, magistrates, fine enforcement agencies, community corrections officers and prisons of one jurisdiction to deal with offences/offenders from another jurisdiction. Thus, a person suspected of having committed an offence in WA may be arrested in SA by SA police exercising WA jurisdiction, and that person may be brought before a SA (or an NT) magistrate sitting as a cross-border magistrate exercising WA jurisdiction. The WA laws of evidence, procedure and sentencing would be applied to the proceeding.

The substantive provisions of the *Cross-Border Justice Act 2008*, which was assented to on 31 March 2008, have not yet come into operation. The operation of the scheme requires each of the Governments concerned to enact reciprocal laws: to that end, the *Cross-Border Justice Act* will serve as a legislative model for the Governments of SA and the NT<sup>50</sup>.

In respect of bail:

- the WA *Bail Act*, with appropriate modifications, will apply to anyone held in the custody of a WA police officer in a participating jurisdiction;
- if a person in SA or the NT is on bail under the WA *Bail Act*, and fails to comply with a bail undertaking, he or she will have committed an offence if it would also be an offence if the failure to comply occurred in WA;
- if a SA or NT police officer arrests a person in WA under SA or NT law, either with or without a warrant, the bail laws of SA or NT (as the case may be) will apply.

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<sup>50</sup> Cross-Border Justice Bill 2007, Explanatory Memoranda.

## 6.2

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### FITNESS TO PLEAD

#### 6.2.1 Physical Impairment

- **Physical impairment, such as deaf/muteness may render an accused unable to understand the proceedings or to make a proper defence**

Concern has been expressed for many years about the disproportionately high rate of ear disease and consequent hearing impairment in the Aboriginal community, particularly in regional and remote locations<sup>51</sup>. In *The Recognition of Aboriginal Customary Law* the Australian Law Reform Commission expressed concern about the disadvantage which an Aboriginal accused with unidentified hearing loss might endure in face-to-face communication:

“An interrogation might well proceed with the Aborigine hearing only part of the words addressed to him... Having.... learned to supplement auditory signals with other signals such as the movement of the lips and gestures, the disability may be masked and the interrogator may remain unaware of it. If signs of it do not appear they may be misinterpreted as surliness, or worse still, as the hesitations and the silences of guilt.”<sup>52</sup>

#### **Case: *Ebatarinja v Deland* (1998) 194 CLR 444**

**Facts:** the appellant, a deaf-mute Aboriginal male, had been charged with a number of offences including murder. The appellant, who was able to communicate only with his hands, did not know that he had been charged with the offences, nor was he able to communicate with his lawyers or understand legal proceedings. The parties accepted that it would not be possible to find a suitable interpreter. The Juvenile Court magistrate had stated a special case to the Supreme Court of the Northern Territory, asking whether the committal proceedings should be stayed. Subsequently the Director of Public Prosecutions filed an *ex officio* indictment in the Supreme Court charging the appellant with murder. Mildren J held that the magistrate should comply with the committal provisions of the *Justices Act 1979* (NT) notwithstanding that in the circumstances committal proceedings would be essentially ritualistic. His Honour then stayed the *ex officio* indictment.

**Held:** appeal allowed. The High Court noted that any committal proceedings undertaken in the appellant's physical presence would not be taken “in the presence or the hearing of the accused” within the meaning of the *Justices Act 1979* (NT):

“On a trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her.”<sup>53</sup>

The Court noted, however, that nothing prevented the Crown from proceeding with the *ex officio* indictment in the Supreme Court. In proceeding with that indictment, the appellant's fitness to plead could be determined in the Supreme Court, which had sole jurisdiction to determine that issue<sup>54</sup>.

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<sup>51</sup> House of Representatives Standing Committee on Aboriginal Affairs *Aboriginal Health* AGPS, Canberra, 1979. See also D Howard et al 'Aboriginal Hearing Loss and the Criminal Justice System' (1993) 3 *Aboriginal Law Bulletin* No. 65, 9, at 9.

<sup>52</sup> Queensland, *Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland* Government Printer, Brisbane, 1977, para 114, quoted in ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 546. (Accessed 5 July 2008)

<sup>53</sup> *Ebatarinja v Deland* (1998) 194 CLR 444 at 454, per the Court. See also *Kunnuth v The State* [1993] 4 All ER 30 at 35 (PC).

<sup>54</sup> *Ebatarinja v Deland* (1998) 194 CLR 444 at 456 per the Court.

**Case: *R v A.T.* (Unrep, NT Sup Ct, Thomas J, No 62 of 1992, 26 October 1992)**

In *R v A.T.* a 16 year old Aboriginal defendant had pleaded guilty to a number of offences including arson. Thomas J noted that the defendant's hearing disability had damaging social and psychological effects which had led to the development of inappropriate behavioural patterns:

"Although a hearing problem was identified early in [the defendant's] life and again identified during childhood, it appears that he has not had access to a range of [medical] services...that could have minimised the communicative, social and psychological impact of those problems and I quote one section of the report prepared by Mr Howard in which he states: 'These communication difficulties have been a major contributor to the development of serious social and psychological problems.'"<sup>55</sup>

Even if a hearing impairment is subsequently cured, it may leave a legacy of linguistic and communicative incompetence which continues to affect an Aboriginal person throughout his or her life<sup>56</sup>.

**6.2.2 Cultural or Language Barriers**

For many Aboriginal persons, particularly those living in remote communities, English may be a second or even a third language. In *The Recognition of Aboriginal Customary Laws* the Australian Law Reform Commission (ALRC) pointed out that conceptual as well as language issues may render an Aboriginal accused unfit to plead:

"A difficulty that has arisen in a number of cases concerning Aborigines relates to their fitness to plead (and thus to be tried) because of their inability to understand the charge or the nature and course of the court proceedings to which they are being subjected. This difficulty may result in part from language problems, which can be addressed, if not overcome, by the provision of an interpreter. However such problems may still occur, because it may be difficult, perhaps impossible, to explain even basic legal concepts to an Aborigine who has no knowledge or experience of the criminal justice system (eg the concepts of 'guilty' or 'not guilty')."<sup>57</sup>

The ALRC considered that legislative provisions designed for mentally impaired accused should not be invoked for Aboriginal accused persons who are unable to understand the proceedings at trial. Rather, the determination of fitness to plead should be postponed until the general question of guilt or innocence was determined. Thus, if a person were acquitted, fitness to plead would not arise as an issue<sup>58</sup>.

- **Provisions in the *Criminal Procedure Act 2004 (CPA)*, including s 129 CPA, deal with an accused's capacity to understand the charge or plea**

Section 129 *Criminal Procedure Act 2004 (WA)* (CPA) (which applies to pleas of guilty to charges which will be heard on indictment) provides as follows:

"129 (2) Unless the plea is a written plea given to a court of summary jurisdiction, the court must not accept the plea unless —

- (a) the accused is represented by a lawyer; or
- (b) if the accused is not so represented, the court is satisfied the accused understands the plea and its consequences."

<sup>55</sup> *R v A.T.* (Unrep., NT Sup Ct, Thomas J, No 62 of 1992), 26 October 1992 quoted in D Howard et al 'Aboriginal Hearing Loss and the Criminal Justice System' (1993) 3 *ALB* No. 65, 9 p 9.

<sup>56</sup> D Howard et al 'Aboriginal Hearing Loss and the Criminal Justice System' (1993) 3 *ALB* No. 65, 9, p 10.

<sup>57</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 579. (Accessed 5 July 2008). See also *Eastman v The Queen* [2000] HCA 29 at [59] per Gaudron J.

<sup>58</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) paras 583-585. (Accessed 5 July 2008)

See also LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) p 190-191. (Accessed 5 July 2008)



Implicit in 129 (2)(b) CPA is an assumption that that if an accused is legally represented then no language or communication difficulties exist which may affect the ability of the accused to understand the nature and consequences of the plea.

Moreover, s 129 (2)(b) CPA does not suggest the way in which the court must satisfy itself that an unrepresented accused understands the plea and its consequences.

In *Aboriginal Customary Laws: Final Report* the Law Reform Commission of Western Australia (LRCWA) recommended that s 129 CPA be amended to provide, for all accused persons, that a court must not accept a plea of guilty unless, having considered whether there are any language, cultural or communication difficulties, the court is satisfied that the accused understands the nature of the plea and its consequences<sup>59</sup>.

- **At common law, an inability to understand the plea and its consequences may render an Aboriginal accused unfit to plead**

In *Eastman v The Queen*<sup>60</sup> Gaudron J considered that the issue of fitness to plead arises where “language difficulties make it impossible for [an accused] to make a defence”<sup>61</sup>.

In *R v Ngatayi*<sup>62</sup> the appellant, an Aboriginal man from a traditional community near Broome had been convicted of wilful murder. At trial, the appellant’s counsel had requested that a jury be empanelled to determine the appellant’s fitness to plead on the ground that notwithstanding the assistance of an interpreter, the accused was incapable of understanding that a defence was available to him. The trial judge declined to apply s 631 *Criminal Code*<sup>63</sup> and entered a plea of not guilty, apparently applying s 49(1) of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*<sup>64</sup>.

An appeal to the High Court failed, the majority (Gibbs, Mason and Wilson JJ) concluding that s 631 did not mean that an accused can only be tried if he is capable, unaided, of understanding the proceedings so as to be able to make a proper defence. When the incapacity to understand the proceedings is due to an inability to understand the language, the incapacity is removed if an interpreter is available. Similarly, in deciding whether an accused is capable of understanding the proceedings so as to be able to make a proper defence it is relevant that he is defended by counsel. If the accused is able to understand the evidence, and to instruct his counsel as to the facts of the case, no unfairness or injustice will generally be occasioned by the fact that the accused does not know, and cannot understand, the law. Their Honours stated that with the assistance of counsel the accused will usually be able to make a proper defence.

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<sup>59</sup> LRCWA Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) Recommendation 42, p 191. (Accessed 5 July 2008)

<sup>60</sup> *Eastman v The Queen* [2000] HCA 29.

<sup>61</sup> *Eastman v The Queen* [2000] HCA 29 at [59]. See also A Crouch ‘The Way, the Truth and the Right to Interpreters in Court’ *Law Institute Journal*, Vol 59, 1985, 687, p 688.

<sup>62</sup> (1980) 147 CLR 1.

<sup>63</sup> Section 631 *Criminal Code 1913 (WA)*, now repealed, provided for the empanelment of a jury to ascertain fitness to plead whenever it appeared to be “uncertain, for any reason” that an accused was capable of understanding the proceedings at the trial so as to be able to make a proper defence.

<sup>64</sup> Section s 49 (1) of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*, now repealed, provided that in criminal proceedings punishable by imprisonment for a period of six months or more the court “shall refuse to accept a plea of guilt at trial or an admission of guilt before trial in any case where the court is satisfied upon examination of the accused person that he is a person of Aboriginal descent who from want or comprehension of the nature of the proceedings alleged, or of the proceedings, is or was not capable of understanding that plea of guilt or that admission or confession”.

Gibbs, Mason and Wilson JJ did acknowledge, however, that an order for discharge of an accused might be the only course available where no statutory provision exists pursuant to which that accused might be detained and no interpreter can be found for an accused who is neither mentally nor physically disabled but who cannot comprehend the language of the proceedings<sup>65</sup>. Their Honours noted that in *R v Willie*<sup>66</sup> Cooper J had ordered the discharge of four Aboriginal accused persons because no interpreter could be found competent to communicate the charge to them. Gibbs, Mason and Wilson JJ commented that “the report does not however disclose the authority, statutory or otherwise, for taking this course.”<sup>67</sup>

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<sup>65</sup> *Ngatayi v The Queen* (1980) 147 CLR 1 at 7-8. See also *R v Grant* [1975] WAR 163.

<sup>66</sup> (1885) 7 QLJ (NC) 108.

<sup>67</sup> *Ngatayi v The Queen* (1980) 147 CLR 1 at 8.

## 6.3

### INTERPRETERS

In 1991 the *Royal Commission into Aboriginal Deaths in Custody: Final Report* (RCIADIC), noting that “Aboriginal people are still being denied bail because of the problems of language and understanding”, stated that this situation “demands the provision of interpreters whenever the need arises”.<sup>68</sup>

RCIADIC recommended that where doubt exists that an Aboriginal defendant has the ability to fully understand proceedings in the English language and is fully able to express himself or herself in the English language” a court must satisfy itself that the defendant in fact does have that ability. Where doubts persist, “proceedings should not continue until a competent interpreter is provided to the person without cost to that person.”<sup>69</sup>

In 2006, in its *Aboriginal Customary Laws: Final Report* the Law Reform Commission of Western Australia (LRCWA) acknowledged the difficulty which many Aboriginal people experience in understanding and participating in the legal system. In that context, the LRCWA described the availability of Aboriginal language interpreters in Western Australia as “far from adequate”, and has supported calls made by the Aboriginal Legal Service of Western Australia and others for the establishment of a Statewide Aboriginal language interpreting service<sup>70</sup>.

#### 6.3.1. The Right to an Interpreter

- **The *Criminal Investigation Act 2006* (WA) confers limited rights to an interpreter**

Sections 136, 137 and 138 of the *Criminal Investigation Act 2006* (WA) (*CI Act*) contain a number of protective provisions for arrested persons and suspects. In particular, s 137(3)(c) *CI Act* provides for an arrested person to be given assistance by an interpreter of other qualified person if the person is unable to understand or communicate in spoken English sufficiently. In addition to those rights, an arrested suspect may not be interviewed until the services of an interpreter or other qualified person are available “if he or she is *for any reason* unable to understand or communicate in spoken English sufficiently”: s 138(2)(d) *CI Act*. (emphasis added)

In Victoria, the equivalent statutory provision to these provisions is s 464D *Crimes Act 1958* (Vic). In *R v Mohammed Mustaf Mohammed*<sup>71</sup> (a case involving a Somali accused) the accused objected to the admission of a tape-recorded record of interview on the grounds that he had been denied an interpreter at the time of his interview by police. Kaye J excluded the record of interview from evidence, noting:

“[Section] 464D(1) of the *Crimes Act* specifies that where a person in custody does not have knowledge of English sufficient to enable him to understand the questioning, the interview should be deferred until a competent interpreter is present.”<sup>72</sup>

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<sup>68</sup> RCIADIC, Vol 3, Chapter 21, ([www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/37.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/37.html)) para 21.4.22. (Accessed 6 July 2008)

<sup>69</sup> RCIADIC, Vol 3, Chapter 22, [www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/national/vol3/44.html](http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/national/vol3/44.html) para 22.4.27, Recommendation 99. (Accessed 6 July 2008) See also ALRC *The Recognition of Aboriginal Customary Law*, Report No 31, 1986. ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) paras 596-600. (Accessed 5 July 2008)

<sup>70</sup> LRCWA *Aboriginal Customary Laws: Final Report*, Project No 94 (September 2006), ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) p 333, p 337 and Recommendation 117. (Accessed 5 July 2008).

<sup>71</sup> [2004] VSC 408.

<sup>72</sup> *R v Mohammed Mustaf Mohammed* [2004] VSC 408 at [58].

- **Section 75 (3)(b) Criminal Procedure Act 2004 (WA) provides for a court of summary jurisdiction to be adjourned so that the services of an interpreter can be obtained**

Section 75 (3)(b) *Criminal Procedure Act 2004* (WA) (CPA) provides that in summary proceedings, a court may adjourn a charge so that the services of an interpreter can be obtained.

**Case: *Frank v Police* [2007] SASC 288**

Facts: the appellant, an Aboriginal male from a traditional community in the Pitjantjatara Lands of South Australia, had pleaded guilty to a number of charges of assault. The sentencing magistrate had adjourned the sentencing proceedings on several occasions because of the court's inability to locate a suitable interpreter for the offender. Ultimately the magistrate sentenced the accused in the absence of an interpreter, but did not provide full reasons, expressing the view that it was unlikely that the accused, without the aid of an interpreter, would have the capacity to understand what was being said.

Held: appeal allowed and the sentence set aside. Sulan J noted that there had been numerous attempts to obtain the services of an interpreter, all of which had failed. His Honour commented:

"The appellant was denied a fair hearing. He was deprived of a basic right."<sup>73</sup>

Sulan J remarked that the task of defence counsel in obtaining instructions had been "almost impossible" because of the failure of the administration to provide adequate and reliable interpreting services. His Honour commented:

"The solicitor was not able to advise, nor able to obtain adequate instructions. When a defendant is receiving legal aid, there is a responsibility upon those who administer legal aid to ensure that clients can understand and give meaningful instructions."<sup>74</sup>

Sulan J's remarks suggest that it may be open to a court to find that an accused had been denied the right to a fair trial where that accused has been denied access to an interpreter prior to his or her court appearance.

- **The requirement that the trial be fair may mandate that an interpreter be provided**

At common law, a party in civil or criminal proceedings is not entitled as of right to an interpreter<sup>75</sup>. However, the requirement that the trial be fair may mandate the provision of an interpreter. In *Dietrich v The Queen*<sup>76</sup> Gaudron J commented that the requirement that a trial be fair may require that "procedures...be modified, for example, to allow evidence to be given through an interpreter."<sup>77</sup> In *Re East: ex parte Nguyen*<sup>78</sup> Kirby J commented that where a trial would be unfair because of the lack of an interpreter "it is the duty of the judicial officer to endeavour to ensure that an interpreter is provided."<sup>79</sup>

In *Ebatarinja v Deland*<sup>80</sup> the High Court commented that where an accused "does not speak the language in which the proceedings are conducted, the absence of an interpreter will result in an unfair trial."<sup>81</sup>

<sup>73</sup> *Frank v Police* [2007] SASC 288 at [49].

<sup>74</sup> *Frank v Police* [2007] SASC 288 at [51].

<sup>75</sup> *Dairy Farmers v Acquilina* (1963) 109 CLR 458 at 464 per the Court.

<sup>76</sup> *Dietrich v The Queen* (1992) 177 CLR 292.

<sup>77</sup> *Dietrich v The Queen* (1992) 177 CLR 292 at 363; see also Deane J at 330 – 331.

<sup>78</sup> (1998) 196 CLR 354.

<sup>79</sup> *Re East: ex parte Nguyen* (1998) 196 CLR 354 at 390.

<sup>80</sup> (1998) 196 CLR 354.

<sup>81</sup> *Ebatarinja v Deland* (1998) 196 CLR 354 at 454.

- **International human rights instruments confer the right to an interpreter**

A number of international human rights instruments confer the right to an interpreter in court proceedings, either expressly or impliedly. For Australian purposes, the most developed statement relating to the provision of interpreters in criminal proceedings is Article 14(3) of the *International Covenant on Civil and Political Rights* (ICCPR) which provides:

“In the determination of any criminal charge against him, everyone shall be entitled to the following guarantees, in full equality:

.....

(f) the right to the free assistance of an interpreter if the person cannot understand or speak the language used in court.”<sup>82</sup>

In *Dietrich v The Queen*<sup>83</sup> Brennan J stated that, although not part of Australian municipal law, the ICCPR “has a legitimate influence on the development of the common law”<sup>84</sup>. Toohey J observed that -

“English authority tends to support the argument that a court may, perhaps must, consider the implications of an international instrument where there is a lacuna in the domestic law”<sup>85</sup>.

These dicta support the view that, from a human rights perspective, judicial discretion should be exercised to ensure that an Aboriginal accused, who does not understand or cannot communicate in English, receives the assistance of an interpreter in criminal proceedings.

### 6.3.2 Practical Difficulties in Respect of Interpreters

A number of practical difficulties arise in obtaining the assistance of competent Aboriginal interpreters in court proceedings. These include:

- ***Determining an accused’s competency in English***

There is no objective indicator of the extent to which language disability must be demonstrated before an interpreter is deemed necessary in criminal proceedings<sup>86</sup>. Apparent fluency in the English language may be misleading, especially to a person from a monolingual and monocultural background.

In criminal proceedings, the capacity of an accused to “understand or speak” English is usually ascertained –

“...by a series of questions along the lines of ‘where do you live’, ‘how old are you’, ‘how long have you been in Australia’ and so on, which can generally be answered reasonably well. It is quite a different thing altogether for the accused then to be able to understand the whole course of the evidence and the addresses; and to do so sufficiently well to defend him or herself or give proper instructions to counsel.”<sup>87</sup>

A linguistics expert in the *Yolgnu* language has suggested that in determining whether an Aboriginal witness needs the assistance of an interpreter, a judge should not place too much reliance upon counsel or the witness himself or herself:

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<sup>82</sup> See also Articles 14(1) and 26 ICCPR; Article 5 *International Convention on the Elimination of All Forms of Racial Discrimination* (1966); Article 14 *Covenant on Civil and Political Rights*; Article 15 (2) *Universal Declaration on Linguistic Rights* (1996).

<sup>83</sup> (1992) 177 CLR 292.

<sup>84</sup> *Dietrich v The Queen* (1992) 177 CLR 292 at 321. See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, at pp 41-43 Brennan J.

<sup>85</sup> *Dietrich v The Queen* (1992) 177 CLR 292 at 360. (The English authority referred to was *Derbyshire County Council v Times Newspapers Ltd* [1992] 1 QB 770.)

<sup>86</sup> V Taylor ‘Interpreting the Legal Process’ *Legal Service Bulletin*, 1989, Vol 14, 284, p 286.

<sup>87</sup> L Roberts-Smith ‘Communication Breakdown’ *Legal Service Bulletin* Vol 14, No 2, April 1989, 75, at 76.

“Courtroom lawyers...are generally unqualified to judge the linguistic competence of Aboriginal witnesses who speak some English. The person least able to advise the court on this matter is any barrister with an interest in failed communication, such as when the Aboriginal person in question might be considered, by that barrister, to be a hostile witness. The witness may also have difficulty in giving an accurate indication to the court, at the outset, as to his or her own level of skill as a communicator in English.”<sup>88</sup>

In *Re East: ex parte Nguyen*<sup>89</sup> Kirby J emphasised that the responsibility for determining English-language competency remains with the judge:

“The judicial officer will not be relieved of the obligation to ensure a fair trial if it should subsequently appear (from something said or done in the trial) that an interpreter is needed.”<sup>90</sup>

**Note:** to help lawyers assess the need for an interpreter, the Northern Territory Law Society has developed and published *Indigenous Protocols for Lawyers in the Northern Territory*, First Edition, 2004. The Protocols include a test to help determine whether an Aboriginal person requires an interpreter<sup>91</sup>.

See **Appendix C: Test to Determine Whether an Aboriginal Interpreter is Required.**

▪ ***Inability to obtain the services of an accredited interpreter***

An accredited Aboriginal interpreter may not be available to assist the court in a criminal proceeding. At the Kimberley Interpreting Services (KIS), for example, not all of its 120 interpreters are accredited, and less than half of those interpret in criminal trials<sup>92</sup>. KIS conducts its own interpreter training programs.

In addition to a general shortage of accredited interpreters, other issues arise:

- an interpreter trained in the relevant Aboriginal language or dialect may not be available in the location where the proceedings are to be conducted;
- an appropriately-trained interpreter may be unavailable by reason of being unwell<sup>93</sup>;
- insufficient notice may have been given to the relevant interpreting service organisation. A demand for an interpreter “straightaway” often cannot be met<sup>94</sup>;
- an appropriately-trained interpreter who is otherwise available may become “unavailable” to interpret for reasons attributable to that interpreter’s own local relationships. The interpreter may believe (in some cases, correctly) that his or her involvement in the court proceedings will be construed as “taking sides” in the matter. Accordingly, the interpreter might be blamed for the verdict in the trial, and accordingly punished or “paid back” by the accused, his or her family or members of the broader community<sup>95</sup>.

<sup>88</sup> M Cooke ‘Aboriginal Evidence in the Cross-Cultural Courtroom’ in D Eades, ed, *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* UNSW Press, Sydney, 1995, 55, p 93. See also Dr M Cooke in “Caught in the Middle: Indigenous Interpreters and Customary Law”, Background Paper 4, the LRCWA’s *Aboriginal Customary Laws Reference* LRCWA, ([www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-02.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-02.pdf)). (Accessed 11 July 2008)

<sup>89</sup> (1998) 196 CLR 354.

<sup>90</sup> *Re East: ex parte Nguyen* (1998) 196 CLR 354 at 390.

<sup>91</sup> Available at [www.lawsocnt.asn.au/fmi/xsl/lmnt/downloads/IndigenousProtocolsforLawyers.pdf](http://www.lawsocnt.asn.au/fmi/xsl/lmnt/downloads/IndigenousProtocolsforLawyers.pdf). (Accessed 11 July 2008)

<sup>92</sup> Telephone communications, Ms Dee Lightfoot, Coordinator, Kimberley Interpreting Services, 2 July 2008.

<sup>93</sup> Interview with Ms Dagmar Dixon, Aboriginal Interpreting Programs, TAFE, Perth, 5 May 2001.

<sup>94</sup> R Goldflam ‘Silence in Court! Problems and Prospects in Aboriginal Interpreting’ in D Eades, ed, *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia*, UNSW Press Ltd, NSW, 1995, 28, p 50.

<sup>95</sup> Interview with Ms Dagmar Dixon, Aboriginal Interpreting Programs, TAFE, Perth, 5 May 2001.

- **Untrained interpreters**

The use of untrained interpreters is regarded as inherently problematic. In particular:

- the use of a family member as an interpreter may be humiliating for a witness and/or may significantly inhibit a witness from disclosing information to the court;
- untrained interpreters may be deficient in language and interpreting skills; they may possess inadequate cross-cultural understanding, or may choose imprecise, inappropriate or misleading words.

- **The alienating effect of the court environment**

There is evidence that second language competency decreases markedly under trauma or stress<sup>96</sup>. The formal court environment and the use of technical legal language may be overwhelming for an Aboriginal interpreter. Such difficulties may be exacerbated by counsels' styles of interrogation.

- **Lack of conceptual equivalence of words or phrases**

An interpreter may find it extremely difficult to translate certain legal words or phrases for which there is no conceptual equivalent. Difficult concepts might include the meaning of a "not guilty" plea, the relevance of "intention" to certain offences; the meaning and operation of "mitigating" and "aggravating" factors, and so on.

- **Language/semantic differences**

As discussed in **Chapter Five**, an English word may have one or more different meanings in Aboriginal languages, and vice versa. The word "kill" may mean "hit" and "hurt" as well as, literally, "to kill". In one reported case an Aboriginal suspect stated that he intended to "kill" the complainant. On closer questioning, it was revealed that his intention was not to murder the complainant, but to "kill her a little bit", "kill her on the leg"<sup>97</sup>.

- **Resource implications**

The use of interpreters in criminal trials has obvious and significant resource implications for courts, not least in that trials involving the participation of an interpreter inevitably take longer than those which do not.

- **The interpreter's conduct**

In the 1991 study *Access to Interpreters in the Australian Legal System: Report* the Commonwealth Attorney-General identified a number of problems as endemic:

- the interpreter may appear to "take sides" and act as an advocate;
- the interpreter may appear to summarise and "package" the client's story;
- the interpreter may appear to act in an unscrupulous manner<sup>98</sup>.

There is also evidence of judicial misgivings about the role and function of interpreters, although again these may now be somewhat dated. Judicial comments have included the following:

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<sup>96</sup> Ethnic Affairs Commission *Use of Interpreters in Domestic Violence and Sexual Assault Cases: A Guide for Interpreters*, Sydney, EAC, 1995.

<sup>97</sup> J Coldrey 'Aboriginals in the Criminal Courts' in K Hazlehurst, ed, *Ivory Scales: Black Australia and the Law*, UNSW Press, 1987, 81, at 87-88.

<sup>98</sup> Commonwealth Attorney-General's Department *Access to Interpreters in the Legal System: Report* AGPS, Canberra, 1991 p 89.

- “Experience has shown that the tribunal of fact can make a better assessment of a witness if there is no interpreter transposed between it and the witness”.<sup>99</sup>
- “It is all too common an experience to hear the interpreter giving the effect instead of a literal translation of questions and answers and of his own accord interpolating questions and eliciting responses.”<sup>100</sup>
- “Witnesses with some but inadequate English language skills [face a dilemma]. Do they continue in English even though they may be disadvantaged or do they use an interpreter and risk being regarded as devious, evasive or running for cover?”<sup>101</sup>
- “It appeared to me that the defendant was pretending that he did not understand English to the degree that he did and was also consistently endeavouring to get opposing counsel to rephrase questions in an endeavour to gain greater time for himself to work out the answers. This manoeuvre was patently obvious. There were occasions...where the interpreter had translated what she thought the witness had said and the witness then in English corrected the translation...”<sup>102</sup>

The Attorney-General’s Report highlighted that a significant number of interpreters working in the legal system at that time were not qualified to do so and described this as being of “grave concern to the interests of the justice system and to those litigants who are required to use them”<sup>103</sup>. It recommended a system of registration as being “of primary importance in addressing the availability of competent interpreters in the legal system”<sup>104</sup>.

### 6.3.3 Calls for Accredited Aboriginal Interpreting Training Programs

- **There have been calls to address the current shortage of accredited Aboriginal interpreters and interpreting training programs in Western Australia**

In 1987, the Australian Law Reform Commission identified an “urgent need” for competent, trained interpreters to participate in trials involving Aboriginal persons who are unable to understand or speak the language used in court.<sup>105</sup> Those views were endorsed in the Final Report of the *Royal Commission into Aboriginal Deaths in Custody* in 1991 and in numerous other reports, including *Access to Justice: An Action Plan*<sup>106</sup>, *Multiculturalism and the Law*<sup>107</sup> and the Law Reform Commission of Western Australia (LRCWA) in its *Aboriginal Customary Laws: Final Report*<sup>108</sup>.

The Australian National Accreditation Authority for Translators and Interpreters (NAATI) accredits programs in interpreting Aboriginal languages, but only to paraprofessional level. The Commonwealth Department of Education, Science and Training has recommended this be reviewed<sup>109</sup>. An Aboriginal Interpreting Diploma Program, accredited by NAATI and offered through Central Metropolitan TAFE in Perth, was discontinued in 2002.

<sup>99</sup> *R v Johnson* (1987) 25 A Crim R 433 at 442 per Williams J.

<sup>100</sup> *Filos v Morland* (1963) 63 SR (NSW) 331 at 333 per Brereton J.

<sup>101</sup> Sir James Gobbo, Supreme Court of Victoria, quoted in Commonwealth Attorney-General’s Department *Access to Interpreters in the Australian Legal System: Report* AGPS, Canberra, 1991, 3.3.7 (p 45).

<sup>102</sup> *Hatzigeorgalis v Ange* (No 2) (Unreported, Sup Ct NSW, Young J, No 3506 of 1986, 17 June 1991) p 20, quoted in K Laster and V Taylor, n 130, p 97.

<sup>103</sup> Commonwealth Attorney-General’s Department *Access to Interpreters in the Legal System: Report* AGPS, Canberra, 1991 p 93.

<sup>104</sup> Commonwealth Attorney-General’s Department *Access to Interpreters in the Legal System: Report* AGPS, Canberra, 1991 p 113.

<sup>105</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 600. (Accessed 5 July 2008)

<sup>106</sup> Access to Justice Advisory Committee, Commonwealth of Australia, 1994.

<sup>107</sup> ALRC, Report No 57, Commonwealth of Australia, 1992. ([www.austlii.edu.au/au/other/alrc/publications/reports/57/](http://www.austlii.edu.au/au/other/alrc/publications/reports/57/))

<sup>108</sup> LRCWA *Aboriginal Customary Laws: Final Report*, Project No 94 (September 2006), ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) (Accessed 11 July 2008)

<sup>109</sup> Commonwealth Department of Science, Education and Training *The Career Paths and Training for Interpreters and Translators Report* (December 2005).



The Kimberley Interpreting Service (which is funded by the Department of Indigenous Affairs) provides interpreter training courses on a very limited basis. Some Aboriginal interpreters in Western Australia have undertaken Aboriginal interpreting courses at Batchelor College in the Northern Territory.

In an extensive submission to the Western Australian Government in April 2006, the ALSWA called for the establishment of a Statewide Languages Services Policy, to be linked to the Western Australian Aboriginal Justice Agreement<sup>110</sup> (AJA). A principal objective of the AJA is to ensure the provision of equitable access to justice-related services across the State, thereby improving justice outcomes for Aboriginal people. Such a Statewide initiative is strongly supported, among others, by the LRCWA<sup>111</sup>, the Kimberley Interpreting Service and the Wangka Maya Pilbara Aboriginal Language Centre<sup>112</sup>.

Most recently this issue was taken up by the Western Australian Equal Opportunity Commissioner, who stated that "consultation showed very clearly that a lot of Aboriginal people did not understand proceedings within courts and were not able to properly engage in those processes"<sup>113</sup>.

Note: a note of the locations within Western Australia in which Aboriginal interpreting services are available is contained in **Appendix D**.

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<sup>110</sup> [www.justice.wa.gov.au/files/Aboriginal\\_Justice\\_Agreement.pdf](http://www.justice.wa.gov.au/files/Aboriginal_Justice_Agreement.pdf). (Accessed 2 July 2008)

<sup>111</sup> LRCWA *Aboriginal Customary Laws: Final Report*, Project No 94 (September 2006), ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) p 337 and Recommendation 117. (Accessed 11 July 2008).

<sup>112</sup> Telephone communications, Ms Dee Lightfoot, Coordinator, Kimberley Interpreting Services and Ms Sue Hansen, Senior Linguist, Wangka Maya Pilbara Aboriginal Language Centre, 2 July 2008.

<sup>113</sup> ABC news online, 'Call for Budget to Deliver on Aboriginal Interpreter Services', 8 May 2008, available at: <http://www.abc.net.au/news/stories/2008/05/08/2238767.htm> (Accessed on 21 May 2008).

## APPENDICES TO CHAPTER SIX

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### Pre-Trial Matters

#### Appendix A: Offices of the Aboriginal Legal Service of Western Australia (inc)

The Aboriginal Legal Service of Western Australia (ALSWA) (Inc) ([www.als.org.au](http://www.als.org.au)) provides a wide range of services for Aboriginal people. The ALSWA operates 17 offices within Western Australia. The contact details of each ALSWA office are as follows:

<b>Perth</b>	Tel: (08) 9265 6666 / 1800 019 900 (freecall)
<b>Albany</b>	Tel: (08) 9841 7833 / 1800 016 715 (freecall)
<b>Broome</b>	Tel: (08) 9192 1189 / 1800 351 067 (freecall)
<b>Bunbury</b>	Tel: (08) 9791 2622 / 1800 630 375 (freecall)
<b>Carnarvon</b>	Tel: (08) 9941 1534 / 1800 645 942 (freecall)
<b>Derby</b>	Tel: (08) 9191 1407
<b>Fitzroy Crossing</b>	Tel: (08) 9191 5147
<b>Geraldton</b>	Tel: (08) 9921 4938 / 1800 016 786 (freecall)
<b>Halls Creek</b>	Tel: (08) 9168 6156
<b>Kalgoorlie</b>	Tel: (08) 9021 3816 / 1800 016 791 (freecall)
<b>Kununurra</b>	Tel: (08) 9168 1635
<b>Laverton</b>	Tel: (08) 9031 1156
<b>Meekatharra</b>	Tel: (08) 9981 1712
<b>Newman</b>	Tel: (08) 9175 0764
<b>Northam</b>	Tel: (08) 9622 5933 / 1800 442 015 (freecall)
<b>Roebourne</b>	Tel: (08) 9182 1107
<b>South Hedland</b>	Tel: (08) 9172 1455 / 1800 650 162 (freecall)
<b>Warburton</b>	Tel: (08) 8956 2823

## **Appendix B: Court Liaison Officers**

In recent years a number of Aboriginal Court Liaison Officers have been appointed by the Manager, Aboriginal Policy and Services at the Department of the Attorney-General for Western Australia. Those Officers, whose principal role is to support Aboriginal accused persons and their families in legal proceedings, have been appointed to metropolitan and regional/remote courts.

The contact details are as follows:

Carnarvon Court	(08) 9941 1082
Perth Magistrates Court	(08) 9425 2419
Perth Children's Court	(08) 9218 0815
Albany Court	(08) 9845 5200
South Hedland	(08) 9172 9300
Roebourne	(08) 9182 1281
Kununurra	(08) 9168 1011
Broome	(08) 9192 1137

## Appendix C: Test for Determining Whether an Aboriginal Interpreter is Required

The following three-stage test ("Aboriginal Interpreter Service User Guidelines") is extracted from *Indigenous Protocols for Lawyers in the Northern Territory*, First Edition, 2004<sup>114</sup>

### **These guidelines are to help you determine if an Aboriginal language interpreter is required.**

The following test method is straightforward and should only take a few minutes. It involves asking some questions that are designed to see how far the person can understand English and how well they can respond using English.

It also involves laying a few word traps to uncover the potential for unrecognised miscommunication.

### **Instructions for administering the test:**

- You should take notes of the interviewee's responses for checking.
- Speak clearly in plain language.
- After you ask each question give adequate time for a response.
- If a response or lack of response indicates that the question may not have been understood, then investigate this further. You could ask, "Do you understand what I asked you just now?" If the interviewee answers "no", repeat the question and then follow this immediately with a check by saying, "I need to find out if you understand my question, so please repeat back what I just asked you now." If they answered "yes", then also immediately follow this response with the same check.

*In either case, if the interviewee is unable to restate the sense of your questions, then an interpreter's assistance is required.*

### **STAGE 1**

Before we talk about \_\_\_\_\_, I need to be sure that we can communicate effectively in English.

I'm going to ask you some questions and see how you answer them. This will help us work out if you need an interpreter. Let me ask you this question first: Do you have any difficulties with speaking or understanding English?

*NOTE: If the interviewee does not respond or if they answer yes, but can give no clear details, then there is no need to proceed further, an interpreter is warranted*

<sup>114</sup> See [www.lawsocnt.asn.au/fmi/xsl/lsnt/downloads/IndigenousProtocolsforLawyers.pdf](http://www.lawsocnt.asn.au/fmi/xsl/lsnt/downloads/IndigenousProtocolsforLawyers.pdf). (Accessed 11 July 2008)

## STAGE 2

Now I'm going to ask you a few questions about yourself so that I can check that you are able to give me information in English. Please listen to my questions and answer them as well as you can.

- Can you tell me where you were born and your date of birth?
- What education have you had?
- Do you know how to read and write English? (If the answer is yes then ask them to read a newspaper headline and to write: I know how to read and write in English.)
- I would like to find out if you have enough English to tell me a story. So tell me a little bit about your country where you come from - for example, things like where it is, what it looks like and what bush tucker you can find there.

*NOTE: If the interviewee's responses are inappropriate to the questions OR if answers are only one or two words long OR if the interviewee cannot come up with a few clear sentences for the last question, then there is no need to proceed further as an interpreter is warranted.*

## STAGE 3

Now I'm going to ask you just a few more questions. This time I might try to make some questions a little bit tricky or ask them in another way so I can see if you stay on track.

- When you were born, was that this century or last century?
- When you were growing up in Sydney, was the food good?
- Gough Whitlam comes from your community too! That's right isn't it?
- How long did you go to school in Canberra; was it more than one year?
- Okay, this is the last question: are you satisfied that we can go ahead in English or do you think we need an interpreter?

*NOTE: If the responses do not match the questions - for example, if the interviewee responds to either/or questions with yes or no, or fails to recognise and rectify the false insertions about Sydney and Canberra - then an interpreter is required.*

## Appendix D: Aboriginal Interpreting Services and Language Centres in Western Australia

### 1. Kimberley Interpreting Service

The Kimberley Interpreting Service employs approximately 120 Aboriginal interpreters, both trained and untrained. Interpreting services can be provided in the following languages:

*Bardi; Bunuba; Jaru; Kija; Kukatja; Nyangumarta; Walmajarri; Kriol; Karajarri; Gajirrabang; Gooniyandi; Kwini; Managal; Mirriwong; Murrinh-Papha; Ngardi; Ngarinyin; Nyikina; Pintupi; Walmajarri; Walpiri; Wangkatjunga; Worrorra; Wunambal; Yulparija*

Contact: Ms Dee Lightfoot, Coordinator: [kis@mn.com.au](mailto:kis@mn.com.au)  
PO Box 3599  
Broome  
WA 6725  
Ph: (08) 9192 3981  
[www.kimberleyinterpreting.org.au](http://www.kimberleyinterpreting.org.au). (Accessed 11 July 2008)

### 2. Wangka Maya Pilbara Aboriginal Language Centre

The Wangka Maya Pilbara Aboriginal Language Centre employs has an Interpreting and Translating Service. It employs about 20 interpreters on a fee for service basis, and interpreting services can be provided in the following languages:

*Nyangumarta; Warnman; Martu Wonga; Kariyarra*

Contact: Ms Sue Hansen, Senior Linguist: [wmcontractlinguist@kisser.net.au](mailto:wmcontractlinguist@kisser.net.au)  
Lotteries House  
South Hedland  
WA 6722  
Ph: (08) 9172 2344  
[acl.arts.usyd.edu.au/projects/wangkamaya/index.php](http://acl.arts.usyd.edu.au/projects/wangkamaya/index.php). (Accessed 11 July 2008)

### 3. Other Aboriginal Language Centres in Western Australia are:

#### Karlkurla Language and Culture Aboriginal Corporation, Kalgoorlie

Contact:  
S Humes: [Sharon@klc@westnet.com.au](mailto:Sharon@klc@westnet.com.au) Ph: (08) 9091 4705

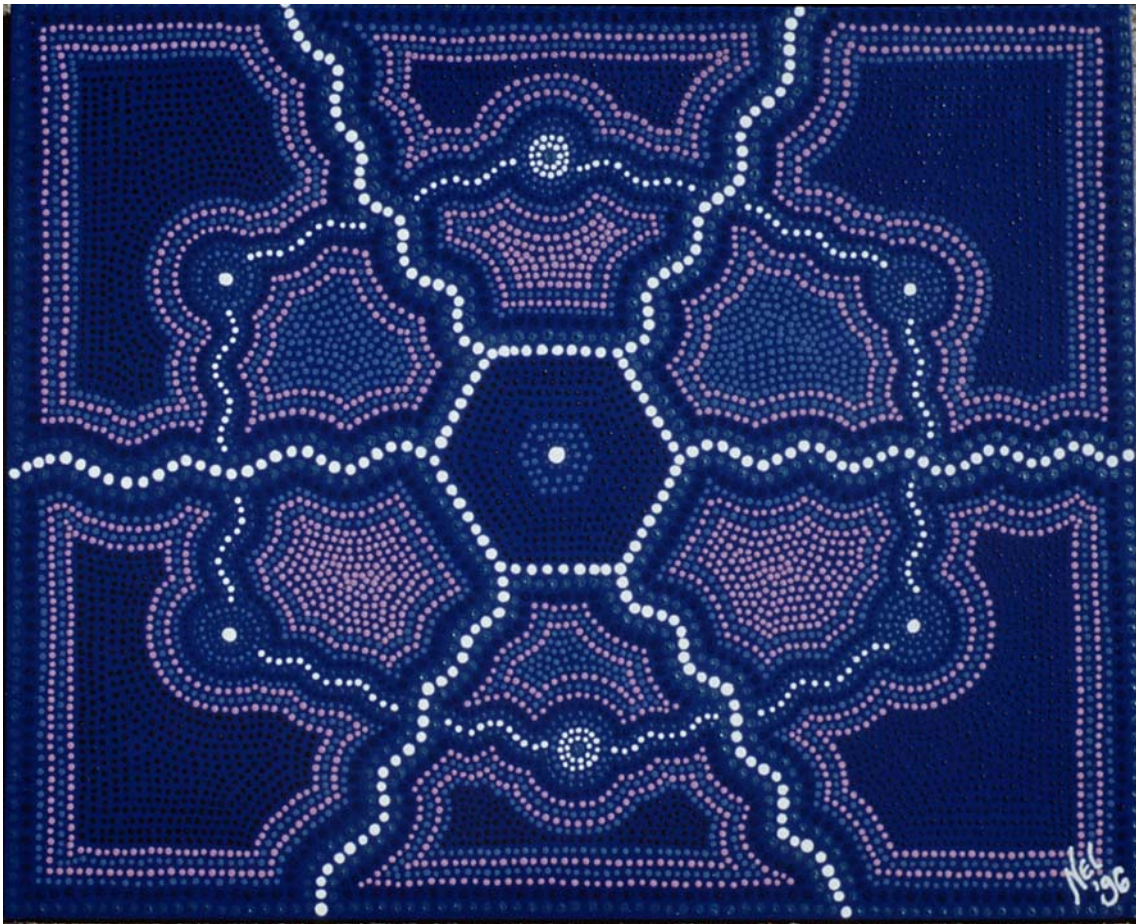
#### Mirima Dawang Woorlab-Gerring Language Centre and Culture Centre, Kununurra

Contact:  
KJ Olawsky [manager@mirima.org.au](mailto:manager@mirima.org.au) Ph: (08) 9169 1029

#### Irra Wangga Language Centre, Geraldton

Contact: [Adriano@irrawangga.org.au](mailto:Adriano@irrawangga.org.au)

# Chapter Seven: Criminal Proceedings



# Chapter Seven: Criminal Proceedings

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Upon the recommendation of Western Australian Aboriginal advisers, the word “Aboriginal”, rather than “Indigenous” is used in this Benchbook

## **Summary of Chapter Seven**

### **Criminal Proceedings**

#### **7.1 REPRESENTATION AND APPEARANCE**

##### **7.1.1 Representation by a person who is neither a lawyer nor an articulated clerk**

- An authorised Aboriginal court officer may appear for an Aboriginal accused
- In other cases, the court's leave may be obtained for representation by a person who is neither a lawyer nor an articulated clerk

##### **7.1.2 Appearance by Video/Audio Link**

- There may be a number of advantages to permitting an Aboriginal accused to appear by audio or video link

#### **7.2 THE JURY**

##### **7.2.1 Adverse Publicity**

- Adverse publicity about Aboriginal people may be so extensive and virulent as to make the fair trial of an Aboriginal accused virtually impossible: *Binge and Ors v Bennett* (1989) 98 FLR 193; *Arthurs v State of Western Australia* [2007] 182

##### **7.2.2 Change of Trial Venue**

- Where there is a risk of prejudice to an Aboriginal accused notwithstanding that proper directions be given to a jury, a change of trial venue may be ordered: *Wotton v Director of Public Prosecutions (Queensland)* [2006] QDC 202

##### **7.2.3 Selection of Jurors**

- An Aboriginal accused is not entitled to be judged by a jury which comprises only Aboriginal elders: *R v Buzzacott* (2004) 154 ACTR 37
- An Aboriginal accused may not challenge a jury on the ground that it has no Aboriginal members at all: *R v Badenoch* [2004] VSCA 95

##### **7.2.4 Gender Composition of Juries**

- Where evidence relating to Aboriginal men or women's "business" is to be given, it may be appropriate to empanel a single-sex jury: *R v Sydney Williams* (1976) 14 SASR 1; *R v Gudabi* (Unrep., NT Sup Ct, Forster CJ, SCC No 85/82, 30 May 1983)

##### **7.2.5 Aboriginal Members of Jury Panels**

- Aboriginal persons are greatly under-represented in jury panels

### **7.3 PLEADING TO THE CHARGE**

#### **7.3.1 Understanding the Charge/Plea**

- Repeal of s 49 (1) *Aboriginal Affairs Planning Authority Act 1972*
- Sections 59(2), 90 and 129(2) *Criminal Procedure Act 2004* (WA) constitute protective provisions for an accused

### **7.4 OPENING REMARKS TO JURY**

#### **7.4.1 Mildren Directions**

- The nature of Mildren directions
- Judicial consideration of Mildren directions: *Stack v State of WA* (2004) 29 WAR 526

### **7.5 EVIDENCE**

#### **7.5.1 Vulnerable Witnesses: Special Provisions**

- Unsworn evidence: s100A *Evidence Act*
- Pre-recorded evidence and support persons: s 106R *Evidence Act*
- Visually-recorded evidence: s 106RA *Evidence Act*

#### **7.5.2 Female Witnesses**

- Difficulties experienced by female Aboriginal witnesses
- “Battered Wives Syndrome”: *Kina v R* (Unrep., Sup Ct Qld, CCA, 29 November 1993)

#### **7.5.3 Child Witnesses**

- Difficulties experienced by child Aboriginal witnesses: the ‘*Pinkenba*’ Case

#### **7.5.4 Exclusion of Persons from Proceedings**

- The exclusion of persons from the proceedings may remove difficulties associated with an Aboriginal witness giving full and frank evidence to the court.

#### **7.5.5 Gender-Restricted Evidence**

- Evidence may be given on a gender-restricted basis to meet Aboriginal cultural requirements: *State of Western Australia v Ben Ward* (1997) 76 FCR 492

#### **7.5.6 Evidence of Husbands and Wives**

- Traditional Aboriginal marriages are not recognised as legal marriages for evidential purposes: *R v Cobby* (1883) 4 LR (NSW) 355 (FC).

#### **7.5.7 Aboriginal Language Patterns**

- Expert evidence may be given in respect of Aboriginal English or other Aboriginal language patterns: *Condrón v R* (1990) 49 A Crim R 79

### **7.5.8 Evidence in Narrative Form**

- Aboriginal witnesses may be permitted to give evidence in narrative form

### **7.5.9 Cross-Examination**

- The courts will not readily restrict the method of cross-examination of witnesses: *Stack v State of Western Australia* (2004) 29 WAR 526

### **7.5.10 Restriction of Publication of Proceedings**

- Prohibiting the publication of criminal proceedings may remove barriers to an Aboriginal witness giving full and frank evidence in court; *R v Bara Bara* (1992) 87 NTR 1

## **7.6 CONFESSIONS AND ADMISSIONS**

### **7.6.1 Entitlements of Arrested Persons and Suspects**

- Sections 137-138 *Criminal Procedure Act 2004* (WA) confer certain entitlements upon arrested persons and suspects, breach of which may result in the exclusion of an admission or confession: *Martin v State of Western Australia* [2008] WASC 105

### **7.6.2 Admissibility of Confessional Statements**

- Care must be taken in admitting a confessional statement where cultural factors might impinge on its genuineness: *The Queen v Foster* (1993) 113 ALR 1; *R v Williams* (1992) 8 WAR 265
- Particular care must be taken in admitting confessional statements of Aboriginal children or youth: *Simon v The Queen* (2002) 134 A Crim R 414; *Cox v The Queen* (2002) WASCA 358
- Traditional Aboriginal concepts of collective responsibility or guilt may influence the making of confessions or admissions: *Bolton v Nielsen* (1951) 53 WALR 48

### **7.6.3 The Anunga Guidelines**

- The *Anunga* Guidelines are intended to ensure that confessional statements of Aboriginal accused are obtained fairly
- The *Anunga* Guidelines are not universal *Coulthard v Steer* (1981) 12 NTR 13), nor are they static (*Gudabi v R* (1984) 52 ALR 133)

### **7.6.4 Application of the Anunga Guidelines in Western Australia**

- Western Australian caselaw generally indicates that the *Anunga* Guidelines provide a useful yardstick in assessing the fairness of a confessional statement: *Webb v R* (1994) 13 WAR 257; *R v Nandoo* (Unrep., Sup Ct WA, Owen J, No 130 of 1996, BC 9605522); *R v Njana* (1998) 99 A Crim R 273
- Recent developments - the Kimberley TaskForce prosecutions: see *Siddon v State of Western Australia* [2008] WASC 100; *Bundamurra v State of Western Australia* [2008] WASC 106; *Djangara v State of Western Australia* [2008] WASC 102

## **7.7 DEFENCES**

### **7.7.1 Consent (Customary Law)**

- An Aboriginal adult or child may consent to the infliction of customary punishment: *R v Judson* (Unrep., District Court of WA, No. POR 26/1995, O'Sullivan DCJ & Jury, 26 April 1996)

### **7.7.2 Duress (Customary Law)**

- The defence of duress may be available in circumstances where Aboriginal customary law places a person under duress to behave in a particular way: *R v Gregory Warren & Ors* (1996) 88 A Crim R 78

### **7.7.3 Provocation**

- In determining issues of provocation, the test to be applied is that of an "ordinary Aboriginal person": *Jabarula v Jambajimba* (1989) 68 NTR 26; *Lofty v R* [1999] NTSC 73; *Hart v The Queen* [2003] WASCA 213

### **7.7.4 Honest Claim of Right**

- A broad meaning may be given to the concept of "property" for the purposes of s 24 *Criminal Code 1913* (WA): *Walden v Hensler* (1987) 75 ALR 173 (HCA)



## CHAPTER SEVEN

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# Criminal Proceedings

## 7.1

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### INTRODUCTION

#### 7.1.1 Representation by a Person who is Neither a Lawyer nor an Articled Clerk

- **An authorised Aboriginal court officer may appear for an Aboriginal accused**

Section 48 *Aboriginal Affairs Planning Authority Act 1972 (WA)* (AAPAA) provides for the representation of Aboriginal accused persons by Aboriginal court officers, who have been authorized to do so by the Minister for Indigenous Affairs.

Aboriginal court officers are trained and employed by the Aboriginal Legal Service of Western Australia (ALSWA) pursuant to s 48AAPAA.

**See Appendix A:** list of the Aboriginal Court Officers currently appointed in Western Australia.

- **The court's leave may be obtained for representation by a person who is neither a lawyer or an articled clerk**

Section 172(3)(b)(iii) of the *Criminal Procedure Act 2004 (WA)* (CPA) provides that, with the court's leave, a person who is not an authorised Aboriginal court officer under section 48 of the AAPAA, a lawyer, or an articled clerk may represent an accused. However, the court may give such leave only in exceptional circumstances: s 172(4) CPA.

#### 7.1.2 Appearance by Video/Audio Link

- **There may be a number of advantages to permitting an Aboriginal accused to appear in certain proceedings by video or audio link**

Section 141 CPA provides for the appearance by video or audiolink of an accused in relation to a charge for any purpose other than to be sentenced. This is subject to s 77 CPA, which provides for the use of an video or audiolink when an accused is held in custody except for trial and sentencing (s 77(1)(a) CPA) and, unless the court orders otherwise in the interests of justice, on the first appearance on a charge (ss 77(2),77(4) CPA)<sup>1</sup>.

The appearance of an Aboriginal accused by video/audio link may be appropriate and advantageous for a number of reasons:

- To enable Aboriginal accused or witnesses to attend court (unless in-person attendance is desirable). Many Aboriginal communities are located long distances from many courts and Aboriginal people may have considerable difficulty in getting transport to court;
- To avoid the need for a detained Aboriginal person to be transported in custody between the custodial facility and the court;

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<sup>1</sup> See also s 66B *Bail Act 1982 (WA)* (use of video/audio link for bail applications).

- To avoid or reduce the necessity of removing a detained Aboriginal person from his or her community. Due to the lack of appropriate regional detention facilities, Aboriginal people (particularly women and juveniles) who are detained in custody are likely to be held in a facility at Perth;
- To assist the court to obtain the best evidence from special witnesses or where an Aboriginal accused or an Aboriginal witness is intimidated by the court environment<sup>2</sup>.

**See Appendix A:** Notes on the use of videolinks in Western Australian superior courts

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<sup>2</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), pp 326-327. (Accessed 5 July 2008)



## 7.2

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### THE JURY

#### 7.2.1 Adverse Publicity

- **Adverse publicity about an Aboriginal accused may be so extensive and virulent as to make a fair trial of that accused virtually impossible**

**Case: *Binge and Ors v Bennett* (1989) 98 FLR 193.**

Facts: the Aboriginal plaintiffs applied to quash an extradition order to return to Goondiwindi in Queensland from New South Wales to face charges of riot causing extensive damage. It was claimed that those events occurred in response to the serious ill-treatment of an Aboriginal boy in Goondiwindi the previous day. The plaintiffs claimed that it would be "unjust or oppressive" for them to be returned to Queensland, on the ground, amongst other things, that the events giving rise to the charges had sparked extensive adverse press coverage in local, State and national newspapers. That publicity included strong adverse statements attributed to the Premier of Queensland and certain Government Ministers and much of it related to Aboriginal people

Held: that the extradition order be quashed. Smart J considered that the adverse publicity had been "so extensive and so virulent as to make a fair trial in Goondiwindi virtually impossible" and that in all the circumstances it would be "harsh and oppressive"<sup>3</sup> to return the plaintiffs to Queensland.

Note: in *Arthurs v State of Western Australia*<sup>4</sup> (which case did not involve an Aboriginal accused) Martin CJ commented upon the possible application of s 118 *Criminal Procedure Act 2004* (WA) (which provides for the court upon an application by the accused to make an order for trial by judge alone, if the court considers that it is in the best interests of justice to do so) to trial involving Aboriginal persons.

Formerly, an accused person might elect trial by judge alone, provided that the prosecutor consented<sup>5</sup>. Martin CJ noted that in 1999 the Law Reform Commission of Western Australia had suggested that an accused might elect trial by judge alone if he or she considered that "because of racial, religious or cultural differences, the risk of a prejudiced jury exists"<sup>6</sup>. Martin CJ commented that "these considerations might often be apt to trials in regional parts of the state in which Aboriginal people are often tried by juries composed entirely or almost entirely of non-Aboriginal persons, despite the best efforts of the Sheriff's office to encourage Aboriginal people to participate in jury service."<sup>7</sup>

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<sup>3</sup> *Binge and Ors v Bennett* (1989) 98 FLR 193 at 199.

<sup>4</sup> [2007] WASC 182.

<sup>5</sup> Section 651A *Criminal Code*.

<sup>6</sup> Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (September 1999) ([www.lrc.justice.wa.gov.au/092-FR.html](http://www.lrc.justice.wa.gov.au/092-FR.html)) Chapter 30, para 30.10. (Accessed 8 July 2008).**stralia**

<sup>7</sup> *Arthurs v State of Western Australia* [2007] WASC 182 at [49-50].

## 7.2.2 Change of Trial Venue

- **Where there is a risk of prejudice to an Aboriginal accused notwithstanding that proper directions be given to a jury, a change of trial venue may be ordered**

Section 135 *Criminal Procedure Act 2004* (WA) (CPA) provides for the change of venue by a court on its own initiative or on an application by a party to a case. If there is a good reason to do so, a court may order that the whole or a part of a case be conducted at another place in the State (whether or not there is a registry of the court or courtroom facilities at the place).

A change of trial venue may be appropriate:

- to assist an Aboriginal accused or Aboriginal witnesses to attend court. Many Aboriginal communities are located long distances from courts and Aboriginal people may have considerable difficulty in getting transport to court;
- to avoid prejudice to an accused Aboriginal person: *Wotton v DPP*<sup>8</sup> (see below);
- to assist the court to obtain the best evidence where an Aboriginal accused or witness is intimidated by the court environment<sup>9</sup>.

### **Case: *Wotton v DPP (Queensland)* [2006] QDC 202**

Facts: the Aboriginal applicant had been charged with riotous damage and arson arising from a highly publicized incident at Palm Island in Queensland. The accused, in applying to have the venue of his trial changed from Townsville to Brisbane, relied on a survey conducted in Townsville which showed that a large proportion of respondents had personally experienced antisocial behaviour involving Aboriginal people or Torres Strait Islanders, almost all people remembered the incident well, over a third remembered the identity of the applicant, and over a fifth regarded him as one of the persons criminally responsible for the events.

Held: that the trial be held in Brisbane. Skoien ACJ concluded that the highly adverse publicity in Townsville had created a risk of prejudice to the accused, notwithstanding that the trial judge would give proper directions to a jury.

Note: in *Binge and Ors v Bennett*<sup>10</sup> (see above at 7.2.1) the court held that the publicity adverse to the accused was so prejudicial that a fair trial could not be held anywhere at all in Queensland.

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<sup>8</sup> [2006] QDC 202.

<sup>9</sup> Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), pp 331-332. (Accessed 5 July 2008)

<sup>10</sup>(1989) 98 FLR 193.

### 7.2.3 Selection of Jurors

- **An Aboriginal accused is not entitled to be judged by a jury which comprises only Aboriginal elders**

**Case: *R v Buzzacott* (2004) 154 ACTR 37**

Facts: the Aboriginal applicant has been charged with the theft of a bronze coat of arms, which he had taken to the Aboriginal Tent Embassy in Canberra. He sought a preliminary hearing to determine a number of points of law. The applicant alleged, among other matters, that he could only have a fair trial if the jury panel were to comprise Aboriginal elders.

Held: application dismissed. Connolly J commented that the right to trial by a jury of one's peers does not mean that an accused person may demand that the jury panel be comprised solely of persons of a particular racial, ethnic, social or gender group. His Honour stated that it would be entirely inappropriate, and indeed unlawful, for him to make directions so as to ensure a particular racial or ethnic composition of the jury panel.

- **An Aboriginal accused may not challenge a jury on the ground that it has no Aboriginal members at all**

**Case: *R v Badenoch* [2004] VSCA 95**

Facts: the Aboriginal accused had been charged with murder. He objected to the composition of the jury panel on the grounds that he could not observe any Aboriginal persons in it, and therefore he did not accept that it was a fair panel.

Held: application dismissed. Coldrey J observed that all the jurors were Australian, whether Aboriginal or not. His Honour commented, further, that the crime in question had not been a cross-cultural one, which might have engendered prejudice; moreover, there was "nothing inherently Aboriginal in the killing or the circumstances surrounding it"<sup>11</sup>. Coldrey J held that in order to establish a challenge to the array, the accused had to establish some default in duty by the sheriff. Such default had not been established in the present case.

Note: in *R v Gibson*<sup>12</sup> the accused, a member of the Pitjantjatjara community in South Australia, made a challenge to the array. Several Aboriginal persons gave evidence that they had never been called for jury service, nor did they know of any Aboriginal person who had been called for jury service. The sheriff gave evidence that Aboriginal persons had in fact been summoned. Bright J dismissed the challenge, finding that the sheriff had made no attempt to exclude Aborigines who were qualified to serve as jurors when calling the jury.

<sup>11</sup> [2004] VSCA 95 at [3].

<sup>12</sup> Unrep., SA Sup Ct, 12 November 1973, quoted in ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 592. (Accessed 5 July 2008)

## 7.2.4 Gender Composition of Juries

- **Where evidence relating to Aboriginal men or women's "business" is to be adduced, it may be appropriate to empanel a single-sex jury**

In *R v Sydney Williams*<sup>13</sup> the Aboriginal accused pleaded guilty to a charge of manslaughter. It appeared that the deceased woman had angered the accused by uttering tribal secrets. With the consent of the Court and the parties, an all-male jury was empanelled to try the case.

Similarly, in *R v Gudabi*<sup>14</sup>, with the consent of the Crown, an all-male jury was empanelled for the trial of an Aboriginal male accused: all women were excluded from the court.

Note 1: in *The Report into Aboriginal Customary Law* the Australian Law Reform Commission (ALRC) recommended that, in appropriate cases and upon application by an accused, the court should exercise its inherent discretion to make an order that a jury of a particular sex be empanelled. Such cases might include those in which a witness is reticent or unwilling to give evidence, or where giving the evidence to persons of the opposite sex would infringe the witness's customary law. The ALRC suggested that an order to empanel a single-sex jury be empanelled should only be made where all the relevant evidence might not otherwise be given in a trial<sup>15</sup>.

Note 2: in *Aboriginal Customary Laws: Final Report* the Law Reform Commission of Western Australia (LRCWA) recommended that the *Criminal Procedure Act 2004* (WA) be amended to permit courts to order that a jury comprise one gender where this might be relevant to the determination of the case and was necessary in the interests of justice<sup>16</sup>.

Note 3: the *Statement of Prosecution Policy and Guidelines* of the Office of the Director of Public Prosecutions for Western Australia includes Guideline No 97 which states that selection of a jury is within the general discretion of prosecuting counsel. "However, no attempt should be made to select a jury that is unrepresentative as to race, age or sex."<sup>17</sup>

## 7.2.5 Aboriginal Members of Jury Panels

- **Aboriginal persons are greatly under-represented in jury panels**

Although Aboriginal people are over-represented as accused persons in trials, they are significantly under-represented in juries. The apparent reasons include the absence of Aboriginal people from electoral rolls, difficulties in ensuring service of jury notices, and the considerable distances at which Aboriginal people may live from the relevant courts. In addition, there may be Aboriginal distrust of the criminal justice system, an inability to understand English and a dislike of being challenged by lawyers<sup>18</sup>. In *Binge v Bennett*<sup>19</sup> Smart J commented:

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<sup>13</sup> (1976) 14 SASR 1.

<sup>14</sup> Unrep., NT Sup Ct, Forster CJ, SCC No 85/82, 30 May 1983.

<sup>15</sup> Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 595. (Accessed 5 July 2008)

<sup>16</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), p 189, Recommendation 41. (Accessed 5 July 2008)

<sup>17</sup> Email to the author from Tom Scutt, Senior Prosecutor, Office of the Director of Public Prosecutions for Western Australia, dated 7 July 2008.

<sup>18</sup> LRCWA *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)) p 231. (Accessed 3 July 2008)

<sup>19</sup> (1989) 98 FLR 193.

"The lack of Aboriginals on both jury panels and juries is to be greatly regretted. The present system of making up jury panels does not of itself discriminate against Aboriginals. However, it is a system which, because of their education, lifestyle and attitudes, does not readily encompass them."<sup>20</sup>

Calls have been made for the abolition of jury trials for Aboriginal accused persons from traditional communities. However, in its *Report into Aboriginal Customary Law* the ALRC pointed out:

"The Commission has received no evidence to justify the conclusion that jury trials involving Aborigines are, in any regular or recurring way, biased or otherwise unsatisfactory."<sup>21</sup>

In *Aboriginal Customary Laws: Final Report* the LRCWA commented that to deny an Aboriginal person the right to trial by jury would be discriminatory. Where there is a risk of prejudice, an application may be made for trial by a judge alone or for a change in venue for the trial, which may itself affect the makeup of the jury<sup>22</sup>.

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<sup>20</sup> *Binge and Ors v Bennett* (1989) 98 FLR 193 at 107.

<sup>21</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 589. (Accessed 5 July 2008)

<sup>22</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 589. (Accessed 5 July 2008)

## 7.3

### PLEADING TO THE CHARGE

#### 7.3.1 Understanding the Charge/Plea

- **Repeal of s 49 (1) *Aboriginal Affairs Planning Authority Act 1972***

Section 49 (1) *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPAA) provided that a court shall refuse to accept a plea of guilt at trial (or an admission of guilt before trial) for an offence punishable in the first instance by a term of imprisonment for six months or more where the court was satisfied that that the accused person was a person of Aboriginal descent, who:

“from want or comprehension of the nature of the proceedings alleged, or of the proceedings, is or was not capable of understanding that plea of guilt or that admission or confession.

Section 49(1) AAPAA, which imposed “significant obligations”<sup>23</sup> upon judicial officers, was repealed in 2004 upon the enactment of the *Criminal Procedure Act 2004* (WA) and related legislation.

- **Sections 59(2), 129(2) and 90 *Criminal Procedure Act 2004* (WA) contain protective provisions for an accused person**

Section 59(2) *Criminal Procedure Act 2004* (WA) (CPA) provides that, before requiring an accused to plead to a charge which is being dealt with summarily, the court must be satisfied that “the accused understands the charge and the purpose of the proceedings”. The provision does not indicate how the court should so satisfy itself. Section 59(3) simply states that, “after complying with subsection (2), the court must require the accused to plead to the charge.”

Section 129 (2)(b) CPA provides that unless the plea is a written plea given to a court of summary jurisdiction, the court must not accept the plea unless:

- “(a) the accused is represented by a lawyer; or
- (b) if the accused is not so represented, the court is satisfied the accused understands the plea and its consequences.”

Note 1: the Law Reform Commission of Western Australia has recommended that s 129 CPA be amended to provide that a court must not accept a plea of guilty unless “having considered whether there are any language, cultural or communication difficulties, the court is satisfied that the accused understands the nature of the plea and its consequences.”<sup>24</sup>

Section 90 CPA provides that a superior court may at any time order that the prosecution of the charge be stayed permanently “if it is in the interests of justice to do so”. It appears that this provision might be invoked where a court is not satisfied that an Aboriginal accused is capable of understanding the plea or the purpose of the proceedings.

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<sup>23</sup> *Webb v R* (1994) 13 WAR 257 at 259 per Malcolm CJ. See also *Green v R* (2001) WAR 192.

<sup>24</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), p 191, Recommendation 42. (Accessed 5 July 2008)

7.4

**OPENING REMARKS TO THE JURY**

**7.4.1 Mildren Directions**

In 1997 Justice Dean Mildren of the Supreme Court of the Northern Territory formulated pro forma directions to the jury for cases involving Aboriginal witnesses, which directions were to be given before the prosecution opens the case. Justice Mildren’s pro forma directions (“Mildren directions”) have been reproduced in *Aboriginal Witnesses in Criminal Courts*, published by the Queensland Justice Commission<sup>25</sup>, and in other publications.

- **The Nature of Mildren Directions**

Mildren directions are designed to assist a jury assessing the evidence of Aboriginal witnesses and/or an Aboriginal accused’s record of interview. This is achieved by drawing the jury’s attention to the possibility that socio-linguistic features of an Aboriginal witness’ evidence may lead to misunderstandings. The directions note, among other things, that many Aboriginal people speak Aboriginal English, which can lead to unwitting miscommunication; that there may be extra-linguistic features of evidence, such as a tendency to avoid eye contact; and that a culturally-appropriate period of silence may elapse before an Aboriginal witness responds to a question. Further, Aboriginal witnesses may also show a tendency to agree with propositions put to them by persons in authority, whether in fact they agree with those propositions or not – i.e. to “gratuitously concur” with the questioner<sup>26</sup>.

- **Judicial Consideration of Mildren Directions**

**Case: *Stack v the State of Western Australia* (2004) 29 WAR 526**

Facts: the Aboriginal applicant, a resident of Perth, had been charged with wilful murder and unlawful wounding. Five Aboriginal witnesses were to be called. At the commencement of the trial the trial judge had given Mildren directions to the jury. In his final directions, the trial judge had referred again to the Mildren directions given at the commencement of the trial. He stated that whether any of the matters canvassed in those directions was relevant to the evidence of any of the Aboriginal witnesses was solely a matter for the jury to decide. The applicant was convicted and later sought leave to appeal on the ground inter alia that the trial judge had erred in respect of his final directions to the jury.

The appeal succeeded on other grounds (see **7.5.9**). However, each member of the Court of Criminal Appeal commented upon the fact that the trial judge had given Mildren directions. Murray J commented that it was “undesirable and unfortunate that his Honour made the preliminary observations he did without any substratum of fact properly proved before the jury in the ordinary way”:

“What was said by the Judge was calculated to cause the jury, in their evaluation of the credibility of such witnesses, to approach a consideration of their evidence sympathetically, making allowances for cultural differences which might or might not have been having an impact on the testimony given by the witnesses. The potential for unfairness to the applicant is manifest, in my respectful opinion.”<sup>27</sup>

<sup>25</sup> See the Hon Justice Dean Mildren “Redressing the Imbalance Against Aboriginals in the Criminal Justice System” (1997) 21 *Criminal Law Journal*, 7; Queensland Criminal Justice Commission *Aboriginal Witnesses in Criminal Courts*, June 1996

<sup>26</sup> See Chapter 5, at 5.3.2.

<sup>27</sup> (2004) 29 WAR 526 at [19] per Murray J.

Murray J observed that the trial judge, in his closing remarks, had done no more than to invite the jury to consider whether the matters referred to in his Mildren directions had to be taken into account in assessing the witnesses' credibility. As the trial judge had "properly" left the matter in the hands of the jury, Murray J dismissed the application for leave to appeal.

Steytler J held that the trial judge had very properly and specifically told the jury that whether or not the issues which he had remarked upon bore upon the evidence of any particular witness and if so, in what way and to what extent, was for them to assess. His Honour considered that the giving of Mildren directions might be appropriate in certain cases, but noted that in the instant case the applicant was an urban dweller.

Templeman J, having allowed the appeal on other grounds, did not express a concluded view in respect of this particular ground of appeal. However, his Honour considered that it had been inappropriate for the trial judge to have given the Mildren directions. Templeman J expressed the view that a trial judge should not anticipate evidence which might be given, or the manner in which it might be given. In giving the Mildren directions, the trial judge had failed to comply with s 638 *Criminal Code* which provides that judicial comment about the evidence should not be made until after the prosecution and defence have closed their respective cases. The trial judge did not identify the evidence to which his initial observations might have related, and therefore he was not making observations on the evidence, but on Aboriginal witnesses in general. Templeman J expressed doubt that the trial judge's non-compliance with s 638 *Criminal Code* had been cured by his directions to the effect that it was for the jury to decide matters of fact, including whether and how his observations bore upon the evidence of any particular witness in the case.

Note: Section 638 *Criminal Code* has been repealed, but s 112 of the *Criminal Procedure Act 2004 (WA)* (CPA) is in similar terms. Section 112 CPA provides that a trial judge may make any observations about the evidence that the judge thinks necessary in the interests of justice, after the prosecution and defence have given final addresses to the jury.



## 7.5

### EVIDENCE

In *Fry v Jennings*<sup>28</sup> Muirhead J pointed out the many difficulties faced by Aboriginal witnesses, difficulties which were "compounded by lack of comprehension of issues, shyness, language barriers, embarrassment and fear."<sup>29</sup>

The differences in cultural and communication styles of Aboriginal and non-Aboriginal people differences were outlined in Chapter Five.

To re-cap on the types of cross-cultural communication issues which may arise in a trial:

- Some Aboriginal people may not have a good understanding of English words or of English grammatical construction. In particular, an Aboriginal witness might use an Aboriginal English dialect, which can give rise to misunderstandings and miscommunication;
- Many Aboriginal people attribute a different (extended) meaning to kinship terms such as "mother", "brother", "sister";
- It may be difficult to convey the meaning of technical legal terms, such as "guilty" and "not guilty" to an Aboriginal witness;
- Aboriginal people may tend to agree (i.e. to "gratuitously concur") with authority figures;
- Certain words may be ambiguous in meaning (e.g. the English term "to kill" may be understood in more traditionally-oriented Aboriginal communities as "to hurt" or "to cut" as well as literally "to kill");
- Aboriginal people may possess different understandings of quantitative specification (such as time and distance) from non-Aboriginal people;
- Aboriginal body language is different in significant ways from non-Aboriginal people (thus, in traditional Aboriginal culture an averting of the eyes indicates respect, rather than evasiveness or dishonesty);
- Certain health problems (such as deafness) which are very common in Aboriginal society, create severe barriers to communication;
- Aboriginal customary law may operate to inhibit or prevent open communication, especially between people of different sexes.

Any of the above factors, or a combination of them, may seriously impede the capacity of an Aboriginal person to understand, and to be understood in, court proceedings. Additional difficulties may be caused by cultural factors such as a witness lacking the authority of his or her group, or gender, to speak in relation to a particular matter.

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<sup>28</sup> (1983) 25 NTR 19.

<sup>29</sup> *Fry v Jennings* (1983) 25 NTR 19 at 26-27.

### 7.5.1 Vulnerable Witnesses: Special Provisions

Pursuant to ss 106A - 106T *Evidence Act 1906 (WA)* special provisions are made for the giving of evidence by children and “special” (vulnerable) witnesses in civil and criminal proceedings. See also s 158 *Criminal Procedure Act 2004 (WA)* (CPA), and Schedule 3 to the CPA, which provide for formalities of witness statements including electronically recorded statements; court orders for examination of witnesses before trial; the conduct of examination of witnesses and the use of pre-trial witness evidence.

- **Unsworn Evidence: s 100A Evidence Act**

Section 100A *Evidence Act 1906 (WA)* (*Evidence Act*) provides that that a person may give unsworn evidence where the Court is satisfied that the person does not understand the nature of, or the obligation imposed by, the oath or affirmation, but does understand that he or she is required to speak the truth and that he or she will be liable to punishment if the truth is not told.

The potential relevance of s 100A *Evidence Act* to persons of traditional Aboriginal background was noted in *Lau v R*<sup>30</sup>. Murray J commented:

"[Section 100A is also] used for the reception of evidence...of... persons of an unsophisticated character, such as tribally orientated persons of Aboriginal descent who for reasons of their lifestyle and the lack of substantial contact with the system of criminal justice, lack the understanding of the oath or solemn affirmation to which the section refers."<sup>31</sup>

Seaman J noted that s 100A *Evidence Act* might be invoked by witnesses “of mature age and full intellectual capacity who, by virtue of their cultural origins, do not understand the nature of or obligations imposed by taking an oath or affirmation”<sup>32</sup>

- **Pre-recorded evidence and support persons**

Section 106R (3)(b) *Evidence Act* may be of particular relevance to Aboriginal witnesses. Section 106R *Evidence Act* provides for a declaration by the court that a witness is a special witness where, in the court’s opinion, if that witness is not treated as a special witness, he or she would:

“.....

(b) be likely –

- (i) to suffer severe emotional trauma; or
- (ii) to be so intimidated or distressed as to be unable to give effective evidence, or to give evidence satisfactorily, by reason of age, *cultural background*, relationship to any party to the proceeding, the nature of the subject-matter of the proceeding, or any other factor that the court thinks relevant.” (emphasis added)

A special witness may give evidence with the assistance of a support person, or at a special videotaped hearing: 106R (4) and (4a) *Evidence Act*. See also 106R (3a) and s106RA(1) *Evidence Act*.

In its *Aboriginal Customary Laws: Final Report* the Law Reform Commission of Western Australia recommended that s 106R *Evidence Act* be amended to provide that a witness be declared a special witness if for reasons of customary law he or she is not able to give evidence in the normal way. The LRCWA also recommended that the facilities for special witness in regional Western Australia be upgraded<sup>33</sup>.

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<sup>30</sup> (1991) 6 WAR 30.

<sup>31</sup> *Lau v R* (1991) 6 WAR 30 at 40.

<sup>32</sup> *Lau v R* (1991) 6 WAR 30 at 39.

<sup>33</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006)

([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), pp 326-327, Recommendations 110 and 111. (Accessed 5 July 2008)

## 7.5.2 Female Witnesses

- **Particular difficulties experienced by female Aboriginal witnesses**

In addition to the cultural and language differences discussed at the commencement of this Chapter, female Aboriginal witnesses may experience the following particular difficulties:

- Aboriginal women often face pressure from within their family and/or their community not to involve another Aboriginal person in legal proceedings; to do so is likely to be perceived as a "betrayal" to the family or community;
- there is often a perception that "white justice" does not "work", and that punishment is best meted out by traditional means;
- the physical courtroom environment is intimidating, the legal process is predominantly male, and many legal practitioners appear to be unaware of the issues facing Aboriginal women;
- the presence of the accused person or other Aboriginal people in the courtroom may exacerbate the intimidation experienced by the female witness;
- significant shame attaches to discussing sexual matters in public;
- sign language may be used by someone in the back of the court to intimidate the witness while she is giving evidence, which sign language goes unnoticed by the court;
- the witness may lack pre-trial preparation and orientation, especially where evidence is to be given of matters relating to sexual assault;
- evidence presented in court about Aboriginal cultural traditions often does not present women's perspectives about those traditions;
- existing legal and support services may not meet the needs of Aboriginal women, and Aboriginal women do not access them as much as they could<sup>34</sup>.

- **"Battered Wives Syndrome"**

**Case: *R v Kina* (Unrep., Sup Ct Qld, CCA, 29 November 1993)**

Facts: the appellant, an Aboriginal woman, appealed against her conviction for the murder of her husband. During the three years leading up to the killing, the victim had subjected the appellant to frequent physical and sexual assaults. Prior to the killing the deceased had threatened to rape the appellant's 14 year old niece. The appellant did not give evidence in the trial, nor was evidence led as to the factual background to the killing.

Held: that the appellant's conviction be quashed. Fitzgerald P and Davies JA accepted that evidence of the "battered woman syndrome" was admissible and relevant:

"In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of:

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<sup>34</sup> Queensland Criminal Justice Commission *Aboriginal Witnesses in Criminal Courts*, June 1996 pp 93 -96. See also LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) (Accessed 5 July 2008) See also P Vincent *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper 11 (February 2005) ([www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-15.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-15.pdf)) p 577. (Accessed 6 July 2008)

- (i) her aboriginality;
- (ii) the battered woman syndrome;
- (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased.

These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions upon the basis of proper advice."<sup>35</sup>

The Court of Criminal Appeal held that a miscarriage of justice had occurred, in that crucial matters had not been raised in evidence, and difficulties of communication had existed between the appellant and her white, male lawyers.

### 7.5.3 Child Witnesses

- **Difficulties experienced by Aboriginal child witnesses**

The difficulties experienced by some Aboriginal adolescent witnesses were demonstrated in committal proceedings referred to as the "Pinkenba Case".

**Case: 'Pinkenba'**

Facts: six police officers were charged with deprivation of liberty. The officers had taken three Aboriginal male juveniles to an industrial area 14 km away, and, after questioning them, left the juveniles to find their own way home. No charges were preferred against them. The juveniles were called to give evidence in committal proceedings. In cross-examining the youths counsel for the police officers:

- used pressured and prolonged questioning;
- used rapid-fire direct questions, which were asked in a raised voice;
- did not permit the juveniles to be silent after a question had been posed to them;
- badgered the juveniles to maintain eye contact.

Neither the prosecution nor the magistrate raised any objections to this method of questioning. The juveniles agreed with almost of the questions asked by cross-examining counsel, and as a result the evidence which they gave was contradictory and apparently unreliable.

Held: there was insufficient evidence for the charges against the police officers to be tried.

[An expert socio-linguist, who observed the juveniles giving evidence at the hearing, concluded that they were "gratuitously concurring" with cross-examining counsel, and that their lack of cross-cultural and linguistic skills rendered them wholly unable to deal with aggressive cross-examination<sup>36</sup>.]

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<sup>35</sup> *R v Kina* (Unrep., Sup Ct Qld, CCA, 29 November 1993) at 31, quoted in Queensland Criminal Justice Commission *Aboriginal Witnesses in Criminal Courts*, June 1996, p 97.

<sup>36</sup> D Eades 'Cross-Examination of Aboriginal Children: The *Pinkenba* Case' 1995 (3) 75 *Aboriginal Law Bulletin* 10.

#### 7.5.4 Exclusion of Persons from Proceedings

- **The exclusion of certain persons from the proceedings may remove difficulties associated with an Aboriginal witness giving full and frank evidence to the court**

Section 171(4)(a) *Criminal Procedure Act 2004* (WA) provides that the court may order "any or all persons, or any class of persons, to leave or be excluded from the courtroom during the whole of the proceedings, or a part of them specified by the court".

This provision may be invoked to facilitate Aboriginal witnesses giving full and frank evidence to the court. Otherwise, Aboriginal customary law barriers (such as bans upon speaking in front of certain people, or revealing particular kinds of information to certain people) may inhibit the giving of such evidence.

#### 7.5.5 Gender-Restricted Evidence

- **Evidence may be given on a gender-restricted basis to meet Aboriginal cultural requirements**

In *State of Western Australia v Ben Ward*<sup>37</sup> (a native title case) the trial judge had accepted submissions from counsel for the native title applicants that on occasion Aboriginal male and female witnesses would be prevented from speaking about certain matters relating to Aboriginal law, ceremony and ritual in the presence of each other. The trial judge had ordered that upon application by any party restrictions would apply to the taking, recording and dissemination of evidence on a gender-restricted basis. An appeal against the trial judge's order was dismissed.

Note: in *Aboriginal Customary Laws: Final Report* the LRCWA recommended that the *Criminal Procedure Act 2004* (WA) be amended to permit applications for a judge or magistrate of a particular gender to be assigned to a case in which gender-restricted evidence is likely to be heard<sup>38</sup>.

#### 7.5.6 Evidence of Husbands and Wives

- **The law does not recognise traditional Aboriginal marriages as legal marriages for the purpose of giving evidence**

A traditional Aboriginal marriage has been defined as "a socially sanctioned and ratified agreement with an expectation of relative permanency"<sup>39</sup>. Historically, Australian law has not recognised traditional Aboriginal marriages as legal marriages. In 1883, in *R v Cobby*<sup>40</sup>, Martin CJ, stated that evidence of Aboriginal customs would not suffice to establish the relationship of husband and wife:

"[The] Aborigines...have no laws of which we can take cognisance. We cannot recognise the customs of these Aborigines so as to aid us in the determination of whether the relationship exists of husband and wife."<sup>41</sup>

<sup>37</sup> (1997) 76 FCR 492.

<sup>38</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) p 330, Recommendation 114. (Accessed 5 July 2008).

<sup>39</sup> RM Berndt 'Tribal Marriage in a Changing Social Order' (1961) 5 *UWALR* 326 at 341, quoted in ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 236. (Accessed 5 July 2008)

<sup>40</sup> (1883) 4 LR (NSW) 355 (FC).

<sup>41</sup> *R v Cobby* (1883) 4 LR (NSW) 355 (FC) quoted in ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 237. (Accessed 5 July 2008). Arguably this principle is archaic: Tom Scutt, Senior Prosecutor, Office of the Director of Public Prosecutions for Western Australia, email dated 7 July 2008.

Section 9 *Evidence Act 1906* (WA) provides that a husband or wife (which terms are not defined) is both competent and compellable in certain criminal proceedings, including those in which the alleged offence involves children of or the spouse of the marriage.

However, traditional Aboriginal marriages, are in some limited circumstances, recognized by statute. See for example, s 4(2)(c) *Adoption Act 1994* (WA)<sup>42</sup>.

In *The Recognition of Aboriginal Customary Laws* the Australian Law Reform Commission (ALRC) highlighted the difficulty of defining traditional Aboriginal marriage for the purposes of Anglo-Australian criminal law. The ALRC acknowledged the significance of the policy considerations which underlie the broad principle of inter-spousal non-compellability (namely the social, emotional and economic importance of stable marriages) and recommended that traditionally married persons "should be compellable to give evidence for and against each other in criminal cases to the same extent as persons under the general law"<sup>43</sup>.

### 7.5.7 Aboriginal Language Patterns

- **Expert evidence may be given in respect of Aboriginal English or other Aboriginal language patterns**

**Case: *Condron v R* (1990) 49 A Crim R 79**

Facts: the appellant had been charged with the murder of an Aboriginal woman: the only evidence against him was his own detailed, signed confession. At trial the appellant, who pleaded not guilty, and disputed the veracity of the signed confession, was convicted. Later fresh evidence became available, but an appeal on that ground failed. Ultimately the Attorney-General referred the matter back to the Queensland Court of Criminal Appeal. During the hearing a socio-linguist gave evidence of marked differences between appellant's speech patterns and those of his signed confession. Another expert gave evidence of the appellant's intellectual and other difficulties

Held: that the appellant's conviction be quashed. Thomas J concluded that, although the experts' combined observations were not of such weight as to render the confession unsafe, they cast doubt upon the reliability of the appellant's confession, particularly in the light of the fresh evidence which had become available<sup>44</sup>.

### 7.5.8 Evidence in Narrative Form

- **Aboriginal witnesses may give evidence in narrative form**

The Law Reform Commission of Western Australia recommended that the *Evidence Act 1906* (WA) be amended to provide that a court may, on its own motion or on an application, direct that a witness give evidence in narrative form and make orders for the way in which that narrative evidence may be given. This may be more culturally appropriate and more likely to result in accurate evidence than the usual direct question-answer format<sup>45</sup>.

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<sup>42</sup> For a recent discussion of customary Aboriginal marriages see T Buti and L Young *Family Law and Customary Law* LRCWA, Project No 94, Background Paper 4 ([www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-04](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-04)). (Accessed 11 July 2008)

<sup>43</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 265, para 315. (Accessed 5 July 2008)

<sup>44</sup> See also *R v Kina* (Unrep., Sup Ct Qld, CCA, 29 November 1993) cf *Stuart v The Queen* (1959) 101 CLR 1; *Condron v R* (1987) 28 ACR 261.

<sup>45</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), p 343-344. (Accessed 5 July 2008)

### 7.5.9 Cross-Examination of Aboriginal Witnesses

- **The court will not readily restrict the method of cross-examination**

**Case: *Stack v State of Western Australia* (2004) 29 WAR 526**

Facts: the Aboriginal applicant had been convicted after a jury trial of manslaughter and unlawful wounding. At trial the prosecution called five Aboriginal witnesses, all of whom save one (“the witness”) had been intoxicated at the time of the events in question. At the commencement of the trial, after giving the usual directions to the jury, the trial judge also gave Mildren-style directions. (See 7.4.1). In those directions, the trial judge commented (among other things) that Aboriginal witnesses may have a propensity to answer leading questions in the affirmative (i.e. to “gratuitously concur” with leading questions).

During the course of the witness’ cross-examination the trial judge informed counsel that he had been having “real difficulty” with the witness’ evidence for some time and, in particular, that he had formed the impression that the witness was largely agreeing with leading questions being put to him. The trial judge ruled that no further leading questions be put to the witness. The applicant appealed, claiming inter alia, that in making this ruling, the trial judge had erred in law or in the exercise of his discretion.

Held (per Steytler J and Templeman J): appeal allowed. Steytler J, who delivered the judgment for the majority on this point, stated that the decided cases establish the fundamental importance of the right of an accused to conduct his/her trial as he/she thinks fit. Steytler J commented that the judicial discretion to control the method of cross-examination should be used with great care since “[a]s with any group or culture, what is generally true may not be true in respect of individual members having different experiences or backgrounds”.<sup>46</sup> Steytler J observed that the transcript disclosed very little evidence of gratuitous concurrence on the part of the witness; in fact, on a number of occasions the witness had taken issue vigorously with counsel. Steytler J observed that the trial judge’s concerns “must, necessarily, have depended upon the manner in which [the witness] gave evidence and indeed, the trial judge said as much at the time of giving his ruling”.<sup>47</sup> His Honour commented that conflicting evidence given from time to time by the witness suggested difficulties of recollection rather than anything else. Steytler J concluded there had been no sufficient basis for the trial judge to have prohibited the use of leading questions in cross-examination and accordingly a miscarriage of the judicial discretion had occurred.

Murray J, dissenting, observed that the trial judge had referred several times to the witness’ demeanour, upon which, in his view, the appellate court could not pass judgment. His Honour noted that the trial judge has the unique advantage of seeing the demeanour of witnesses, as well as hearing their evidence. His Honour stated that the burden of proof lay upon the applicant to prove that the trial judge’s discretion had miscarried, and concluded that the applicant had failed to discharge that burden.

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<sup>46</sup> *Stack v Western Australia* (2004) 29 WAR 526 at 553.

<sup>47</sup> *Stack v Western Australia* (2004) 29 WAR 526 at 554.

### 7.5.10 Restriction of Publication of Proceedings

- **Prohibiting the publication of criminal proceedings may remove barriers to an Aboriginal witness giving full and frank evidence in court**

Customary Aboriginal law may prohibit a witness from giving evidence as to the name of a deceased person, or of a person undergoing initiation, or from disclosing particular kinds of information to any person or to certain people.

Section 171(4)(b) *Criminal Procedure Act 2004* (WA) empowers the court to make an order prohibiting "the publication outside the courtroom of the whole of the proceedings, or a part or particular of them". It may be applied to suppress certain information which is not required to be released in the interests of justice, thereby avoiding unnecessary offence to an Aboriginal person or community, and removing barriers the giving of full and frank evidence by an Aboriginal witness to the court.

**Case: *R v Bara Bara* (1992) 87 NTR 1**

Facts: the Aboriginal accused, who had pleaded guilty to a charge of manslaughter, applied for the prohibition from publication of the deceased's name. Section 57 *Evidence Act 1939* (NT) empowered a court to make an order forbidding the publication of any evidence which was "likely to offend against public decency".

Held: Mildren J ordered that the name of the deceased be suppressed on the grounds that it was "likely to offend against public decency" within the terms of the statute. His Honour took judicial notice of the fact that it is extremely offensive to most Aboriginal people in Aboriginal communities in the Northern Territory, and contrary to most tribal customs, to speak of a dead man by his name.



## 7.6

### CONFESSIONS AND ADMISSIONS

#### 7.6.1 Entitlements of Arrested Persons and Suspects

- **Sections 137-138 *Criminal Procedure Act 2004 (WA)* confer certain entitlements upon arrested persons and suspects, breach of which may result in the exclusion of an admission or confession**

Sections 137 and 138 of the *Criminal Investigation Act 2006 (WA)* (*CI Act*) confer certain entitlements upon arrested persons and arrested suspects respectively.

Section 137 *CI Act* provides that any arrested person is entitled to:

- any necessary medical treatment: s 137(3)(a) *CI Act*;
- reasonable privacy from the mass media: s 137(3)(b) *CI Act*;
- reasonable opportunity to communicate or attempt to communicate the person's whereabouts to a relative or friend: s 137(3)(c) *CI Act*;
- if he or she is for any reason unable to understand or communicate in spoken English sufficiently, to be assisted in doing so by an interpreter or other qualified person assistance by an interpreter of other qualified person: s 137(3)(d) *CI Act*.

Section 137 *CI Act* provides that (in addition to the rights obtained pursuant to s 137 *CI Act*), any arrested suspect is entitled to:

- to be informed of the offence for which the person was arrested and any other offences that he or she is suspected of having committed: s 138(2)(a) *CI Act*;
- to be cautioned before being interviewed as a suspect: s 138(2)(b) *CI Act*;
- a reasonable opportunity to communicate or attempt to communicate with a lawyer: s 138(2)(c) *CI Act*;
- if he or she is for any reason unable to understand or communicate in spoken English sufficiently, not to be interviewed until the services of an interpreter or other qualified person are available: s 138(2)(d) *CI Act*.

Section 139 *CI Act* provides for the detention of arrested suspects for the purpose of investigating any offence suspected of being committed by that person, and for interviewing the suspect in relation to any such offence. However, the suspect generally must be detained in the company of an officer and not in a lock-up (s 139(3) *CI Act*.) Pursuant to ss 154 and 155 *CI Act*, evidence obtained improperly may still be admissible in certain circumstances.

See also: s 28 *CI Act*, which provides for a person accompanying a police officer for the purpose of assisting in an investigation to be informed of his or her rights.

In a number of the recent Kimberley TaskForce prosecutions of Aboriginal accused persons charged with sexual offenders, McKechnie J has been critical of interviewing police officers' failure to apply properly the above provisions of the *CIA Act*.

#### **Case: *Martin v State of Western Australia* [2008] WASC 105**

Facts: the accused had been picked up from a road camp 100 km from Hall's Creek, and taken to the police station at Hall's Creek for questioning. The circumstances of the accused's being taken to Hall's Creek by the police were unclear, and the police officers had kept no contemporaneous notes. The accused was interviewed and then charged with sexual offences before being released on bail. The accused sought to have the video record of interview (VROI) excluded from evidence.

Held: that the VROI be excluded from evidence. McKechnie J held that the precondition of the power of detention for the purpose of interview (s 139(2)(c) *CI Act*) is that the arrested suspect obtains the rights conferred by s 137 and s 138 *CI Act*. In this case, there was no evidence that the accused had been formally arrested; or that he had been told that he could communicate with a lawyer or with a representative of the Aboriginal Legal Service (ALS); and he had been placed unlawfully in a lockup. Before taking the accused to Hall's Creek the police officers had told him that a representative of the ALS would be obtained or that he could communicate with a friend. In fact neither of those things had happened. McKechnie J concluded that the VROI had been obtained voluntarily, but it had been obtained in breach of the *CI Act* in circumstances that made it undesirable to admit it into evidence

See also: *Marshall v State of Western Australia* [2008] WASC 99; *Cox v State of Western Australia* [2008] WASC 101; cf *Cotchilli v State of Western Australia* [2008] WASC 103; *Thomas v State of Western Australia* [2008] WASC 104.

In its *Aboriginal Customary Laws: Final Report* the LRCWA concluded that ss 137-138 *CI Act* do not go far enough in addressing the disadvantage Aboriginal people experience in police interrogations. The LRCWA recommended:

- that an interviewing police officer must caution a suspect and must not question the suspect until satisfied that the suspects understands the caution. In order to be so satisfied, the officer should ask the suspect to explain the caution in his or her own words;
- 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;
- that before commencing an interview the 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;
- that if the suspect is Aboriginal, unless the suspect already has a lawyer, or does not wish the Aboriginal Legal Service (ALS) to be notified, the interviewing officer must inform the ALS prior to the interview commencing, and provide a reasonable opportunity for a representative of the ALS to communicate with the suspect;
- if the suspect does not wish a representative of the ALS to be notified or there is no representative of the ALS available, the interviewing officer must permit a reasonable opportunity for an "interview friend" to attend the interview, unless this opportunity is waived by the suspect<sup>48</sup>.

Note: the *Crimes Act 1914* (Cth) also specifically provides for the investigation and questioning of Aboriginal persons suspected of having committed offences against Commonwealth laws. The provisions limit the length of questioning time, provide that an appropriate Aboriginal legal aid organisation be notified, and require an "interview friend" to be arranged: see ss 23 B, 23C(4), 23H, 23J, 23S and Part IC *Crimes Act 1914* (Cth) generally.

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<sup>48</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), pp 205-207, Recommendation 52. (Accessed 5 July 2008)

## 7.6.2 Admissibility of Confessional Statements

- **Care must be taken in admitting a confessional statement where cultural factors might impinge on its genuineness**

### **Case: *The Queen v Foster* (1993) 113 ALR 1**

Facts: the appellant, a semi-literate Aboriginal person, had been convicted of maliciously setting fire to a school building after the trial judge had allowed evidence of his written confessional statement to be put to the jury. The appellant had signed the statement after having been unlawfully arrested, detained in police custody and subjected to prolonged involuntary questioning. The appellant claimed that during the interrogation the police had threatened to "bash him up" and to "pick up" his younger brother. An appeal to the New South Wales Court of Criminal Appeal failed.

Held: appeal allowed. The High Court found that a real question about the voluntariness of the confession existed, and in any event, given the circumstances of the appellant's detention and interrogation, the confession should have been excluded in the exercise of the trial judge's discretion. McHugh J commented that it was likely that a person of the appellant's age, background, life experience and fragile emotional state at the time of interrogation would have been rendered very susceptible to psychological pressure from his interrogators.

### **Case: *R v Williams* (1992) 8 WAR 265**

Facts: the Crown appealed against a decision of the trial judge not to admit into evidence the confession of the respondent, an Aboriginal man who had been charged with the wilful murder of his de facto wife. It appeared that at the time of the killing, the respondent, who had a low IQ and suffered from brain damage, had been drinking heavily. The trial judge had ruled that the confession had been made voluntarily, but then excluded it in the exercise of his discretion.

Held: appeal dismissed. Rowland and Owen JJ commented that, of necessity, the onus of establishing unfairness is high. Their Honours examined the circumstances in which the interrogation had taken place and concluded that the interviewing officers had were not aware of the high concentration of alcohol in his blood notwithstanding that during the interview the appellant had engaged strange behaviours such as head-banging. Their Honours expressed the view that by failing to take a blood test from the respondent at the time of the interview, he had been deprived of potentially relevant evidence. That disadvantage had been exacerbated by, among other things, the respondent's low IQ and brain damage. In all the circumstances, the exercise of the trial judge's discretion had not miscarried.

- **Particular care must be taken in admitting confessional statements of Aboriginal children or youths**

The courts have sent clear signals that great care must be taken in admitting into evidence an admission or confession of an Aboriginal child. In *Dixon v McCarthy*<sup>49</sup>, a case involving five Aboriginal youths, Yeldham J stated:

"In view of a child's reduced capacity of understanding his rights and his reduced capacity to protect himself in the adult world, the court must be particularly diligent in considering voluntariness of a confession by a juvenile accused."<sup>50</sup>

Note: *Simon v The Queen* and *Cox v The Queen*, noted below, both turned on the application of s 49(1) *Aboriginal Affairs Planning Authority Act 1972* (WA), now repealed. However, those cases retain their significance in respect of the discussion of the admissibility of confessional statements.

<sup>49</sup> [1975] 1 NSWLR 617.

<sup>50</sup> *Dixon v McCarthy* 1 NSWLR 617 at 640.

**Case: *Simon v R* [2002] WASCA 329**

Facts: the appellant, a young Aboriginal man from Kununurra, had been convicted of the charge of sexual penetration without consent. The investigating officers had conducted two video records of interview (VROI). The first VROI was made while the appellant was in custody; the second when the appellant voluntarily went to the police station the following day. During the first VROI the investigating officers had endeavoured to explain at least four times to the appellant that he was not required to answer their questions. The trial judge ruled the first VROI to be inadmissible, but admitted the second VROI into evidence. The appellant appealed on grounds inter alia that the trial judge had erred in law in admitting into evidence the second VROI, and that the requirements of s 49 *Aboriginal Affairs Planning Authority Act 1972 (WA)* (AAPAA) (that the accused be examined to determine whether he had the necessary capacity or understanding to make admissions) had not been complied with. [The Crown conceded that s 49 AAPAA requirements had not been complied with.]

Held: appeal allowed. Roberts-Smith J (for the Court) commented that the appellant was young, unsophisticated and had only been educated to Year 8 standard. The appellant's answers to the investigating officers' questions had indicated "more often than not" that he did not understand the concept of not being required to answer those questions. His Honour stated that the court is obliged "to have regard, not only to the content of the admissions or statements constituting the admissions, but to the accused's demeanour [while making them]...to determine whether or not he is capable of comprehending the circumstances in which he had foregone his right to remain silent and under which he had confessed and whether he was a person capable of understanding the confession which he had made."<sup>51</sup> [The Court concluded that a miscarriage of justice had occurred upon the trial judge's failure to apply s 49AAPAA.]

**Case: *Cox v The Queen* [2002] WASCA 358**

Facts: the applicant, a 15 year old Aboriginal juvenile from a remote community, had pleaded not guilty in the Children's Court to charges of burglary and wilful damage. Two VROIs had taken place: the trial judge had refused to admit the first VROI on the grounds that the admissions made by the applicant could not be shown to be voluntary and in any event it would be unfair to admit them. The second VROI had been made the day after the first, when he had been subjected to prolonged questioning; during the interview the applicant spoke more fluently and was able to be understood more than he had the day before (though he had answered "yeah" to almost all questions asked of him). The trial judge admitted the second VROI into evidence, on the basis that she was satisfied that his will was not overborne in making it. The applicant appealed.

Held: appeal allowed. Olsson AUJ (for the Court) stated that there was "insufficient reason to believe that the applicant comprehended the caution on the second occasion any more than he did on the first"<sup>52</sup>. His Honour concluded that there was nothing in the observed demeanour of the unsophisticated and largely uneducated applicant in the second VROI to indicate that his level of comprehension was any higher than it had been the previous day at the making of the first VROI. [The Court concluded that a miscarriage of justice had occurred upon the trial judge's failure to apply s 49AAPAA.]

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<sup>51</sup> *Simon v R* [2002] WASCA 329 at [30].

<sup>52</sup> (2002) WASCA 358 at para 36.

- **Traditional Aboriginal concepts of collective responsibility or guilt may influence the making of confessions or admissions**

**Case: *Bolton v Nielsen* (1951) 53 WALR 48**

Facts: the two Aboriginal appellants had been convicted, along with two others, of the theft of a car battery. There had been no evidence implicating them in the theft: they had been arrested on the basis of a conversation which apparently implicated them in the theft. Ultimately the appellants had confessed to the theft.

Held: appeal allowed. Dwyer CJ emphasised that since Aboriginal notions of “guilt” are often collective ones the courts must be vigilant in admitting the confessional evidence of Aboriginal persons leading traditional lifestyles<sup>53</sup>.

### 7.6.3 **The Anunga Guidelines**

- **The Anunga Guidelines are intended to ensure that the confessional statements of Aboriginal accused persons are obtained fairly**

In *R v Anunga*<sup>54</sup> Forster J formulated nine guidelines (*Anunga* Guidelines) intended to reduce the difficulties experienced by Aboriginal people in police interrogations, in particular:

- that Aboriginal people often don't not understand English words or concepts, many of which are incapable of translation into Aboriginal languages;
- that many Aboriginal people tend to answer a question in the manner which they suppose the questioner wishes;
- that many Aboriginal people find the police caution bewildering (“because, if they do not have to answer the questions, why then are the questions being asked?”)<sup>55</sup>

The principles formulated by Forster J in *Anunga* are set out below:

1. When an Aboriginal person is being interrogated as a suspect, unless he is fluent in English as the average white man of English descent, an interpreter....should be present.
2. When an Aboriginal is being interrogated it is desirable where practicable that a “prisoner's friend” (who may also be the interpreter) is present. He may be a mission or settlement superintendent or a member of the staff of one of the institutions who knows and is known by the Aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. The combinations of persons and situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that the “prisoner's friend” be someone in whom the Aboriginal has apparent confidence, by whom he will feel supported.
3. Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer to administer it in the usual terms and say “do you understand that?” or “Do you understand that you do not have to answer questions?” Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent....The problem of the caution is a difficult one but the presence of a prisoner's friend or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.
4. Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not is not suggested in any way.....

<sup>53</sup> *Bolton v Nielsen* (1951) 53 WALR 48 at 51-52.

<sup>54</sup> (1976) 11 ALR 412

<sup>55</sup> *R v Anunga* (1976) 11 ALR 412 at 413.

5. Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources.....
6. Because Aboriginal people are often nervous and ill at ease in the presence of white authority figures like policemen it is particularly important that they be offered a meal...when a meal time arrives. They should also be offered tea or coffee.....[or] a drink of water. They should be asked if they wish to use the lavatory....
7. It is particularly important that Aboriginal and other people are not interrogated when they are disabled by illness or drunkenness or tiredness....
8. Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance...
9. When it is necessary to remove clothing for forensic examination or the purposes of medical examination, steps must be taken forthwith to supply substitute clothing.

- **The *Anunga* Guidelines are not they universal, nor are they static**

In *Coulthard v Steer*<sup>56</sup> Muirhead J pointed out that not all Aboriginal people suffer the disadvantage with which the Court in *Anunga* was concerned. His Honour stated that the Guidelines are not absolute and that they do not apply to every situation in which Aboriginal people are questioned. Muirhead J noted that in *Anunga* the Forster J had not suggested that the Guidelines were “universal”<sup>57</sup>.

In *Gudabi v R*<sup>58</sup> the Full Court of the Federal Court (Woodward, Sheppard and Neaves JJ) commented that the *Anunga* Guidelines are not rules of law, breach of which in any respect would result in confessional material being rejected as inadmissible. The Court noted that the *Anunga* Guidelines had been formulated in 1976; that social conditions and values, community standards and expectations had changed, and would continue to change. While the basic principles underlying the *Anunga* guidelines remained valid their application “must reflect changes in society.”<sup>59</sup>

The Court also emphasised that the choice of a “prisoner’s friend” must be left entirely to the choice of the person to be interviewed, that person having been told that the role of the prisoner’s friend is to give support or help. Although police officers should not try to influence the choice of prisoner’s friend, that did not mean that the investigating officer should not give assistance in securing the services of a prisoner’s friend, so long as that assistance is at the express request of the suspect.

#### 7.6.4 The Application of the *Anunga* Guidelines in Western Australia

- **Western Australian caselaw generally indicates that the *Anunga* Guidelines provide a useful yardstick in assessing the fairness of a confessional statement**

Recently, in *Siddon v State of Western Australia*<sup>60</sup> McKechnie J commented that “[t]he exact status of the *Anunga* Rules...in Western Australia has been the subject of differing views”.<sup>61</sup>

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<sup>56</sup> (1981) 12 NTR 13.

<sup>57</sup> *Coulthard v Steer* (1981) 12 NTR 13 at 17.

<sup>58</sup> (1984) 52 ALR 133.

<sup>59</sup> *Gudabi v R* (1984) 52 ALR 133 at 139. See also *inter alia R v Weetra* (1993) 93 NTR 8; *R v Mangaraka* (Unrep. Sup Ct NT, Martin J, No 29 of 1993, 9 June 1995); *R v Echo* (1997) 136 FLR 451.

<sup>60</sup> [2008] WASC 100.

<sup>61</sup> *Siddon v State of Western Australia* [2008] WASC 100 at [21].

In 1982, in *Brooking v Dunlop*<sup>62</sup> Pidgeon J commented that s 49 (1) *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPAA), not the Anunga Guidelines, was the applicable law.<sup>63</sup> However, his Honour went on to say that “some of the guidelines expressed in the *Anunga* case may be of assistance in deciding, in a particular case, whether the evidence is admissible or whether there is unfairness.” Pidgeon J added:

“Circumstances surrounding an accused person may in a particular case may make it necessary, if practical, to have present a “prisoner’s friend” in order to establish that the confession was voluntary.”<sup>64</sup>

In 1983, in *Gibson v Brooking*<sup>65</sup> Wallace J commented that the Anunga Guidelines:

“are not law in the State of Western Australia and are not absolute in any event.”<sup>66</sup>

Subsequently, in a series of Western Australian cases, including *Webb v R* (below), affirmed the relevance of the Guidelines.

**Case: *Webb v R* (1994) 13 WAR 257**

**Facts:** the appellant, an Aboriginal male of low intelligence, and with mental impairment, had been convicted of aggravated sexual assault. At trial counsel for the appellant had informed the presiding judicial officer that he intended to challenge an oral admission, and a confession made in a written record of interview, which the Crown had applied to admit into evidence. A voir dire was held, after which the judicial officer ruled that that evidence was admissible, but gave no reasons. On appeal it was argued *inter alia* that the Commissioner had failed to consider the voluntariness of the confession and whether, in all the circumstances, the admission of the confession was unfair to the appellant<sup>67</sup>.

**Held:** appeal allowed. Malcolm CJ concluded that the Commissioner should have taken the Anunga Guidelines, which indicate what is required by way of fairness when a person of Aboriginal descent is questioned by police, into account. His Honour affirmed the remarks of Wallace J in *Gibson v Brooking* that “the *Anunga* rules do not have the force of law in Western Australia and are not absolute” and continued:

“[The *Anunga* rules] are essentially guidelines indicating what is required by way of fairness when a person of Aboriginal descent is being questioned by police.”<sup>68</sup>

Ipp J also affirmed that the *Anunga* Guidelines are not binding in Western Australia, or absolute, but added that in appropriate circumstances:

“the Anunga Rules give a very good indication of what ordinarily would be regarded as a fair interrogation. In *Williams* [(1992) 8 WAR 265] Rowland and Owen JJ remarked (at 273) that ‘something akin to a departure from the Judges’ Rules or the Anunga Rules’ can give rise to unfairness.”<sup>69</sup>

In 1996, in *R v Nandoo*<sup>70</sup> Owen J commented that the Anunga Guidelines were to be regarded as “a very convenient and desirable guide when looking to the circumstances in which confessional material is obtained.”<sup>71</sup>

<sup>62</sup> Unrep., Sup Ct WA, Pidgeon J, Appeal No. 365 of 1982.

<sup>63</sup> Until its repeal in 2004, s 49 (1) AAPAA provided *inter alia* that in any proceedings in respect of an offence punishable in the first instance by a term of imprisonment for six months or more, the court shall refuse to accept an admission of guilt before trial in any case where the court is satisfied upon examination of the accused person that he is a person of Aboriginal descent who from want or comprehension of the nature of the proceedings alleged, or of the proceedings, was not capable of understanding that that admission or confession

<sup>64</sup> *Brooking v Dunlop* (Unrep., Sup Ct WA, Pidgeon J, Appeal No. 365 of 1982) p 8.

<sup>65</sup> [1983] WAR 70.

<sup>66</sup> *Gibson v Brooking* [1983] WAR 70 at 75.

<sup>67</sup> A further ground of appeal was non-compliance with the requirements of s 49(1) *Aboriginal Affairs Planning Authority Act 1972*.

<sup>68</sup> *Webb v R* (1994) 13 WAR 257 at 259.

<sup>69</sup> *Webb v R* (1994) 13 WAR 257 at 266.

<sup>70</sup> Unrep., Sup Ct WA, Owen J, No 130 of 1996, BC 9605522).

<sup>71</sup> *R v Nandoo* (Unrep., Sup Ct WA, Owen J, No 130 of 1996, BC 9605522) at 7.

In *R v Njana*<sup>72</sup> Scott J expressed the view that the *Anunga* Rules should be used as guidelines within the flexibility dictated by commonsense, and should be adhered to where practicable.<sup>73</sup>

Note 1: in 2004 s 49 AAPAA was repealed and the scope of s 129(2)(b) of the *Criminal Procedure Act 2004* (WA), which replaced it, is not as broad. In that context, the *Anunga* Guidelines may assume increased importance: see the discussion of the recent Kimberley TaskForce cases, below.

Note 2: The *Anunga* Guidelines have been incorporated into the Western Australian Police Commissioner's Orders and Procedures Manual (COPS Manual).

- **Recent developments: the Kimberley TaskForce prosecutions**

McKechnie J has discussed the application of the *Anunga* Rules in a number of cases being prosecuted in 2008 pursuant to the Kimberley TaskForce initiative, including *Siddon v State of Western Australia* (below).

**Case: *Siddon v State of Western Australia* [2008] WASC 100**

Facts: the accused, who had been charged with indecent dealing, applied for an order to exclude a video record of interview (VROI) from evidence. Two policemen had approached the accused and asked him to accompany them to the police station (located two houses away) to speak with them about the events in question. The accused had been placed in the "cage" at the back of a police vehicle and driven to the police station. One of the police officers gave inconsistent evidence about whether the accused had been told at any time that he was under arrest. At the police station, the officer had asked the accused whether he needed anyone to come and sit with him while they had "a bit of a chat" and the accused had replied in the negative.

Held: the VROI had been made involuntarily, and was therefore inadmissible. McKechnie J found that the accused had not been told at any time that he was not under arrest or that he was otherwise free to go. The events established that, far from being "a bit of a chat", the interview was a formal interview relating to a serious allegation. McKechnie J stated that the diminution of the importance of the interview to the accused meant that he could not be satisfied that the accused "understood his rights to have a support person available".<sup>74</sup> Noting that the *Anunga* Rules had been adopted by the Western Australian Commissioner of Police in the COPS Manual, McKechnie J commented that, while the *Anunga* Guidelines are not binding, a failure to follow them "may give a strong indication that an interview was not voluntary"<sup>75</sup>. His Honour was not satisfied that the accused had understood the caution; rather the interviewing officers had paid only "only lip service.... to the need to ensure that the accused understood his right to answer questions"<sup>76</sup>. McKechnie J's conclusion that the confession had been made involuntarily was "reinforced by the unlawful detention of the accused for the purpose of questioning and the failure to emphatically inform him that he was free to leave."<sup>77</sup>

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<sup>72</sup> (1998) 99 A Crim R 273.

<sup>73</sup> *R v Njana* (1998) 99 A Crim R 273 at 280.

<sup>74</sup> *Siddon v State of Western Australia* [2008] WASC 100 at [20].

<sup>75</sup> *Siddon v State of Western Australia* [2008] WASC 100 at [21].

<sup>76</sup> *Siddon v State of Western Australia* [2008] WASC 100 at [24].

<sup>77</sup> *Siddon v State of Western Australia* [2008] WASC 100 at [34].



**Case: *Bundamurra v State of Western Australia* [2008] WASC 106**

Facts: the accused, who had been charged with sexual offences, was a senior warden at Kalumburu. He had sat in on interviews conducted by police with suspects in the past, but had no education or training in respect of the rights of accused persons in custody. The accused had been cautioned prior to and during the course of the video record of interview (VROI). He had chosen his brother as an “interview friend”, but it appeared that his brother, who had not sat in on such interviews before, was not particularly aware of the purpose of his role.

Held: that although the accused had been unlawfully detained in custody at the time of the interview, the statements in the interview had been given voluntarily. McKechnie J remarked that the *Anunga* requirement of an interview friend “is in some respects patronising because it takes no account of the occupation, education, intellectual capacity or personality of a particular Aboriginal person and purports to be a blanket guideline”<sup>78</sup>. The accused’s principal language was English and he had displayed no apparent lack of understanding during the VROI. McKechnie J stated that, on a review of the whole of the VROI, he was satisfied that the accused understood the caution, noting that “[n]ecessarily, such a finding is in part impressionistic, based on the record of interview.”<sup>79</sup> McKechnie J emphasised that the VROI needed to be seen in its entirety, with paralingual features such as body language and gestures being taken into account:

“Not only the verbal communication is important but the non-verbal communication, including nods and shakes of the head and other gestures are to be taken into account.”<sup>80</sup>

McKechnie J concluded that the fact that the accused’s detention had been unlawful, and that apparently the accused’s brother had “no appreciation of his task” as an interview friend, were relevant to the voluntariness of the VROI, but they did not render it involuntary. His Honour ruled that the VROI (with the exclusion of certain inadmissible parts) could be admitted into evidence.

See also: *Djanghara v State of Western Australia* [2008] WASC 102. In that case the applicant sought to exclude a video record of interview (VROI) from the evidence. McKechnie J commented that the applicant was a traditional Aboriginal person from a remote community who lacked the advantages that others might have in interacting with police. The accused had chosen his wife as his interview friend, but she had left the room on two occasions. A mission superintendent, who was also present, at one point said to the accused that he thought he should answer the questions as “it would be to his advantage”. McKechnie J found that the accused had understood the caution; that it was “not for the police to specify who the friend should be”<sup>81</sup>; and that the mission superintendent was not in a position of authority over the accused and had not induced him to respond to the questions. His Honour ruled that the VROI had been obtained voluntarily, and that there was no basis to reject it on the exercise of judicial discretion.

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<sup>78</sup> [2008] WASC 106 at [15].

<sup>79</sup> [2008] WASC 106 at [20].

<sup>80</sup> [2008] WASC 106 at [21].

<sup>81</sup> [2008] WASC 102 at [4].

## 7.7

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### DEFENCES

#### 7.7.1 Consent (Customary Law)

- **An Aboriginal adult or child may consent or alternatively there may be an honest and mistaken belief that they consented to the infliction of customary punishment**

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

Facts: the Aboriginal defendants were charged with unlawful wounding and assault occasioning bodily harm. The circumstances were that a 14 year old Aboriginal girl had been punished under *Martu* law. The punishment involved hitting the girl with sticks and a crowbar and spearing her in the leg. Based on evidence that the punishment had been carried out in accordance with *Martu* law, defence counsel said that the girl had consented or alternatively that the defendants had an honest but mistaken belief that she consented. In summing up the judge told the jury that they were not being asked to decide whether or not they approved of Aboriginal law or of the defendants' conduct, but whether or not the accused were guilty in terms of the legal principles discussed.

Verdict: the jury returned a verdict of not guilty on all charges.

*Note:* in *Aboriginal Customary Laws Final Report* the LRCWA noted that a number of other matters may be taken into account determining whether an Aboriginal person has truly consented to undergoing punishment, including:

- the age of the person;
- whether the person is consenting to the punishment, in order to avoid being rejected by his or her community;
- whether the person is consenting to the punishment in order to prevent someone close to them from being punished in their stead<sup>82</sup>.

#### 7.7.2 Duress (Customary Law)

- **The defence of duress may be available in circumstances where Aboriginal customary law places a person under duress to behave in a particular way**

**Case: *R v Gregory Warren & Ors* (1996) 88 A Crim R 78**

Facts: the appellants had been convicted of violent offences including grievous bodily harm with intent to cause grievous bodily harm. A man had been beaten in circumstances where the appellants said that the man had been punished for breaching the appellants' community's customary law and that if the appellants had refused to punish him they would themselves have been punished in the same way. The trial judge held that the defence of duress was not available because Australian criminal law does not recognize or operate alongside customary law. He also held that the appellants were not acting pursuant to customary law but rather pursuant to the effect of alcohol and a wish to make a show of strength.

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<sup>82</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), pp 142-143. (Accessed 5 July 2008)

Held: (by majority) that the trial judge had erred by characterizing the issue as a conflict of laws. The appellants had not argued that their conduct was lawful because it was lawful under customary law; rather, they had claimed that their wills were overborne and they were under duress because they were threatened with punishment under customary law. Therefore they did not have to show that Australian criminal law recognized or operated alongside customary law. However, the court further held it was not necessary to decide the availability of the defence of duress in the circumstances of this particular case; the appeal failed because the trial judge had rejected the appellants' explanation of the motivation for their behaviour.

### 7.7.3 Provocation

- **In determining issues of provocation, the test to be applied is that of an “ordinary Aboriginal person”**

**Case: *Jabarula v Jambajimba* (1989) 68 NTR 26**

Facts: the appellants had been convicted of assault charges. A police officer and a councillor, while checking infringements of the *Liquor Act*, had signalled an oncoming car to stop. The car stopped and two men had got out. The police officer drove to the side of the road. Unnoticed by the officer, one man tripped and fell after exiting the car and was struck by the officer's car, which, it was argued, precipitated an attack on the complainants by the accused. At trial, the magistrate had rejected their defence of provocation.

Held: appeal dismissed. The court stated that when considering what the ordinary person would have done, this person can be defined with reference to the accused's cultural characteristics and environment. In this case, this meant an ordinary Aboriginal man living today in the environment and culture of a remote Aboriginal community. The court defined an “ordinary Aboriginal man” as one who is sober, does not have a particularly bad temper, is not unusually excitable or pugnacious, and has such powers of self control as everyone is entitled to expect of an ordinary person of that culture and environment. The actions of three of the appellants went well beyond the reactions of an ordinary person and were largely due to drunkenness.

**Case: *Lofty v R* [1999] NTSC 73**

Facts: the appellant had been convicted of the murder of his wife, who apparently had intended to leave him for another man. There was evidence that the relationship between the wife and the other man would have seriously breached customary law. The trial judge directed the jury that it should look at the victim's conduct from the point of view of its significance to the accused. All his personal circumstances were relevant including that he lived as an Aboriginal man in a remote community, the degree to which he followed customary law, and the significance of the victim's conduct to him including whether it was a grave breach of that law. The trial judge applied an “ordinary Aboriginal man” test as articulated in *Jabarula*, above. The appellant appealed against his conviction on the ground that the trial judge had misdirected the jury.

Held: appeal dismissed; the directions given by the trial judge were appropriate.

**Case: *Hart v The Queen* [2003] WASCA 213**

Facts: the appellant appealed his conviction for murder of his estranged wife. There was evidence that he had assaulted her on a previous occasion, that she had denied him access to their children, that he had found her kissing his friend and that he had intended to attack the other man, but had struck his wife by accident. The appellant had not raised provocation or evidence of loss of self-control at trial.

Held: appeal dismissed. The court held that even the version of the facts most favourable to the appellant failed to raise any issue of provocation which could be put before the jury. Even if the conduct could be called a “wrongful act”, “insult” or offensive to the appellant, it was not capable of provoking an ordinary person to retaliate to such a degree of violence, even taking into account the appellant’s characteristics. To say otherwise would be to set too low a standard expected by a civilised society from an ordinary person. Also, the difficulties in respect of access to the children had existed for some time and these difficulties on their own could not have led the appellant to act “in the heat of passion”.

#### 7.7.4 Honest Claim of Right

- **A broad meaning may be given to the concept of “property” for the purposes of s 24 *Criminal Code* 1913 (WA)**

**Case: *Walden v Hensler* (1987) 75 ALR 173 (HCA)**

Facts: the Aboriginal applicant had been convicted of keeping protected fauna. He raised the defence of honest claim of right pursuant to s 22 *Criminal Code* 1913 (WA).

Held: appeal allowed. Brennan, Toohey and Gaudron JJ concluded that the applicant had an honest claim of right, in that he believed he was entitled to take turkeys. Brennan J (dissenting) held that the offence did not relate to the property.

*Note*: an accused who is relying on s 22 *Criminal Code* must believe that he or she was entitled to do what he or she did under a relevant Aboriginal law that is recognised by the general law of the State, even if that is not the correct legal position<sup>83</sup>.

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<sup>83</sup> *DPP Reference No 1 of 1999* [2000] NTCA 6.

## APPENDIX TO CHAPTER SEVEN

### Criminal Proceedings

#### Appendix A: Aboriginal Court Officers

Section 48 *Aboriginal Affairs Planning Authority Act 1972 (WA)* (AAPAA) provides for authorised persons to assist persons of Aboriginal descent in court proceedings. Written authorisation to carry out the activities prescribed in s 48 AAPAA must be obtained from the Minister for Indigenous Affairs. The Aboriginal Legal Service of Western Australia (Inc.) plays a major role in coordinating the activities of persons issued with a Section 48 Certificate (Aboriginal Court Officers).

The contact details for ALS Court Officers are as follows:

(1) Metropolitan Area

**Perth** Kenneth Sutton (Manager, Court Officer Unit)  
 Samuel Dinah (Prison Liaison Officer)  
*Officers:* Robert Bonson - Cowan Bonson  
 Sorgi Eggington - Tenneill Hunter  
 Lorretta McNamara - Mark Radovanovic  
 Rod Williams

Tel: (08) 9265 6666

(2) Country

<b>Albany</b>	Carmen Roberts	(Tel: (08) 9841 7833)
<b>Broome</b>	Margaret Ugle	(Tel: (08) 9192 1189)
<b>Bunbury</b>	Kevin Blurton	(Tel: (08) 9791 2622)
<b>Carnarvon</b>	Richard Oakley	(Tel: (08) 9941 1534)
<b>Derby</b>	Gayle Singer-Edwards	(Tel: (08) 9191 1407)
<b>Fitzroy Crossing</b>	Steven Carter	(Tel: (08) 9191 5147)
<b>Geraldton</b>	Stephanie Mippy	Tel: (08) 9921 4938)
<b>Halls Creek</b>	Steven Carter	(Tel: (08) 9168 6156)
<b>Kalgoorlie</b>	Murray Stubbs Elvis Stokes	(Tel: (08) 9021 3816)
<b>Kununurra</b>	Frank Chulung	(Tel: (08) 9168 1635)
<b>Laverton</b>	Cedric Wyatt	(Tel: (08) 9031 1156)
<b>Meekatharra</b>	Deborah Robinson	(Tel: (08) 9981 1721)
<b>Newman</b>	Tina Ewen	(Tel: (08) 9175 0764)
<b>Northam</b>	Sylvia Crombie	(Tel: (08) 9622 5933)
<b>Roebourne</b>	Priscilla Papertalk	(Tel: (08) 9182 1107)
<b>South Hedland</b>	Murray Jones	(Tel: (08) 9172 1455)
<b>Warburton</b>	Maria Meredith	(Tel: (08) 8956 2823)

## **Appendix B: Notes on the Use of Videolinks in Court Proceedings, Provided by the Hon Justice Jenkins of the Supreme Court of Western Australia**

### **1. Video Links**

The use of video conferencing is an increasing phenomenon in the Children's, Magistrates, District and Supreme Courts, with accused persons appearing via video link from regional and remote places, sentenced prisoners appearing by video from custody, witnesses appearing to give evidence from towns all over Western Australia and other places in Australia and the world and the public being invited to view proceedings or sentencing without having to travel to Perth or major regional areas to do so.

Each court has a number of courts equipped with video conferencing facilities. Some of these courts are equipped with a multi-site facility which allows the relevant court to link to up to three locations simultaneously. The new District Court Building has the capacity to run 8 video links simultaneously with 6 of these systems able to link to multiple sites. The District Court no longer has dedicated lines to a courtroom as in the old building so a video link can be done from any one of the 24 courtrooms.

The following notes outline issues involved in organising the video conference:

If a party wishes to use video link technology to present their case in the Supreme Court, they should contact the Supreme Court Technology Officer (CTO) on (08) 9421 5377 well before the date the matter is listed for hearing so as to ensure that the required technology is available in the courtroom in which the matter is listed to be heard. It is also wise to contact the relevant judge's associate.

All requests for video links in the District Court go to the Listings Section, telephone number 9425 2275. Requests are made via an Order to the court, and once approved details are either emailed or faxed to the Listings section.

### **2. Relevant Legislation**

There is a wide range of legislation providing the discretionary framework enabling the use of a video link facility in court proceedings. Whilst not exhaustive, the links below represent those Acts and regulations most commonly relied upon.

#### *Evidence Act 1906 (WA)*

- s.25A Cross-examination by accused in person
- s.106N Video links or screening arrangements may be used
- s.106R Special witnesses, measures to assist
- s.106RA Visually recording evidence of witnesses in criminal matters
- s.120 Interpretation for ss120 to 132
- s.121 WA court may take evidence or receive a submission by video/audio link o
- s.122 Counsel entitled to practise
- s.123 Recognized court may take evidence or receive a submission from a person in this State
- s.124 Recognized court's powers
- s.127 Privileges, protection and immunity of participants in proceedings
- s.128 Recognized court may administer an oath in the State
- s.130 Contempt of a recognized court
- s.131 Regulations for fees and expenses relating to the use of a video link or an audio link
- s.132 Operation of other laws

*Criminal Procedure Act 2004 (WA)*

- s.77 Video or audio link, use of when accused in custody etc
- s.141 Video and audio links, use of

*Criminal Appeals Act 2004 (WA)*

- s.43 Party in custody, entitlement to be present at appeal

*Sentencing Act 1995 (WA)*

- s.14A Court may sentence by video link

See also Rules of the Supreme Court 1971

### **3. Taking Evidence (Remote Location)**

Any person calling evidence for presentation to the court can seek an order that the witness be allowed to give that evidence by video link from another location. The circumstances where this may be appropriate vary considerably, but one of the most common reasons would be to save the expense and inconvenience of the witness travelling to Perth.

In any event, there must be an order for the evidence to be so received. There are two ways this can be arranged. In the first instance a formal application can be made on notice, at a directions hearing or during the course of the trial itself. In the latter case, the person calling the evidence must have everything set to go, which requires a certain degree of planning and co-operation from the opposing party.

To set up a video link for this purpose the requirements are (1) a court order allowing the evidence to be taken. No order, no evidence; (2) a host provider at a location convenient to the witness. It is the applicant's responsibility to organise the link at the remote location - the court will not make any arrangements for the link; (3) a booking with the court to use its videolink facility, which requires the payment of a booking fee to the relevant court.

**Note:** If an applicant is planning to make a formal application during the trial, the applicant should liaise with the associate to the trial judge and the opposing counsel to ensure there is no opposition to the application. If there is opposition, it is preferable to hear the application before the trial. If all is in accord, it can be set up and the application made at trial.

### **4. Taking Evidence (Special Witness - CCTV)**

In the event of a witness in a criminal matter being a child or otherwise classified as a special witness whether by legislation or by order, the evidence can be received by either CCTV from the remote witness room, or video link from a remote location. In the case of CCTV, it is necessary to ensure that there is no conflict of booking.

These arrangements are normally made by the Director of Public Prosecutions through the associate to the trial judge in the Superior Courts.

### **5. Counsel/In Person Litigants Appearing Via Video Link**

Increasingly, counsel and others in remote areas utilise video technology in preference to briefing metropolitan counsel for directions and other interlocutory appearances. They are able to do this with leave, and that leave can be set up administratively through the judge's associate. In those cases, counsel or the litigant in person is liable for the relevant fees and in the case of the Supreme Court they should complete the application form prior to the date of the link.

## 6. Accused Persons Appearing Via Video Link

*In Custody* - it is the routine practice of the Supreme Court for accused persons in custody to be 'brought up' and to appear in court via video link for all appearances other than trial and sentence, rather than being physically transported to the court. Other courts have similar arrangements. In the case of sentencing the sentencing judge decides whether the offender should be brought to Court for sentence.

*On bail* - when accused persons are on bail and have to appear in the court for pre-trial procedures the standard procedure is for them to answer their bail in person. However, if the accused is in a regional or remote location, and it would be disruptive, inconvenient or expensive for them to have to travel to the court, arrangements can usually be made for them to appear by video link from a court or place near to their place of residence or for them to answer their bail at a police station near to their place of residence.

*Sentencing* - usually judges and magistrates prefer to sentence an offender in person rather than via video link. However, if an offender is in a remote location, and it would be disruptive, inconvenient or expensive for them to travel to a court in Perth or to a circuit court for sentencing, upon request the judge may be prepared to sentence the offender via video link. These arrangements can be made administratively.

## 7. Multilink facilities

By using the multi-site conferencing feature, counsel can appear from one location, the party represented (or indeed another counsel) can appear from a different location. The multi-site facility allows for simultaneous connection to up to three locations. This is a very helpful facility where the offence occurred in a different location to where sentencing will occur and/or the accused and counsel will be at the time of sentencing. By connecting to different locations, the victim or interested members of the public are able to see sentencing take place via video link. The multi link facility can also be used where the party lives in a remote location, his or her counsel lives in a different town and the judge or magistrate will be in Perth.

**Fees and Charges** –It is generally the case that fees do not apply in circumstances where the link is on the court's motion as in instances of prisoners or remanded accused persons being linked from prisons. Other circumstances which may lead to the waiver of fees relate to the financial circumstances of parties or otherwise in the interests of justice. Circumstances in which there is a likely saving to the parties as in either time and/or travel costs of counsel or witnesses are unlikely to attract a waiver. In all cases, fees are payable unless otherwise waived or varied. These principles apply in the civil, criminal and appellate jurisdictions. In all cases, persons wishing to apply for a waiver of the fees should approach the relevant court and complete the necessary application.



### **Appendix C: Comments on Criminal Proceedings - the Hon Justice Murray of the Supreme Court of Western Australia**

"A need exists for care in relation to such things as interpretation of evidence, culturally sensitive areas of fact (particularly references to deceased persons) and the need in a variety of circumstances to take care that the communication process in the courtroom does not result in misunderstandings. I have in mind, of course, such things as the expression of distance in terms of time and matters of that kind.

In my court, of course, these matters generally arise in cases which involve juries and in my experience they may be effectively handled when the prosecutor, defence counsel and/or a knowledgeable field officer, and the trial judge are fully acquainted with the potential problem and ensure that the jury understands the difficulty. There can, as you will know, be difficulties in that the communication process between a witness and the court may be impeded, not only by the incapacity to speak of certain matters in the presence of particular individuals who may be in court, perhaps in the public gallery, members of the opposite sex, or members of particular skin groups, but also by simple shyness.

Further, difficulties may arise in respect of the manner in which questions are framed, particularly in cross-examination if a rather aggressive form of putting propositions of fact to the witness for agreement is used. Again, that is a problem which may be avoided by the skill of the advocate, but if the judge detects that a problem has arisen, he may draw it to counsel's attention and ask that the questions be re-framed in a more non-leading manner."

### **Appendix D: Comments on Criminal Proceedings - the Hon Justice Templeman of the Supreme Court of Western Australia**

*[Comments made in respect of juries in remote and regional areas]*

It is important to ensure that where it appears that an Aboriginal person who has pleaded not guilty may change his or her plea that person should receive advice at the earliest opportunity so that if there is to be a change of plea it can be dealt with without the need to assemble a jury panel. Apart from the cost of so doing, the inconvenience to people in a circuit town is quite considerable.

There is also the point, made to me quite forcefully by a Clerk of the Circuit Court in such a town, that when trials are aborted, for whatever reason, it reflects very badly on the judicial system. Potential jurors in country districts are much more likely to be co-operative if they think that the system is working efficiently. All too frequently, they perceive a waste of time and money."

## **Appendix E: Examples of Directions to the Jury: her Honour Judge Yeats**

### **(1) Cultural Issues Affecting Traditional Aboriginal Men Charged with Sex Offences**

*[When I was sitting in Broome in 2006 a traditional Aboriginal man was on trial for sex offences allegedly committed against a much younger Aboriginal woman. In order to defend himself the Accused had to go into the witness box to give evidence in his defence. This procedure distressed him so much that I adjourned the trial and discussed the problem with the experienced female defence counsel from the ALS. The accused was a traditional Aboriginal man from Fitzroy Crossing then in his late 40's. His distress was so great including hyperventilating that I feared he would have a heart attack while trying to give evidence. Defence Counsel explained that for cultural reasons he was overwhelmed by shame and embarrassment when talking about a sexual matter in the courtroom in front of females and strangers. We reached agreement with all concerned that on the following morning we would allow the Accused to give his evidence from the remote room by CCTV – the room usually used by complainants in sex cases. There is no legislative authority to allow this procedure but I considered it necessary in order to ensure that the Accused had a fair trial. The Accused was much calmer, more rational and gave a much better account of himself in his evidence on the following day. Following is the direction I gave the jury at the conclusion of the trial.]*

You may be well aware that a great cultural difference exists between traditional Aboriginal persons such as Mr. S and persons such as yourselves the members of the jury and ourselves who serve as judge and counsel. Yet we are all West Australians and we are all subject to the same criminal laws enacted by our Parliament.

Our criminal procedures require trial by jury when an accused person pleads Not Guilty to a serious criminal charge. It is the only procedure we have to determine guilt when guilt is not admitted. That process may not be entirely suitable given the great cultural differences affecting Mr. S but it is the system we must use.

I know each of you is doing your best to consider the evidence in this case and to be fair to everyone involved. But sometimes these cultural differences can lead a jury to misjudge an Aboriginal person.

You live in Broome and I do not so you may already have a much greater understanding of Aboriginal cultural differences than I do but, to be safe, I feel it is my duty in this case to give you a warning.

It is well known that traditional Aboriginal men feel a great deal of shame in discussing sexual matters, particularly when women are present. Please take that into account when you are considering the accused's evidence and the strain he was under yesterday afternoon. In order to defend this charge he had to do something very culturally inappropriate and, to him, shameful - that is, talk about sex in a courtroom in front of women and strangers.

We did our best for him allowing him to use the remote room this morning. And you may have found his evidence was much more coherent today when he was not facing women and strangers in the courtroom.

It is important that you give him a fair hearing. You should not give much weight to the evidence he gave under such stress yesterday. It would be safer to rely on the evidence he gave by CCTV this morning .

*[Footnote: The accused had been in custody for many months awaiting trial because of a breach of bail. The jury was unable to reach verdicts at the end of the trial and I released Mr. S on bail to appear again in February 2007 for a Status Conference. He returned to country in Fitzroy Crossing and passed away there in early January after suffering a heart attack.]*

## **(2) Aboriginal woman charged with aggravated burglary**

*[These are my directions to a jury considering aggravated burglary charges against an Aboriginal woman. None of the jurors appeared to be of Aboriginal descent. The accused woman was acquitted.]*

Finally, ladies and gentlemen, there is a very important aspect of your duty. You must act with complete impartiality, without letting matters of prejudice or sympathy affect your judgment. We are all human beings and all of us have prejudices and all of us have sympathies. What is asked of you as a juror is to recognise those prejudices and sympathies and put them aside during your deliberations. We know that in Western Australia, in Perth, there is prejudice against Aboriginal people among some parts of the population. I think we all know of that. You may find that some of the evidence in this case touches issues that may give rise to prejudice. You have had evidence of violence towards Aboriginal women and you have had police evidence that the accused woman's defacto partner pleaded guilty to committing this burglary. You are judging an Aboriginal woman and not a member of the non-Aboriginal community. There are no Aboriginal persons on your jury. The twelve of you who are not of Aboriginal descent are going to be making judgments in a cultural area that you are not familiar with. It is a fact that Aboriginal culture is different in some ways and you must be careful not to let any prejudices you may have about Aboriginal people intrude in an objective assessment of the evidence. It's not an easy thing, ladies and gentlemen, but I think if you recognise your own prejudices, and we know we all have them, then you can ensure that those prejudices do not interfere with your objective assessment of the evidence.

There is also of course the issue of sympathy. You have heard evidence of 10 or 11 years of violence that you may find this accused woman has suffered at the hands of [X]. I think domestic violence is something we know may occur in all parts of the community. You are asked to put aside any sympathy you may naturally feel for a person in the accused woman's position. You needed to know about this violence because it relates to her defence but you must look at her defence objectively and not just say, 'Well, the poor woman has been bashed up for 10 years and therefore I won't convict her of this offence.' You must objectively consider the evidence as it has unfolded and consider all the evidence and not let either prejudice or sympathy interfere with a proper verdict. That is not an easy thing but that is what is asked of you as jurors.

The community does expect that the twelve of you will use your commonsense when you sit as jurors. Among the twelve of you there is a wealth of life experience. You have lived longer and shorter periods. You have done different things. You have had experience with different people. Some of you may have had close experiences with Aboriginal people. Your life experience, your commonsense, those are things that you bring to bear and that give you a special wisdom that we rely on when you sit as a juror.

## **(3) Aboriginal man charged with sexual offences against a very young child**

*[In a trial in Perth of an Aboriginal man charged with digitally penetrating a 19 month old Aboriginal child in Armadale I gave this warning to the jury: In this case two of the twelve jurors appeared to be of Aboriginal descent.]*

Ladies and gentlemen, it is your duty to act with complete impartiality, complete detachment, without letting matters of sympathy, prejudice, sentiment or emotion play any part. There is an area of particular concern in this case. You are sitting in judgment on a person of Aboriginal descent. Over the past 6 months there has been a considerable amount of publicity in the newspapers in Western Australia about allegations of sexual abuse in regard to Aboriginal communities and children in those communities. Much of that publicity centred on an area quite removed from Armadale but, nonetheless, you must ensure that you do not allow any of that publicity to prejudice your judgment in this case. It is obvious that the facts in this case are very different from the highly publicised case involving a teenage girl. You must ensure that you put aside any prejudices that you may have about sexual offending by Aboriginal men. The accused man is entitled to be judged entirely on the evidence presented in this trial and on that alone and you must not allow any prejudices to sway your judgment.

## **Appendix F: Comments on Criminal Proceedings: Magistrate Liz Langdon of the Magistrates Court of Western Australia**

In some towns in the South West of Western Australia (Bridgetown, Donnybrook and Harvey) the location of the Magistrates' Court and Children's Court inside the police station can be particularly intimidating for aboriginal adults and young people. Also, the fact that there are very few Aboriginal people amongst lawyers, court staff and police is often very alienating.

Poor acoustics in the courtrooms can also present problems for Aboriginal witnesses and accused persons given the high incidence of hearing impairment amongst Aboriginal people. At the Collie courthouse, for example, where there is an over-representation of Aboriginal accused persons appearing in court there are very poor acoustics in the courtroom.

In my court, on the South West circuit, I have noticed the following issues that have arisen in relation to particular Magistrates' Court matters:

**Disorderly Behaviour charges** – Use of public places and spaces by Aboriginal people in towns often mean they are more visible and more susceptible to being charged with street offences and anti-social type offences like street drinking, disorderly behaviour, move on notices and common assault and there is a feeling expressed by aboriginal accused that they are over-policed. These offenders usually end up with huge unpaid fines which then invariably lead to suspension of their driver's licence.

**Driving whilst suspended charges** – There is often family pressure to drive relatives to particular destinations and there is the obvious need to drive themselves and their relatives to funerals.

**Supervisory orders** – Those accused persons who are without a drivers' licence are further disadvantaged by the fact that they are unlikely to be placed on a community based disposition. If the accused lives out of town and they don't drive a motor vehicle then they are unable/unlikely to attend community work or drug and alcohol counselling or other program conditions. Face to face supervision by either Juvenile Justice or Community Justice is also difficult in country areas where there is little or no outreach service available.

**Violence Restraining Orders** – I have noticed an attempt by some Aboriginal applicants to use VROs to sort out feuding but this doesn't seem to work as local processes often need to follow their natural course. There is a need for mediation by an indigenous mediator.

**Protection and Care matters** – Aboriginal respondents (parents) are often not legally represented with little understanding of the process or procedures. There is a need for a duty lawyer service for all respondents to these applications filed by the Department for Child Protection so that the matters can be litigated in a timely and comprehensible manner.

## **Appendix G: Comments on Criminal Proceedings: Peter Collins, Principal Legal Officer of the Aboriginal Legal Service of Western Australia**

Western Australia continues to imprison Aboriginal people at an alarming rate and has the dubious honour of the highest rate of Aboriginal imprisonment in the entire country.

There are a great many causes for this continuing problem and a number of those causes are completely outside the scope of the criminal justice system. The ALSWA also recognises that a number of the causes are related to matters which come within the ambit of Parliament, police, prosecuting authorities and the Ministry of Justice.

However, the ALSWA submits that the courts have a legitimate role to play in reducing the rate of Aboriginal imprisonment. Any decisions of the court will of course be subject to the requirements of legislation and precedent.

There are a number of matters which effect or relate to Aboriginal people which have an impact on the court process and in particular the Aboriginal defendant's ability to have a fair hearing or trial. These matters can be broadly described as:

1. Language difficulties;
2. Cultural issues;
3. Social issues.

What is important is the need for those involved in the criminal justice system to consider these issues in every case where there is an Aboriginal person involved.

The ALSWA submits that these matters are well known and have been well researched in the past. Therefore, in its submissions for the Benchbook the ALSWA does not intend to refer to those.

One of the most important areas where the judiciary now have exclusive control is in the recognition of Aboriginal customary law. The review by the Law Reform Commission of WA into Aboriginal customary law was welcomed and may hopefully lead to greater recognition of Aboriginal customary law.

It seems clear that the mainstream criminal justice system has been unable to adequately deal with the high incarceration rate of Aboriginal people. The ALSWA believes that it is time to try something else and there is clear case precedent to allow for the continued and greater recognition of Aboriginal customary law in the sentencing process in Western Australia.

Most of the case precedents consider the question of "tribal" or traditional punishment in the form of physical punishment such as spearing<sup>84</sup> and when there is clear evidence that such a punishment has or will occur the courts acknowledge the principle of double punishment and allow some reduction in the punishment.

However, the consideration of non-physical forms of traditional punishment or customary law are seldom referred to or considered by the courts. There is clear precedent for such a course of action. In *Miyatatawuy* (1996) 87 A Crim R 574 the fact that an offender and her partner (who was the victim) were banished and remained at a dry community for a significant period and thereby complied with the customary law punishment imposed by the elders of that community, was taken into account as mitigation.

There is also authority for the proposition that the wishes of the community to which the offender belongs is a relevant consideration to be taken into account in the sentencing process<sup>85</sup>.

<sup>84</sup> See for example *Minor* (1992) 59 A Crim R 227; *Wilson* (1995) 81 A Crim R 270; *Gordan* [2000] WASCA 401.

<sup>85</sup> See *Munungarr* (1994) 4 NTLR 63 and *Mamarika* (1982) 5 A Crim R 354.

The ALSWA submits that the judiciary in Western Australia should consider and take into account evidence of any customary law which is relevant to an offender as well as the wishes of the community to which the offender (and the victim) may belong. On some occasions it may be impractical or cost prohibitive to hear oral evidence from some Aboriginal persons, especially those from remote areas. In *Munugurr* (1994) 4 NTLR 63 it was suggested that to overcome this problem such evidence could be presented by way of affidavit or statutory declaration. These documents could then be served on the Crown and the witnesses only called if the Crown required them for cross-examination.

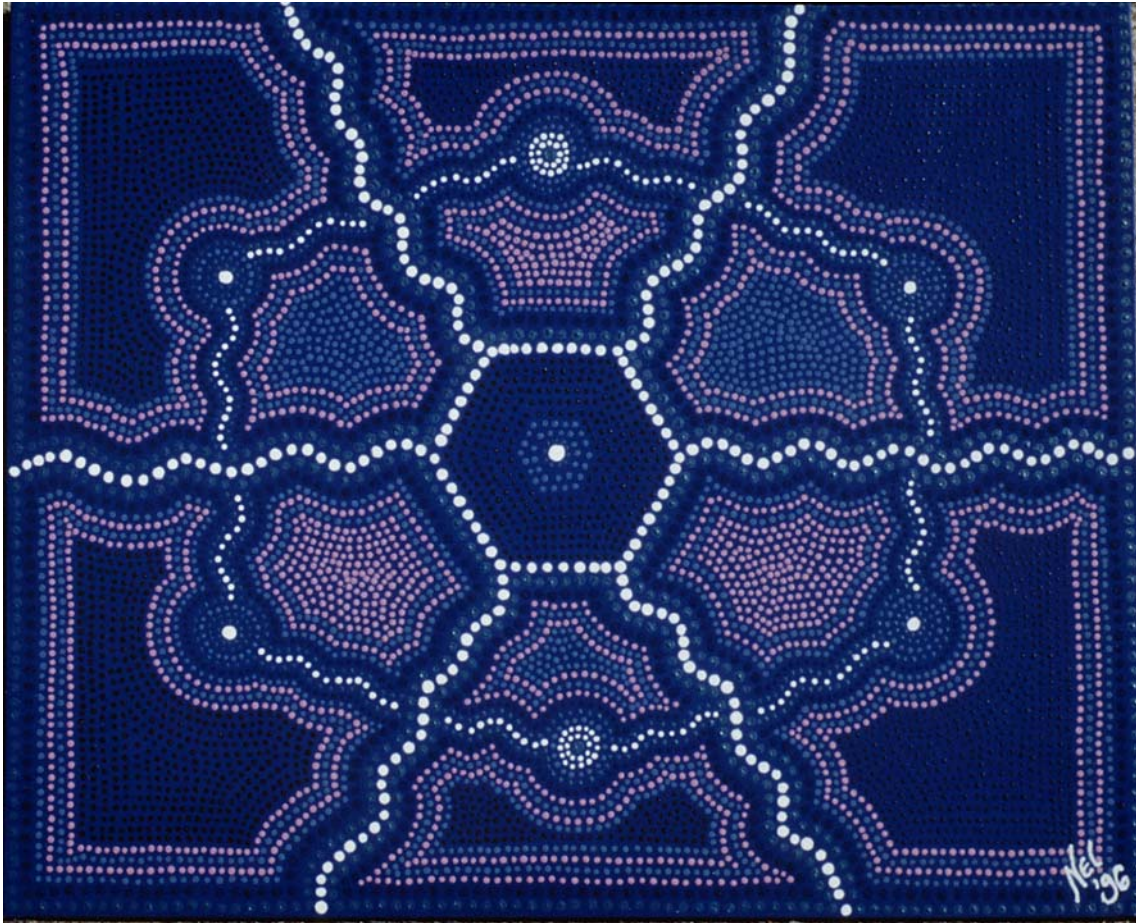
The consideration of Aboriginal customary law as well as the sentencing principles which were formulated in *Fernando* (1992) 76 A Crim R are often overlooked for Aboriginal offenders in semi-urban or urban areas. It has been suggested that the principles outlined in *Fernando* are equally applicable to Aboriginal people in urban areas although the application of those principles may vary in each individual case<sup>86</sup>.

The ALSWA submits that there should be an increased focus on cultural and customary law matters which relate to a particular Aboriginal defendant who is before the court. This focus should not be limited to Aboriginal defendants from remote or country locations and should include those Aboriginal defendants who come from towns and the metropolitan area.

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<sup>86</sup> Nicholson, J "The Sentencing of Aboriginal Offenders" (1999) 23 *Criminal Law Journal* 5.

## Chapter Eight: Sentencing



# Chapter Eight: Sentencing

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Upon the recommendation of Western Australian Aboriginal advisers, the word  
“Aboriginal”, rather than “Indigenous” is used in this Benchbook

## Summary of Chapter Eight

### Sentencing

#### 8.1 INTRODUCTION

##### 8.1.1 Aboriginal Customary Concepts of Criminal Justice

- Aboriginal customary law is characterised by notions of summary justice, strict liability, payback and family/group punishment and responsibility: *Bolton v Nielsen* (1951) 53 WALR 48

##### 8.1.2 International Law

- Non-ratified international instruments may inform the sentencing process: *Police v Abdulla* (1999) 74 SASR 337
- Ambiguous legislative provisions should be construed consistent with human rights principles, particularly in relation to matters affecting indigenous people: *Western Australia v Ward* (2002) 191 ALR 1

##### 8.1.3 Equality Before the Law

- Principles of substantive equality may support a special approach to the sentencing of Aboriginal offenders

##### 8.1.4 Recommendations of the *Royal Commission into Aboriginal Deaths in Custody*

- *The Royal Commission into Aboriginal Deaths in Custody* recommended that:
  - the principle of imprisonment as a sentence of last resort be enforced by legislation (*Recommendation 92*)
  - that, in the interests of rehabilitation, criminal records be expunged after an appropriate time has lapsed since last conviction (*Recommendation 93*)
  - that authorities consult with discrete Aboriginal communities to ascertain a range of appropriate sentences for consideration by the court (*Recommendation 104*)
  - an appropriate range of non-custodial sentencing options be made available, to be implemented in consultation with Aboriginal communities and groups (*Recommendations 109, 111, 113, 114*)

##### 8.1.5 LRCWA's Recommendations (*Aboriginal Customary Laws: Final Report*)

- In *Aboriginal Customary Laws: Final Report* the Law Reform Commission of Western Australia (LRCWA) recommended:
  - that Aboriginal courts be established as a matter of priority (*Recommendation 24*);
  - that the cultural background of an offender be included as a statutory sentencing factor (*Recommendation 36*);
  - that sentencing legislation provide that a court is to have regard to the particular circumstances of Aboriginal people when considering imprisonment (*Recommendation 37*)
  - that any customary law matters be taken into account in sentencing (*Recommendation 38*)
  - that members of community justice groups, Elders and/or respected members of Aboriginal communities may make submissions to the sentencing court (*Recommendation 39*)

## **8.2 IMPRISONMENT AS A SENTENCE OF LAST RESORT**

### **8.2.1 Law and Policy**

- The principle that imprisonment should be a sentence of last resort is now enshrined in law and policy
- However, even where an offence is not the worst of its type, the requirements of specific and general deterrence may require that a prison sentence be imposed: *Wiggan v R* (Unrep., WA Sup Ct, CCA, 24 January 1991)

## **8.3 ABORIGINALITY**

### **8.3.1 Sentencing Principles**

- The same principles are to be applied in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group: *Neal v the Queen* (1982) 42 ALR 609; *Rogers and Murray* (1989) 44 A Crim R 301; *State of Western Australia v Richards* [2008] WASCA 134

## **8.4. AGGRAVATING FACTORS**

### **8.4.1 Domestic Violence**

- The primary concern of the courts must be to protect women in the community from vicious, drunken and abusive behaviour: *Woodley* (1994) 76 A Crim R 302
- Even where a complainant continues to cohabit with an offender, the court should deal with assaults upon that complainant as it would a member of the wider community: *Woodley* (1994) 76 A Crim R 302
- Courts cannot deal with the core problem of an offender being unable to resist the use of physical violence when intoxicated and angered by his/her partner's conduct: *Woodley* (1994) 76 A Crim R 302; *Daniel* (1997) 94 A Crim R 96

### **8.4.2 Offences Against Children**

- Where a young offender commits a serious offence against a young child, the need for a penalty of sufficient weight may outweigh the rehabilitation objective: *Warrie v R* (Unrep., WA Sup Ct, CCA, 12 July 1974)

### **8.4.3 Cultural Attitudes to Familial Relationships**

- The cultural attitude of an offender and a complainant to their familial relationship may be an aggravating factor: *State of Western Australia and Richards* [2008] WASCA 134

## **8.5. MITIGATING FACTORS**

### **8.5.1 Facts Existing Only by Reason of Ethnicity**

- A judge must take into account facts which exist only by reason of an offender's membership of an ethnic or other group: *Neal v The Queen* (1982) 42 ALR 609; *State of Western Australia and Richards* [2008] WASCA 134, *Clinch* (1994) 72 A Crim R 301
- The fact that an Aboriginal offender has an urban background has assumed significance in some cases: *R v Fuller-Cust* (2002) 6 VR 496

### **8.5.2 Circumstances Underlying Alcohol/Substance Abuse**

- Although generally drunkenness is not a mitigating factor, the general circumstances which give rise to alcohol abuse may be mitigating: *Juli* (1990) 50 A Crim R 31
- Although the circumstances giving rise to alcohol abuse may be mitigating, they do not detract from the law's duty to protect women in the community and the need for deterrence: *R v Leering* (Unrep, Sup Ct WA, CCA, No 127 of 1990, 21 December 1990)

### **8.5.3 Emotional Stress**

- Emotional stress such as that arising from interracial tensions may constitute a special mitigating factor: *Neal v The Queen* (1982) 42 ALR 609

### **8.5.4 Cultural Dislocation**

- The difficulties experienced by an Aboriginal person adjusting to city life, including the forming of addictions to alcohol and drugs, may be mitigating: *Harradine v R* (1992) 61 A Crim R 201
- The negative consequences of an offender's re-location at a young age from a pastoral station to an Aboriginal community may be mitigating: *R v Churchill* [2000] WASCA 230

### **8.5.5 Effect of Removal from Family**

- An offender's early removal from family, inability to reconnect with family and consequent suffering of anxiety about his Aboriginal identity may be taken into account: *R v Fuller-Cust* (2002) 6 VR 496

### **8.5.6 Socio-Economic Factors**

- Ethnically-related oppressive socio-economic conditions may be mitigating: *R v "E" (A Child)* (1993) 66 A Crim R 14
- Such socio-economic factors may include the greater difficulty for many Aboriginal people of finding employment: *Newcombe v Police* [2004] SASC 26

### **8.5.7 The Impact of Imprisonment**

- The impact of a sentence of imprisonment on an Aboriginal person in the light of his or her social and cultural background may be taken into account: *State of Western Australia and Richards* [2008] WASCA 134; cf *Juli* (1990) 50 A Crim R 31, *Rogers and Murray* (1989) 44 A Crim R 301

### **8.5.8 Customary Punishment**

- The fact or likelihood of customary punishment being inflicted may be taken into account in sentencing: *Jadurin v R* (1982) 44 ALR 424
- Evidence must be adduced of the connection between the injuries inflicted and the relevant customary law punishment: *R v Brand* [1998] WASCA 279
- A sentencing court may take into account the fact that an offender has suffered injuries, even if those injuries were not inflicted in accordance with traditional law: *Marimika v R* (1982) 5 A Crim R 354
- The fact or possibility that an Aboriginal offender may receive community punishment may serve to lessen the severity of a sentence, in order that an offender will not be punished twice for the same offence: *R v Minor* (1992) 2 NTLR 183
- It is not appropriate to imprison an Aboriginal offender for the purpose of protecting him or her from the infliction of customary punishment: *Jamieson v R* (Unrep., WA Sup Ct, Wolff CJ, 7 April 1965)

### **8.5.9 The Wishes of the Aboriginal Community**

- The wishes of an Aboriginal community may be taken into account: *Miyatatawuy* (1996) 87 A Crim R 574; *R v Gondarra* [2005] (Unrep, Sup Ct NT, Southwood J, SCC 20407332)

### **8.5.10 The Impact of Traditional Belief**

- Where the reason for the commission of an offence stems from traditional Aboriginal belief or culture, evidence of that belief or culture may be mitigating: *Shannon v R* (1991) 57 SASR 14; *Goldsmith v R* (1995) 65 SASR 373
- Although the court may take traditional belief into account, this will not override the objective seriousness of the case: *Hales v Jamilimira* (2003) 12 NTLR 14; *R v GJ* [2005] NTCCA 20

## **8.6 SENTENCING: OTHER**

### **8.6.1 The Principles in *R v Fernando***

- The *Fernando* principles encapsulate the leading authorities on the sentencing of Aboriginal offenders
- The *Fernando* principles have been held not to apply in cases where the offender does not come from a remote or regional community: *Ceissman* (2001) 119 A Crim R 535

### **8.6.2 *Dangerous Sexual Offenders Act 2006 (WA)***

- The psychiatric assessment risk tools currently used to predict propensity to commit serious sexual offences in the future may not be appropriate for predicting the risk factors for Aboriginal offenders: *DPP (WA) v Williams* [2007] WASCA 206
- In particular, there are concerns about the reliability of tools which have not been devised for and/or do not necessarily take account of the social circumstances of Aboriginal people in remote communities: *DPP v Mangolamara* [2007] WASCA 71

### **8.6.3 Section 16A (2A) and (2B) *Crimes Act 1914* (Cth)**

- Section 16A of the *Crimes Act 1914* (Cth) prohibits judicial officers taking into account, when sentencing for a Commonwealth offence, “any form of customary law or cultural practice” relevant to the criminal behaviour to which an offence relates

## **8.7 ABORIGINAL COURTS**

### **8.7.1 Aboriginal Courts in Western Australia**

- Yanderyarra Aboriginal Circle Court
- Aboriginal Court, Norseman
- Community Court, Kalgoorlie

## CHAPTER EIGHT

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# Sentencing

In *Sentencing: Aboriginal Offenders* the New South Wales Law Reform Commission (NSWLRC) remarked that the question of sentencing Aboriginal offenders cannot be separated from the broader issues relating to Aboriginal offending:

“There are inherent limitations in focusing purely on sentencing, since explanations for the levels of offending by, and over-representation of, Aboriginal people in the criminal justice system involve much more than sentencing law and practice. Sentencing is the last stage of a chain of actions and decisions in the criminal justice system.”<sup>1</sup>

The NSWLRC concluded that the root causes of Aboriginal offending “lie in disadvantage and despair occasioned by poverty, unemployment, addictive behaviour, poor levels of education and health, and social and economic disempowerment”, and observed that “commitment to effecting positive changes in these areas is essential, however, to create a climate whereby Aboriginal people have true equality before the law.”<sup>2</sup>

In *R v Gladue*<sup>3</sup> the Supreme Court of Canada commented that the need for offenders to take responsibility for their actions is central to the sentencing process and that incarceration obviates the need to accept responsibility<sup>4</sup>. While acknowledging that “sentencing innovation cannot by itself remove the causes of aboriginal offending and the greater problem of alienation from the criminal justice system”<sup>5</sup>, the Supreme Court called upon sentencing judges to use their power to influence the treatment of Aboriginal offenders: and, in particular, to employ sentencing options which would “play perhaps a stronger role in restoring a sense of balance to the offender, victim and community, and in preventing further crime.”<sup>6</sup>

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<sup>1</sup> New South Wales Law Reform Commission *Sentencing: Aboriginal Offenders*, Report 96, Sydney (October 2000) para 1.51. ([www.lawlink.nsw.gov.au/lrc.nsf/pages/r96chp1](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r96chp1)). (Accessed 11 July 2008)

<sup>2</sup> NSWLRC, *Sentencing: Aboriginal Offenders*, Sydney (October 2000) para 1.52 ([www.lawlink.nsw.gov.au/lrc.nsf/pages/r96chp1](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r96chp1)). (Accessed 11 July 2008)

<sup>3</sup> *R v Gladue* [1999] 1 SCR 688.

<sup>4</sup> *R v Gladue* [1999] 1 SCR 688, para 72.

<sup>5</sup> *R v Gladue* [1999] 1 SCR 688, para 65.

<sup>6</sup> *R v Gladue* [1999] 1 SCR 688, para 65.

## 8.1

### INTRODUCTION

#### 8.1.1 Aboriginal Customary Concepts of Criminal Justice

Note: a detailed discussion of Aboriginal customary law concepts of offending and punishment is contained in **Chapter Two**.

Some of the major points are re-capped below:

- **Aboriginal customary law is characterised by notions of summary justice, strict liability, payback and family/group punishment and responsibility**
  - offences relating to sacred matters (e.g. such as the viewing of sacred objects, places, or ceremonies by those not entitled to view them) are crimes of strict liability and may demand the immediate death of the offender;
  - in other cases, an appropriate punishment may be chosen from a range of punishments following a process of argument or mediation involving the parties injured by the offence and the offender and/or the offender's supporters. In other cases Elders may meet to decide upon an appropriate punishment;
  - punishment is perceived as a response to a particular act by the injured party or group, rather than as a response to an act which is inherently "unlawful";
  - punishment is usually characterised by "payback" or "square it up" principles, on the basis that "retaliation is the essence of law";
  - customary punishments may include death (either directly, or by sorcery or incantation); spearing (of greater or lesser severity); other forms of corporal punishment; shaming or ridicule; rigorous forms of initiation; compensation (e.g. through adoption or marriage) and banishment from the community;
  - if a particular punishment is interpreted as retaliation, it may invite an act of reprisal. Things may escalate to the point that a "blood feud" will erupt which may continue for many years after the commission of the original offence.

In socio-centric Aboriginal communities, isolation or banishment from the group is an extremely harsh punishment. Thus, a lengthy term of imprisonment may exacerbate an Aboriginal offender's feelings of alienation. However, the contrary view has also been expressed: viz some Aboriginal people do not mind imprisonment, and attach no stigma to it<sup>7</sup>.

In traditional Aboriginal society criminal responsibility may be widely attributed (or, paradoxically, claimed). Thus, relatives of an offender may be blamed for the actions of an offender. In *R v Thompson*<sup>8</sup> the sentencing judge commented:

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<sup>7</sup> See *inter alia* E Eggleston *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* ANU Press, Canberra, 1976; Q Beresford and P Omaji *Rites of Passage: Aboriginal Youth, Crime and Justice*, Fremantle Arts Centre Press, Fremantle, 1996; E Ogilvie and A Van Zyl 'Young Aboriginal Males, Custody and the Rites of Passage' *Trends and Issues in Crime and Criminal Justice* AIC, April, 2001.

<sup>8</sup> *R v Thompson* (Unrep., WA Sup Ct, Roberts-Smith J, No 199 of 2000, 20 February 2001).



"I note and accept that [the offender] not only intends but is determined to present herself to the community for traditional punishment and I accept that it will be inflicted as described by [counsel] not only on her but on her mother and three brothers; that is to say, the expectation is that she and her mother will be hit with fighting sticks and her three brothers will be speared in the thigh."<sup>9</sup>

Aboriginal persons may also demonstrate a sense of "guilt by association", which in Anglo-Australian terms would be inappropriate. In *Bolton v Nielsen*<sup>10</sup> Dwyer CJ commented:

"[A]nybody familiar with the Australian aboriginal...understands their sense of communal responsibility for their acts, good or bad, and that it is not uncommon for natives in a group to stand behind the individual; it is therefore necessary, when a group of natives are charged with committing what in substance is a single act, to explain that they have no collective responsibility for that act, nor any immediate responsibility unless they are the immediate actors or accessories."<sup>11</sup>

### 8.1.2 International Law

The United Nations treaty-based human rights system provides a mechanism by which Aboriginal people can seek to enforce their human rights, both in the domestic and international arena<sup>12</sup>. International instruments such as the *International Covenant for Civil and Political Rights* (ICCPR) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) constrain the severity of sentences which may be imposed in respect of criminal offences, and impose minimum standards for the treatment of prisoners. A number of international instruments, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules") prescribe strict standards for the sentencing of juveniles<sup>13</sup>.

The issue of sovereignty has restricted the international enforcement of treaty obligations in respect of domestic law. Consequently, although sentencing issues relating to Aboriginal people in Australia have been the subject of significant international inquiry, the practical impact of international law upon the current sentencing regime in Western Australia has not been felt.

Recommendations that Western Australia abandon its mandatory sentencing regime, amid concern over its disproportionate impact on Aboriginal people, have not been sufficient to encourage any significant change in the law<sup>14</sup>.

In October 2005, the Committee on the Rights of the Child considered the second and third periodic reports of Australia under Article 44 of the *Convention on the Rights of the Child*, in the context of the rate of imprisonment of Aboriginal offenders.<sup>15</sup> The Committee expressed concern in the over-representation of Aboriginal people currently serving sentences of imprisonment in Australian prisons and made a number of recommendations intended to reduce the impact of such imprisonment on Aboriginal families.<sup>16</sup>

<sup>9</sup> *R v Thompson* (Unrep., WA Sup Ct, Roberts-Smith J, No 199 of 2000, 20 February 2001) at 9 – 14.

<sup>10</sup> (1951) 53 WALR 48.

<sup>11</sup> *Bolton v Nielsen* (1951) 53 WALR 48 at 51-52.

<sup>12</sup> United Nations, *Human Rights Treaty Bodies and Indigenous People, 'The Treaty-based System and how to use it'*, Leaflet No 4.

<sup>13</sup> See United Nations, (A/RES/45/113 14 December 1990).

<sup>14</sup> Committee on the Elimination of Racial Discrimination, '*Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on Australia*', CERD/C/AUS/CO/14, Sixty-Sixth session (March, 2005).

<sup>15</sup> United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*, Fortieth Session, (20th October 2005) p 8.

<sup>16</sup> United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*, Fortieth Session, (20th October 2005) p 8.

The complexity of the interaction of relevant international human rights instruments with domestic law was discussed in the Background Papers published by the Law Reform Commission of Western Australia (LRCWA) in its Aboriginal Customary Laws Reference, in particular *International Human Rights and the Recognition of Aboriginal Customary Law*<sup>17</sup> and *Customary Law, Human Rights and International Law: Some Conceptual Issues*<sup>18</sup>. See also the LRCWA's 2005 *Discussion Paper* and its 2006 *Final Report*.

**Note:** On 13 September 2007 Australia, with Canada, New Zealand and the United States, voted against the adoption of the *Declaration of the Rights of Indigenous People* in the United Nations General Assembly<sup>19</sup>. However, the policy of the current Commonwealth Government is to endorse this Declaration<sup>20</sup>.

- **Non-ratified international instruments may inform the sentencing process**

Article 10 of the International Labour Organisation's *Convention No. 169 Concerning Indigenous and Tribal Persons in Independent Countries* 1989, which imposes international standards for Indigenous and tribal peoples<sup>21</sup>, provides:

- “1. In imposing penalties laid down by the general law on members of these peoples account shall be taken of their economic, social and cultural characteristics;
2. Preference shall be given to methods of punishment other than confinement to prison.”

Australia has not ratified *ILO Convention No. 169*.

**Case: *Police v Abdulla* (1999) 74 SASR 337**

**Facts:** The female Aboriginal respondent had pleaded guilty to charges of breaking and entering, using offensive language, resisting a police officer and breach of bail. Evidence was given that the respondent's offending was linked to alcohol abuse, and that her failure to answer bail was due to her inability to understand the importance of the court's orders. Rather than ordering a sentence of imprisonment, the magistrate had imposed a further \$50 bond upon the respondent. The police appealed.

**Held:** appeal dismissed. Perry J observed that s 11 *Criminal Law (Sentencing) Act 1988* (SA) made it plain that imprisonment must be the sentence of last resort. His Honour also commented that *Convention No. 169, Concerning Indigenous and Tribal Persons in Independent Countries* was relevant to the application of South Australian sentencing legislation:

“In the area of human rights particularly, Australian courts should always be prepared to take into account international instruments where they identify precepts of international application, at least where they are not in conflict with the domestic laws of this country.

Article 10(2) of the Convention provides that for such persons ‘preference should [sic] be given to methods of punishment other than confinement in prison’.”<sup>22</sup>

Perry J concluded that, despite some anomalies in the exercise of his sentencing discretion, the magistrate had been endeavouring to design a sentencing package to give the respondent a last chance of avoiding lapsing into a life of crime. In that context, the magistrate had acted within the scope of the jurisdiction conferred by the sentencing legislation.

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<sup>17</sup> M Davis and H McGlade, LRCWA Project No 94, Background Paper 10 (March 2005) ([www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-10.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-10.pdf)) (Accessed 29 March 2008).

<sup>18</sup> C Cunneen and M Schwartz, LRCWA, Project No 94, Background Paper 11 (February 2005) ([www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-11.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-11.pdf)) (Accessed 29 March 2008).

<sup>19</sup> The *Declaration of the Rights of Indigenous People* (A/RES/61/295) was adopted by 144 votes to 4, with 11 abstentions.

<sup>20</sup> Official website of the Labor Party, *International Declaration of the Rights of Indigenous People*, Media Statement, 15 September 2007, (<http://www.alp.org.au/media/0907/msia140.php>) (Accessed 1 April 2008)

<sup>21</sup> Adopted in Geneva on 27 June 1989.

<sup>22</sup> *Police v Abdulla* (1999) 74 SASR 337 at 344.

- **Ambiguous legislative provisions should be construed consistent with human rights principles, particularly in relation to matters affecting indigenous people**

In *Western Australia v Ward & Others*<sup>23</sup> Kirby J, considering the construction of certain provisions of the *Native Title Act 1994* (Cth), commented that ambiguous legislative provisions should be given a construction that is consistent with principles of fundamental human rights as expressed in international law. His Honour commented that principles of international law relating to indigenous people as being of particular relevance, given that “indigenous peoples.... are often specially vulnerable to racial and other forms of discrimination.”<sup>24</sup>

### 8.1.3 Equality Before the Law

- **Principles of substantive equality may support a special approach to the sentencing of Aboriginal offenders**

In the *South West Africa Case (Second Phase)*<sup>25</sup> Tanaka J formulated the principle of substantive equality before the law in the following terms:

“The principle of equality before the law does not mean absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.

To treat unequal matters differently according to their inequality is not only permitted but required.”<sup>26</sup>

The Human Rights Committee, which supervises the implementation of the ICCPR, has emphasised that the principle of equality may call for measures of positive discrimination:

“[N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]”<sup>27</sup>

Equality before the law, so conceptualised, may support the adoption of a special approach to the sentencing of Aboriginal offenders whose position is unequal to persons in the broader community.

See also: s 8 *Racial Discrimination Act 1975* (Cth), which provides for the taking of “special measures” consistent with Article 1 of ICCPR.

### 8.1.4 RCIADIC Recommendations

In *Royal Commission into Aboriginal Deaths in Custody: National Report* (RCIADIC) the Royal Commissioner, having examined the role of sentencing in the high incarceration rate of Aboriginal persons, made wide-ranging recommendations intended to reduce that rate<sup>28</sup>.

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<sup>23</sup> (2002) 191 ALR 1.

<sup>24</sup> *Western Australia v Ward & Others* (2002) 191 ALR 1 at 566-568.

<sup>25</sup> (1966) ICJ Rep. 6.

<sup>26</sup> Sir Hersch Lauterpacht *An International Bill of the Rights of Man* 1945, p 115; quoted in the dissenting opinion of Tanaka J, *South West Africa Case (Second Phase)* (1966) ICJ Rep. 6 (as reported in E Lauterpacht, ed, (1968) 37 *International Law Reports*, Butterworths, London p 462.)

<sup>27</sup> See *Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev 1 (1994), p 68.

<sup>28</sup> E Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report* Vols. 1-11, AGPS, Canberra, 1991 ([www.austlii.edu.au/au/other/IndigLRes/rciadic](http://www.austlii.edu.au/au/other/IndigLRes/rciadic)). (Accessed 6 July 2008)

- The RCIADIC recommendations included -
  - *Recommendation 92*: the principle of imprisonment as a sentence of last resort be enforced by legislation<sup>29</sup>;
  - *Recommendation 93*: that governments should consider enacting legislation which, in the interests of rehabilitation, would provide for criminal records to be expunged after an appropriate time has lapsed since last conviction<sup>30</sup>;
  - *Recommendation 104*: that, in the case of discrete or communities, authorities consult with those Aboriginal communities and organisations to ascertain the range of sentences which the community considers appropriate for the offence in question<sup>31</sup>;
  - *Recommendations 109, 111, 113, 114*: that an adequate and appropriate range of non-custodial sentencing options be made available for Aboriginal offenders, which options should be considered and implemented in consultation with Aboriginal communities and groups<sup>32</sup>.

### 8.1.5 LRCWA's Recommendations (*Aboriginal Customary Law*)

- In *Aboriginal Customary Laws: Final Report*, the Law Reform Commission of Western Australia (LRCWA) recommended that
  - *Recommendation 24*
    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.<sup>33</sup>
  - *Recommendation 36*: Cultural background 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<sup>34</sup>.

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<sup>29</sup> RCDIAC, Vol 3, Chapter 22 ([www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/40.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/40.html)) para 22.1.14. (Accessed 6 July 2008)

<sup>30</sup> RCDIAC, Vol 3, Chapter 22 ([www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/40.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/40.html)) para 22.1.14. (Accessed 6 July 2008)

<sup>31</sup> RCDIAC, Vol 3, Chapter 22 ([www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/45.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/45.html)) para 22.4.51. (Accessed 6 July 2008)

<sup>32</sup> RCDIAC, Vol 3, Chapter 22 ([www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/49.htm](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/49.htm)) para 22.5.14. (Accessed 6 July 2008)

<sup>33</sup> LRCWA *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), p 136. (Accessed 5 July 2008)

<sup>34</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), p 173. (Accessed 5 July 2008)

- *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* 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'<sup>35</sup>.

- *Recommendation 38:* That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide that when sentencing an Aboriginal offender 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.<sup>36</sup>

- *Recommendation 39:* 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, 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.<sup>37</sup>

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<sup>35</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), p 177. (Accessed 5 July 2008)

<sup>36</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), p 183. (Accessed 5 July 2008)

<sup>37</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)), p 184. (Accessed 5 July 2008)

## 8.2

### IMPRISONMENT AS A SENTENCE OF LAST RESORT

#### 8.2.1 Law and Policy

The principle that imprisonment should be a sentence of last resort is now deeply enshrined in both domestic and international law and policy: see, for example -

- Section 6(4) *Sentencing Act 1995* (WA)
- Section 7 (h) *Young Offenders Act 1994* (WA)
- Section 17A *Crimes Act 1914* (Cth)
- Article 10 of the International Labour Organisation's *Convention No. 169 Concerning Indigenous and Tribal Persons in Independent Countries*, 1989
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules")

Note: the imposition of short terms of imprisonment is discouraged under the *Sentencing Act 1995* (WA) (*Sentencing Act*): see s 86, s 35(1) *Sentencing Act*.

- **Even where an offence is not the worst of its type, the requirements of specific and general deterrence may require that a prison sentence be imposed**

**Case: *Wiggan v R* (Unrep., WA Sup Ct, CCA, 24 January 1991)**

Facts: the applicant, an Aboriginal male from a remote Aboriginal community, was sentenced to an effective three year term of imprisonment in respect of convictions of deprivation of personal liberty and unlawful assault causing bodily harm. He had taken the complainant, a young Aboriginal woman, against her will from Broome to the community. The applicant had forcibly detained the complainant for several days. The applicant had no prior convictions, and submitted that the sentencing judge had erred in finding that imprisonment was the only appropriate penalty. Counsel for the applicant argued that the applicant's actions represented an attempt to "claim" the complainant according to traditional Aboriginal law and custom.

Held: application dismissed. The court concluded that the sentencing judge had acted correctly in imposing a custodial order, notwithstanding the applicant's previous good record. Kennedy J (Malcolm CJ and Pidgeon J concurring) emphasised the importance of specific and general deterrence in arriving at an appropriate sentence:

"[The applicant's] conduct in abducting the complainant from Broome to a place a significant distance away, and later striking her heavily with a stick to maintain control over her, cannot be tolerated. This remains so whether the convicted person lives within a European community or within such a community as that in which the complainant and applicant were living. The women in such communities are equally entitled to protection against the infringement of their liberty. It must be made abundantly clear by the courts that conduct such as that of the applicant will be severely dealt with, not only as a punishment to the offender, but also to deter others who might be minded to behave in a similar manner."<sup>38</sup>

Kennedy J noted that the sentencing judge had sentenced the applicant in Broome, and had ordered that the applicant be eligible for parole. As a result, the applicant was permitted to remain in Broome while serving the term of imprisonment.

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<sup>38</sup> *Wiggan v R* (Unrep., WA Sup Ct, CCA, 24 January 1991) at 10.

## 8.3

### ABORIGINALITY

#### 8.3.1 Sentencing Principles

- **The same principles are to be applied in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group**

It is generally accepted that an Aboriginal person is one who is of Aboriginal descent, who identifies himself or herself as Aboriginal and who is recognised by his or her community as Aboriginal<sup>39</sup>.

In 1982, in *Neal v The Queen*<sup>40</sup> Brennan J stated that “[t]he same principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group.” His Honour continued:

“ But in imposing sentences courts are bound to take into account in accordance with those principles, all material facts, including those facts which exist only by reason of the offender’s membership of an ethnic or other group. So much is essential to the administration of justice.”<sup>41</sup>

In *Rogers and Murray*<sup>42</sup>, Malcolm CJ affirmed the sentencing principles formulated by Brennan J in *Neal v The Queen*, and added:

“Race itself is not a permissible ground of discrimination in the sentencing process. If there were to be a different approach to the sentencing of Aboriginals based only upon their Aboriginal background this would be contrary to s 9 of the *Racial Discrimination Act* 1975 (Cth) .....It follows from this that the sentencing principles to be applied to a[n].....offence by an Aboriginal must be the same as those in any other case.”<sup>43</sup>

Malcolm CJ continued: “[T]here well may be particular matters which the court may take into account....including social, economic and other disadvantages which may be associated with or related to a particular offender’s membership of the Aboriginal race.”<sup>44</sup>

The principles formulated by Brennan J in *Neal v The Queen* and by Malcolm CJ in *Rogers and Murray* were expressly approved by the Chief Justice of Western Australia and the President of the Court of Appeal in *State of Western Australia v Richards*<sup>45</sup> (discussed below at **8.4.3**, **8.5.1** and **8.5.7**).

<sup>39</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 at 274 per Deane J. See also the discussion of definitions of “Aboriginal” for legal purposes in Chapter One.

<sup>40</sup> (1982) 42 ALR 609.

<sup>41</sup> *Neal v The Queen* (1982) 42 ALR 609 at 626.

<sup>42</sup> (1989) 44 A Crim R 301.

<sup>43</sup> (1989) 44 A Crim R 301 at 307.

<sup>44</sup> (1989) 44 A Crim R 301 at 307.

<sup>45</sup> [2008] WASCA 134 at [6-7] per Martin CJ; at [44-45] per Steytler P (with whom the other members agreed on this point).

## 8.4

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### AGGRAVATING FACTORS

#### 8.4.1 Domestic Violence

- **The primary concern of the courts must be to protect women in the community from vicious, drunken and abusive behaviour**

**Case: *R v Woodley* (1994) 76 A Crim R 302**

Facts: one of the several Aboriginal male respondents in this case had pleaded guilty to a charge of grievous bodily harm and had been sentenced to 240 hours community service work and 18 months probation. He had been intoxicated at the time of the offence. The Crown appealed against the leniency of the sentence.

Held: appeal allowed, the court finding that the sentence had not been in accord with authority and that the sentencing judge had completely overlooked the need to protect Aboriginal women from violence. The Court commented:

“The courts will do their utmost to treat Aboriginal offenders with patience and tolerance; but, in respect of offences of this nature, their primary concern must be to protect the community and, in particular, the women in the community, who should not have to put up with vicious, drunken and abusive behaviour of this nature.”<sup>46</sup>

The Court substituted a sentence of imprisonment for two years with eligibility for parole upon the respondent.

In *R v Gordon* (below), a case which also involved serious violence against a female, the majority held that no sentencing error had occurred.

**Case: *R v Gordon* [2000] WASCA 401**

Facts: the respondent, an Aboriginal male with an extensive history of alcohol-related assaults, had pleaded guilty to a charge of the unlawful killing of his wife. At the time of the offence the respondent was affected by alcohol: he was also on parole for having assaulted his wife on an earlier occasion. The deceased’s injuries were described in the sentencing court as being consistent with a “protracted and brutal flogging”. Twenty years earlier the respondent had killed a former wife in similar circumstances. He had been sentenced to seven years imprisonment without parole and the Crown appealed against the leniency of the sentence.

Held (by majority): appeal dismissed. Kennedy J (Anderson J concurring) concluded that although another judge might have imposed a higher sentence, no sentencing error had occurred. Wheeler J, dissenting, held that the Crown had established that the sentence was so inadequate as to manifest error. Her Honour commented:

“[I]n order to determine whether his Honour erred, the question is what sentence could properly have been imposed, rather than what sentence an appellate judge would have thought preferable.”<sup>47</sup>

Wheeler J, dissenting, observed that the only mitigating factor was the respondent’s plea of guilty: much of his conduct had consisted of attempting to cover up what had occurred. Her Honour continued:

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<sup>46</sup> *R v Woodley* (1994) 76 A Crim R 302 at 318 per the Court (Kennedy, Rowland and Franklyn JJ).

<sup>47</sup> *R v Gordon* [2000] WASCA 401, paras 27 – 29.



"[A] prolonged attack over a period of time resulting in at least 100 injuries upon a smaller person who was making no apparent attempt to defend herself, the only explanation being that in a drunken frenzy the respondent may not have realized that the injuries were likely to have the effect that they did, may well fall within the worst category of cases.

Wheeler J added that "[w]hile the role of the criminal law in deterring the commission of violent acts is problematic, and particularly so in relation to Aboriginal communities, it is important to indicate very clearly that drunken violence against Aboriginal women is viewed very seriously."<sup>48</sup>

- **Even where a complainant continues to cohabit with an offender, the court should deal with assaults upon that complainant as it would a member of the wider community**

**Case: *R v Woodley* (1994) 76 A Crim R 302**

Facts: another respondent in the *Woodley* case had pleaded guilty to charges of charges of unlawful wounding, sexual penetration without consent and grievous bodily harm, which offences had occurred on separate occasions. . The complainant was the respondent's wife, who continued to cohabit with the respondent after the attacks. The Crown appealed against the leniency of the sentence.

Held: appeal allowed, and a sentence of three years imprisonment imposed. The Court of Criminal Appeal commented:

"Even accepting.... that the respondent's de facto is prepared to continue cohabiting with the respondent, why should Aboriginal women have to put up with this vicious type of assault which is not tolerated in the wider community?"<sup>49</sup>

The Court emphasised that courts must deal with "vicious, arrogant and drunken violence to [Aboriginal] women in the same way as they would treat it in the rest of the community."<sup>50</sup>

- **Courts cannot deal with the core problem of an offender being unable to resist the use of physical violence when intoxicated and angered by his/her partner's conduct**

**Case: *R v Woodley* (1994) 76 A Crim R 302**

Facts: a third respondent in the *Woodley* case had pleaded guilty to charges of charges of unlawfully wounding and of threatening unlawfully to kill his wife. The respondent had a long criminal record, including a murder conviction. He was sentenced to 240 hours community service work and placed on probation for 18 months. The Crown appealed against the leniency of the sentence.

Held: appeal allowed, and a sentence of two years imprisonment substituted for the original sentence. The Court of Criminal Appeal commented:

"In all of these cases it seems that alcohol has played a part in the conduct of the complainants, as well as each respondent. It is probable that the offences occurred because each respondent was unable to resist the use of physical violence when angered or frustrated by what each believed was improper conduct by his partner. The courts cannot deal with this root problem. If treatment of a realistic nature is available, or if social facilities are available, the courts will use their best endeavours to accommodate these ideals."<sup>51</sup>

<sup>48</sup> *R v Gordon* [2000] WASCA 401, paras 30 – 36.

<sup>49</sup> *R v Woodley & Ors* (1994) 76 A Crim R 302 at 316 per the Court.

<sup>50</sup> *R v Woodley & Ors* (1994) 76 A Crim R 302 at 316 per the Court.

<sup>51</sup> *R v Woodley & Ors* (1994) 76 A Crim R 302 at 321.

Note: in *Daniel v R*<sup>52</sup> Fitzgerald P commented that it is at least implicitly accepted “that there are often two victims involved in the offences committed by Aborigines, especially drunken Aborigines, one the victim of the offence and the other the offender”. His Honour doubted the effectiveness of imprisonment as a deterrent to violent offending:

“While courts cannot entirely yield to the pessimistic belief that adequate punishment frequently does not act as a deterrent to violent offences, it is unrealistic to think that imprisonment is a wholly satisfactory response to behaviour based on anger, resentment, powerlessness and frustration related to deprivation and oppression, whatever the race of the offender.”<sup>53</sup>

See also:

- *R v Bulmer* (1987) 25 A Crim R 155
- *R v Fernando* (1992) 76 A Crim R 58
- *Spencer v R* [2005] NTCCA 3

#### 8.4.2 Offences Against Children

- **Where a young offender commits a serious offence against a young child, the need for a penalty of sufficient weight may outweigh the objective of rehabilitation**

**Case: *Warrie v R* (Unrep., WA Sup Ct, CCA, 12 July 1974)**

Facts: the applicant, an 18 year old Aboriginal male from a remote community, who had a learning deficit and a history of sexual aggression, had pleaded guilty to a charge of sodomy. The offence had occurred while the applicant was intoxicated; the victim, a three year old girl, had sustained severe and permanent injuries from the assault. The applicant was sentenced 10 years imprisonment with a non-parole period of four years. The applicant sought leave to appeal against the severity of the sentence.

Held: leave to appeal refused. The Court of Criminal Appeal commented that the applicant’s crime involved much more than a mere “offence against the order of nature” and that, while the offender’s rehabilitation was an important consideration, in this case it had to “take a lower place” to the need for a penalty of sufficient weight to mark the seriousness of the crime.”<sup>54</sup>

See also:

- *R v Iginuwuni* (Unrep., NT Sup Ct, Muirhead J, No 6 of 1975, 12 March 1975)
- *Little v The Queen* [2000] WASCA 87
- *R v Inkamala* [2006] NTCCA 11
- *Mununggur v R* [2006] NTCCA 16

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<sup>52</sup> (1997) 94 A Crim R 96.

<sup>53</sup> *Daniel v R* (1997) 94 A Crim R 96 at 126.

<sup>54</sup> *Warrie v R* (Unrep., WA Sup Ct, CCA, 12 July 1974) at 3 per the Court.

### 8.4.3 Cultural Attitudes to Familial Relationships

- **The cultural attitude of an offender and a complainant to their familial relationship may be an aggravating factor**

**Case: *State of Western Australia v Richards* [2008] WASCA 134**

Facts: the respondent, a 27 year old Aboriginal man from a traditional community in the Western Desert region, had been convicted after a jury trial of sexual penetration without consent. The complainant was a 46 year old female, who, in Anglo-Australian terms, was the cousin of the respondent's father. In Aboriginal cultural terms, the complainant was the respondent's aunt. The respondent had been sentenced to a term of three years and six months imprisonment, which imprisonment would be suspended conditionally for two years. The State appealed against the sentence.

Held: appeal allowed. Martin CJ commented that the considerations properly to be taken into account in sentencing are not limited to mitigating factors:

“In this case, the cultural attitude of the offender and the complainant to their familial relationship is a circumstance which aggravates the offence committed.”<sup>55</sup>

Steytler P noted that a number of factors had exacerbated the respondent's culpability in this case, including “the fact that the complainant was related to the respondent.”<sup>56</sup>

Note: the decision in *Rogers and Murray*<sup>57</sup> may need to be re-considered in the light of *State of Western Australia v Richards*. In *Rogers and Murray* the applicant, an 18 year old Aboriginal man from a remote community, appealed against a sentence of six years imprisonment for an offence of sexual assault. The complainant was a seven year old girl, who had been described in the proceedings as the applicant's niece. Malcolm CJ commented that, on the facts of the case, no relationship of trust existed between the applicant and the complainant “although there was a relationship of blood”<sup>58</sup>. The Court of Criminal Appeal allowed the appeal on the ground of the applicant's timely plea of guilty, his contrition, his inexperience with alcohol and the fact that it was a first offence and imposed a new sentence of three years imprisonment with eligibility for parole.

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<sup>55</sup> *State of Western Australia v Richards* [2008] WASCA 134 at [45].

<sup>56</sup> *State of Western Australia v Richards* [2008] WASCA 134 at [49].

<sup>57</sup> *Rogers and Murray v R* (1989) 44 A Crim R 301.

<sup>58</sup> *Rogers and Murray v R* (1989) 44 A Crim R 301 at 305.

## 8.5

### MITIGATING FACTORS

#### 8.5.1 Facts Existing Only by Reason of Ethnicity

- **A judge must take into account facts which exist only by reason of an offender's membership of an ethnic or other group**

**Case: *Neal v The Queen* (1982) 42 ALR 609**

Facts: the Aboriginal applicant had spat at the manager of a store located on the Aboriginal reserve. He was convicted of charges of unlawful assault and sentenced to two months imprisonment with hard labour. The Queensland Court of Criminal Appeal had quashed the sentence and substituted a sentence of six months imprisonment with hard labour. The applicant applied for special leave to appeal to the High Court.

Held: that special leave be granted. Brennan J commented:

"The facts of the present case.... point to some 'special problems' which may explain – though they cannot justify or excuse – Mr Neal's conduct. The assault was not caused by any ill-feeling between [the complainant] and Neal personally. Yet a dramatic and emotional confrontation...had occurred, apparently produced by a deeply-felt objection to Departmental control of the reserve".<sup>59</sup>

His Honour observed that although the same sentencing principles are to be applied in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group:

".....in imposing sentences courts are bound to take into account in accordance with those principles, all material facts, *including those facts which exist only by reason of the offender's membership of an ethnic or other group*. So much is essential to the administration of justice."<sup>60</sup> (emphasis added)

In *Rogers and Murray*<sup>61</sup> Malcolm CJ observed that "there well may be particular matters which the [sentencing] court may take into account....including social, economic and other disadvantages which may be associated with or related to a particular offender's membership of the Aboriginal race."<sup>62</sup>

In *State of Western Australia v Richards*<sup>63</sup> Martin CJ commented:

"Within the constraints imposed by the sentencing legislation of the state, the courts can and must take into account all the circumstances of the offence, and of the complainant and the offender and his or her background, which are relevant to the sentence to be imposed."<sup>64</sup>

In that same case Steytler P stated that "[i]t is settled that, 'in determining the duration of a custodial sentence, [courts will] take into account features of the offence or of the offender which will result in imprisonment bearing down more severely upon the offender than the average prisoner'":

"Consequently, when additional hardship arises as a result of membership of an ethnic or other group, this will be a relevant consideration."<sup>65</sup>

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<sup>59</sup> *Neal v The Queen* (1982) 42 ALR 609 at 624-625.

<sup>60</sup> *Neal v The Queen* (1982) 42 ALR 609 at 626.

<sup>61</sup> (1989) 44 A Crim R 301.

<sup>62</sup> *Rogers and Murray* (1989) 44 A Crim R 301 at 307.

<sup>63</sup> [2008] WASCA 134.

<sup>64</sup> *State of Western Australia v Richards* [2008] WASCA 134 at [7].

<sup>65</sup> *State of Western Australia v Richards* [2008] WASCA 134 at [44].

**Case: *Clinch v R* (1994) 72 A Crim R 301**

**Facts:** the applicant, a 25 year old Aboriginal male with a twelve-year history of offending, had pleaded guilty to 18 charges including assault occasioning bodily harm, burglary, armed robbery and aggravated sexual penetration without consent. He had been sentenced by different judges on three occasions: first, to 14 years imprisonment; secondly, to an effective term of 12 years imprisonment, to be served cumulatively with the first sentence; thirdly, to nine years imprisonment, to be served concurrently with the earlier sentences. The applicant sought leave to appeal against the severity of the sentences

**Held:** appeal allowed. The Western Australian Court of Criminal Appeal declared that the sentence of 12 years imprisonment imposed by the second judge offended the principle of totality, and ordered that it be reduced to a cumulative sentence of five years. Malcolm CJ described in detail the applicant's extremely troubled background:

"The applicant's background.... shows that the applicant's life has been marked by repeated trauma and tragedy with the result that, in the absence of any preventative strategy his life has disintegrated into alienation and violence, following a pattern of discrimination, exclusion and disadvantage which he and his family have suffered for many years. Both the applicant's parents died while he was very young. They had met while in juvenile detention. The applicant was born when his mother was only 16. During their short lives both his parents spent long periods in prison, as have most of their seven children. The applicant had no proper parenting from his natural parents. His grandmother had been removed from her own mother and placed in a mission. The family members who are not in custody spent most of their lives in a tent on the Gnowwangerup Reserve because Aborigines were not permitted to live in the town. The family eventually moved to Perth because the applicant's health required treatment in the Children's Hospital. The applicant's mother died a violent and terrible death at the hands of her de facto spouse. One of the applicant's sisters was raped when she was 12 years old. Neither the applicant nor his siblings received any counselling or other assistance as a consequence of any of the traumatic events in their lives. It is apparent that the applicant is in need of intensive treatment and healing as a result of his traumatic past."<sup>66</sup>

His Honour observed that "this tragic background is all too common among our Aboriginal people" and, while that background explained some of the reasons "why these terrible offences were committed"<sup>67</sup> and provided some degree of mitigation for them, it did not excuse them.

- **The fact that an Aboriginal offender has an urban background has assumed significance in some cases**

The fact that an Aboriginal offender has an urban background has assumed significance in a number of Victorian and New South Wales cases. In *R v Fuller-Cust*<sup>68</sup> Batt JA commented:

"So far as the applicant's Aboriginality is concerned, the law, as I understand it, is that the same sentencing principles apply to an Aboriginal offender as to any other offender, but there may be particular matters which a court must take into account....including disadvantages associated with the offender's membership of the Aboriginal race: *Neal v The Queen*, *R v Rogers*, and *R v Fernando*. (The way of life of the offenders in that case was far different from that of the applicant in Geelong and elsewhere in Victoria.)<sup>69</sup> (emphasis added)

In the same case Eames JA expressed the view that the impact in the sentencing context of an offender's Aboriginality is not to be contrived from a superficial generalization about differences between urban and non-urban Aboriginality:

<sup>66</sup> *Clinch v R* (1994) 72 A Crim R 301 at 308-309.

<sup>67</sup> *Clinch v R* (1994) 72 A Crim R 301 at 309 per Malcolm CJ.

<sup>68</sup> (2002) 6 VR 496.

<sup>69</sup> *R v Fuller-Cust* (2002) 6 VR 496 at 515.

“Considerations arising from an offender’s Aboriginality may exist whether the Aboriginal person is living in an urban or a rural situation. In any instance the court is seeking to gain a proper appreciation of the circumstances of the individual offender for the purposes of sentencing, including such factors relevant to that offender as the person’s own experience as an Aboriginal person.”<sup>70</sup>

In *R v Fuller-Cust* Eames J affirmed that “race is not a basis for discrimination in the sentencing process”<sup>71</sup> and emphasised that nothing contained in his reasons was to be taken as suggesting that Aboriginal offenders should be treated more leniently than non-Aboriginal offenders.

See also:

- *Ceissman* (2001) 119 A Crim R 535
- *R v Pitt* [2001] NSWCCA
- *Newman, R v Simpson* (2004) 145 A Crim R 361
- M Flynn “Not ‘Aboriginal Enough’ For Particular Consideration When Sentencing” (2005) 6(9) ILB 15

### 8.5.2 Circumstances Underlying Alcohol or Substance Abuse

- **Although generally drunkenness is not a mitigating factor, the general circumstances which give rise to alcohol abuse may be mitigating**

**Case: *Juli* (1990) 50 A Crim R 31**

Facts: the applicant, a 25 year old Aboriginal male from a remote community, had pleaded guilty to charges of sexual assault and aggravated sexual assault. He had a disturbed family background characterized by alcohol abuse, violence and instability. At the time of the offences the applicant was intoxicated and suffering from a paranoid psychosis. He had been sentenced to four years imprisonment in respect of the first offence, and to six years imprisonment in respect of the second offence, to be served cumulatively. The applicant sought leave to appeal against the severity of the sentences.

Held: application granted and appeal allowed. Malcolm CJ stated:

“[The sentencing judge] accepted that the applicant was affected by alcohol at the time that he committed the offences but said that this ..falls far short of an excuse for what you did.’ As a general proposition this is no doubt correct. Drunkenness is not normally an excuse or a mitigating factor. In particular circumstances, however, it may be relevant as a mitigating factor. In the particular circumstances of this case the appellant’s abuse of alcohol reflects the socio-economic circumstances in which he has grown up and should be taken into account as a mitigating factor in the way which I suggested in *Rogers and Murray*.”<sup>72</sup>

The Court of Criminal Appeal directed that the applicant’s terms of imprisonment be served concurrently, rather than cumulatively.

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<sup>70</sup> *R v Fuller-Cust* (2002) 6 VR 496 at 523.

<sup>71</sup> *R v Fuller-Cust* (2002) 6 VR 496 at 520.

<sup>72</sup> *Juli* (1990) 50 A Crim R 31 at 36.

- **Although the circumstances giving rise to alcohol abuse may be mitigating, they do not detract from the law's duty to protect women or from the sentencing objective of deterrence**

**Case: *R v Leering* (Unrep, Sup Ct WA, CCA, No 127 of 1990, 21 December 1990)**

Facts: the respondent, a 19 year-old Aboriginal male from a remote community, had pleaded guilty to charges of deprivation of liberty and aggravated sexual assault. He was unused to alcohol and had, while intoxicated, held down and restrained the 16 year old complainant while a co-offender sexually assaulted her. The respondent had been sentenced to an effective term of 18 months imprisonment and the Crown appealed against the leniency of that sentence.

Held: appeal allowed. Malcolm CJ commented:

"The appeal raises in a stark fashion the dilemma faced by the courts in the administration of criminal justice in taking proper account of the mitigating factors relevant to sexual offences committed when drunk by aboriginal persons normally residing in remote communities, while affording the protection of the criminal law to aboriginal women and young girls who become the potential victims of such offences....."

While there were significant mitigating factors operating in this case, there was also a need to impose a sentence which would reflect a general deterrence and the need to protect potential victims of such offences."<sup>73</sup>

Seaman J commented that nothing stated by the court in *Juli*<sup>74</sup> detracted from the need to protect Aboriginal women:

"*Juli's* case holds that grave social problems due to alcohol abuse in the Aboriginal communities and the general circumstances which have led to these problems may provide circumstances of mitigation and that the impact of imprisonment on Aboriginal people in the light of their social and cultural background should be taken into account.

However, nothing was said in that case to detract from the necessity of the law to afford protection to women in the Aboriginal community or in the community at large."<sup>75</sup>

The Court, concluding that the sentence imposed by the sentencing judge failed to recognise the enormity of the case and the need to deter others, substituted an aggregate sentence of 2 years and nine months imprisonment for the original term.

See also:

- *R v Churchill* [2000] WASCA 230
- *Green v R* (2001) 24 WAR 192
- *R v Fernando* (1992) 76 A Crim R 58
- *R v Brand* [1998] WASCA 279
- *Harradine v R* (1992) 61 A Crim R 201
- *R v Miyatatawuy* (1996) 87 A Crim R 574
- *Hartland v Umagai* [1999] WASCA 22

<sup>73</sup> *R v Leering* (Unrep, Sup Ct WA, CCA, No 127 of 1990, 21 December 1990) at 3.

<sup>74</sup> (1990) 50 A Crim R 31.

<sup>75</sup> *R v Leering* (Unrep, Sup Ct WA, CCA, No 127 of 1990, 21 December 1990) at 12.

### 8.5.3 Emotional Stress

- **Emotional stress such as that arising from inter-racial tensions may constitute a special mitigating factor**

**Case: *Neal v The Queen* (1982) 42 ALR 609**

Facts: the applicant, an Aboriginal male living on an Aboriginal reserve in Queensland, had spat at the non-Aboriginal manager of a store located on the reserve. He was convicted of charges of unlawful assault and sentenced to two months imprisonment with hard labour. The Queensland Court of Criminal Appeal had quashed the sentence and substituted a sentence of six months imprisonment with hard labour. The applicant applied for special leave to appeal to the High Court.

Held: that special leave be granted. Brennan J acknowledged that emotional stress existed in Aboriginal communities:

“Consideration of emotional stress is commonplace in the exercise of a sentencing discretion....

The facts of the present case.... point to some ‘special problems’ which may explain – though they cannot justify or excuse – Mr Neal’s conduct. The assault was not caused by any ill-feeling between [the complainant] and Neal personally. Yet a dramatic and emotional confrontation...had occurred, apparently produced by a deeply-felt objection to Departmental control of the reserve”.<sup>76</sup>

His Honour concluded that it would be an error to neglect consideration of the applicant’s emotional stress: it was material to the assessment of proper retribution and might also be material to deterrence.

Murphy J observed that “reserve conditions and race relations” constitute a special mitigating factor in sentencing. His Honour continued:

“The evidence showed that Mr Neal and his fellow Aborigines have a deep sense of grievance at their paternalistic treatment by white authorities....[They] had no control over what was sold at the store...[and] were powerless to do anything about it....

Aboriginal sense of grievance has developed over the 200 years of white settlement in Australia. Early in the nineteenth century Aborigines were ‘being treated with arrogant superiority, often accompanied by considerable brutality’....

The plight of the Aborigines was compounded by the introduction of European diseases and alcohol, which, in addition to white colonization, ‘contributed to the fragmentation of Aboriginal society and helped to promote the apathetic attitudes erroneously attributed by the Europeans to inferior intellectual capacity’....Aborigines have complained bitterly about white paternalism robbing them of their dignity and right to direct their own lives....

The United States’ experience has shown that persons frustrated by powerlessness through the exercise of racist policies and practices, and the expression of racist ideals, feel their grievances deeply and sometimes express them in the only way possible – by protest or violence...

Spitting is humiliating and degrading. It is a typical response of children and others without power, attempting to humiliate and degrade those who are seen as oppressors....The sentence of imprisonment imposed upon Mr Neal will not improve race relations but will tend to embitter them. Taking into account the racial relations aspect of the case, the fact that Mr Neal was placed in a position of inferiority to the whites managing the reserve should have been a special mitigating factor in determining sentence.”<sup>77</sup> (references omitted)

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<sup>76</sup> *Neal v The Queen* (1982) 42 ALR 609 at 624-625.

<sup>77</sup> *Neal v The Queen* (1982) 42 ALR 609 at 619 – 621.



In *Clinch v R*<sup>78</sup> (discussed above at 8.5.1) Seaman J discussed the contents of a confidential medical report which had been provided in respect of the applicant. The applicant was a recidivist offender who had acquired an “appalling” criminal record since the age of 13 years. Seaman J remarked upon the disastrous effect of discrimination, exclusion and disadvantage which has been visited upon the Aboriginal community by the non-Aboriginal community:

“[The report] shows that the applicant’s life has.....disintegrated into alienation and violence following a path of discrimination, exclusion and disadvantage which his family had experienced over a number of years.”<sup>79</sup>

Seaman J concluded: “I will say no more about it other than it shows that the treatment of the Aboriginal community by the wider community in the past haunts the present and has a connection with the appellant’s ruthless and violent behaviour.”<sup>80</sup>

See also:

- *McKenna v R* (1992) 7 WAR 455
- *Re “S” (A Child) (No 2)* (1992) 7 WAR 434
- *R v Fuller-Cust* (2002) 6 VR 496

#### 8.5.4 Cultural Dislocation

- **The difficulties experienced by an Aboriginal person adjusting to city life, including the forming of addictions to alcohol and drugs, may be mitigating**

**Case: *Harradine v R* (1992) 61 A Crim R 201**

Facts: the appellant, a 23 year old Aboriginal male, had been convicted of charges of assault occasioning actual bodily harm and two charges of sexual assault. Evidence was given that the appellant had been brought up in an Aboriginal reserve until the age of 16 years, when he had moved to Adelaide. The complainant, his estranged partner and mother of his three children, had introduced him to alcohol and drugs. The appellant appealed against the effective ten-year term which had been imposed.

Held (by majority): appeal allowed. Mulligan J described the major changes which the appellant had experienced in moving from life in an Aboriginal community to life in the city:

“[The appellant] came to the city at a young age. Soon thereafter he commenced a close personal relationship with the victim which was intensely emotional. Most of his prior offending arose out of features of that relationship and his immaturity as a youth and, later, a young man in the city. The offences were committed due to alcohol and the intensity of his emotional relationship with the victim. They were committed against a background of problems encountered by him in adjusting to city life from the relative security of Aboriginal community life. True it is that he had been living in the city for five years or so, but it should not be assumed that the problems which he initially encountered had been resolved.”<sup>81</sup>

Mulligan J commented that it was not easy to fully appreciate the plight of Aboriginal persons who find themselves, at a young age, in city life with its temptations and distractions, and without the discipline previously experienced in mission and family life. The Court reduced the term of imprisonment for the assault occasioning actual bodily harm to one year and six months and the non-parole period to four years and six months.

<sup>78</sup> (1994) 72 A Crim R 301.

<sup>79</sup> *Clinch v R* (1994) 72 A Crim R 301 at 327.

<sup>80</sup> *Clinch v R* (1994) 72 A Crim R 301 at 327.

<sup>81</sup> *Harradine v R* (1992) 61 A Crim R 201 at 210.

- **The negative consequences of an offender's re-location at a young age from a pastoral station to an Aboriginal community may be mitigating**

**Case: *R v Churchill* [2000] WASCA 230**

Facts: the respondent, an Aboriginal woman, pleaded guilty to a charge of manslaughter. She had been born at a pastoral station in the north-west of Western Australia but had moved to the town of Kununurra while still a child. From that time her parents had begun to abuse alcohol and become violent. Both of the respondent's parents had died by the time the respondent was 15 years old. The respondent had three children by different fathers, and was in a mutually violent relationship with the deceased. She was sentenced to three and a half years imprisonment with eligibility for parole, and the Crown appealed.

Held: appeal dismissed, notwithstanding that the sentence imposed by the sentencing judge appeared to be "excessively lenient"<sup>82</sup>. Kennedy ACJ described the background of the applicant, who had been born on a pastoral station, as initially stable and happy: however, upon the family moving to Kununurra, a pattern of tragedy and socio-cultural disintegration had begun:

"[The psychologist] was told that [the respondent] had been born at Nicholson Station... She had happy memories of station life; but subsequently the family moved to Kununurra, where her parents took to heavy drinking, and fighting..... The respondent's father died in a car accident when she was about 10, and her mother had died when she was about 15. She has effectively been on her own since the death of her mother.

The respondent started drinking at the age of about 16 and has remained a 'committed' drinker more or less ever since. She has three children, each by a different father. The children have lived with various relations .....The forced departure from Nicholson Station occurred before the respondent was old enough to be aware of it; but she has shared in the dislocation of her people, and she has grown up in the midst of the turmoil which resulted from it and from which they have never recovered."<sup>83</sup>

The psychologist had commented that the respondent exhibited no signs of mental disorder, but that her "chaotic and violent lifestyle"<sup>84</sup> were such that she might as easily have been the victim as the offender.

### 8.5.5 Effect of Removal from Family

- **An offender's early removal from family, inability to reconnect with family and consequent suffering of anxiety about his Aboriginal identity may be taken into account**

**Case: *R v Fuller-Cust* (2002) 6 VR 496**

Facts: the applicant, an Aboriginal male aged 36 years, had been convicted of offences including rape, indecent assault, false imprisonment and recklessly causing injury. He had a long history of alcohol abuse and criminal offending. During the trial, evidence had been given that the applicant, whose father was non-Aboriginal, had been placed in foster care at a very young age. While in foster care he had been sexually abused, and ultimately was rejected by his foster family. The applicant had spent most of his life in welfare or custodial institutions; he had tried at times to locate his biological parents but a recent first meeting with his biological mother had been unsuccessful. He was sentenced to 20 years imprisonment, with a non-parole period of 17 years and appealed against the severity of that sentence.

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<sup>82</sup> *R v Churchill* [2000] WASCA 230 at [27] per Kennedy ACJ.

<sup>83</sup> *R v Churchill* [2000] WASCA 230 at [11-12].

<sup>84</sup> *R v Churchill* [2000] WASCA 230 at [17] per Kennedy ACJ (quoting from the psychologist's report).

Held (by majority): appeal allowed, but only as to the orders made by the trial judge as to concurrency and cumulation. Batt J commented that the expert evidence had established that the applicant's offending "sprang from [his] anger and resentment in reaction to perceived personal rejection, betrayal and lifetime disadvantage which, as he knew from past experience, he was not able to control after over-indulgence in alcohol."<sup>85</sup> Batt J stated:

"There may be particular matters which a court must take into account in applying those principles which are mitigating factors applicable to the particular offender, including disadvantages associated with the offender's membership of the Aboriginal race: *Neal v. The Queen...*; *R. v. Rogers and Murray...* and *R. v. Fernando...* (The way of life of the offenders in those cases was far different from that of the applicant in Geelong and elsewhere in Victoria.)<sup>86</sup>

Batt J commented that relevant matter was that the applicant had been brought up in foster care, separated from his natural parents. Batt J (O'Bryan AJA concurring) concluded that nature and objective gravity of the offences and the sentencing objectives of protection of the community and deterrence required a total effective sentence of 17 years 3 months imprisonment with a non-parole period of 14 years.

Eames J, dissenting, held that errors made by the sentencing judge had tainted the sentence in its entirety and held that the applicant should be re-sentenced. Eames J observed that the applicant's Aboriginality and his forced separation from his parents at a very early age were highly relevant to his sentencing:

"To ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself."<sup>87</sup>

Eames J commented that the mitigating effect of an offender's Aboriginality was not to be contrived from a superficial generalization about differences between urban and non-urban Aboriginality. His Honour concluded that, as with Aboriginality generally, the relevance of the offender's background in an urban environment must be considered on a case by case basis and should be given that weight which reflects its actual significance.

See also:

- R Edney *The Stolen Generation and Sentencing of Indigenous Offenders* [2003] ILB 16

### 8.5.6 Socio-Economic Factors

- **Ethnically-related oppressive socio-economic conditions and conflict may be mitigating**

**Case: *Re "E" (A Child)* (1993) 66 A Crim R 14**

Facts: the Aboriginal respondent, a youth, had been convicted of attempts to murder six policemen. The respondent, with others, had enticed police to chase them in vehicles which the youths had stolen; they then used those vehicles to smash into the police cars. The respondent admitted that he and his friends had planned grievance killings as part of an ongoing "war" with the police. He had been sentenced to an effective period of 23 months imprisonment. The Crown appealed against the leniency of the sentence.

<sup>85</sup> *R v Fuller-Cust* (2002) 6 VR 496 at 513.

<sup>86</sup> *R v Fuller-Cust* (2002) 6 VR 496 at 515.

<sup>87</sup> *R v Fuller-Cust* (2002) 6 VR 496 at 515.

Held: appeal allowed, on the ground that the sentence had been manifestly lenient. Malcolm CJ commented that although an offender's background of socio-economic disadvantage was mitigating the extent of allowance made for that factor depended upon the nature of the offence and the circumstances in which it is committed:

"[The respondent's] background as an Aboriginal, brought up in an environment of perceived conflict between the urban Aboriginal community to which he belonged and the police, and the deprived oppressive socio-economic conditions in which his family and other members of his ethnic group have suffered, assist in explaining to some degree how his attitudes to the police and the rest of the community have developed. The extent to which allowance should be made by way of mitigation on account of these circumstances, must depend on any particular case to a very significant degree on the nature of offence and the circumstances under which it is committed."<sup>88</sup>

The Court imposed an effective period of six years imprisonment, with eligibility for parole.

- **Mitigating socio-economic factors may include the greater difficulty for many Aboriginal people of finding employment**

**Case: *Newcombe v Police* [2004] SASC 26**

Facts: the applicant, a 19 year old Aboriginal male, had pleaded guilty to a charge of property damage. He had been arguing with a cousin; both had been drinking; the applicant had kicked a shop window, causing it to break. The applicant was fined \$400 and ordered to pay \$848 and court costs. He appealed against the sentence, submitting that a conviction should not have been recorded.

Held: appeal allowed. Gray J noted that the applicant was a by a young man with a good record; he had attended school until aged about 16 years, worked in a CDEP scheme and was currently attending TAFE. Statistical evidence was tendered of the economic situation of Aboriginal people generally within Australia, and the relatively high unemployment rate of Aboriginal people. Gray J considered the negative effect that recording a conviction might have on the offender's future employment to be a factor "relevant to him through his particular ethnicity"<sup>89</sup>. His Honour concluded that the offence was an isolated one brought about by the applicant's immaturity and alcohol. Gray J concluded that the magistrate had erred in recording a conviction, by failing to have sufficient regard to the offender's personal circumstances and the possible prejudice to his future employment prospects.

### 8.5.7 The Impact of Imprisonment

In *R v Sydney Williams*<sup>90</sup> an initiated Pitjantjatarra man had pleaded guilty to the manslaughter of a woman whom he had beaten to death with a stick and a bottle. It appeared that in the course of a drinking session the victim had provoked the offender by repeatedly uttering religious secrets, which secrets she was prohibited from knowing. Wells J sentenced the offender to two years imprisonment with hard labour and ordered him to return to his traditional community, to submit himself to the lawful orders and directions of his elders for at least a year. His Honour then suspended the term of imprisonment.

Four years later, in a letter to the Australian Law Reform Commission, Wells J explained that he had wished to avoid sentencing Sydney Williams to a "living death":

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<sup>88</sup> *R v E (A Child)* (1993) 66 A Crim R 14 at 17; see also Ipp J at 31.

<sup>89</sup> *Newcombe v Police* [2004] SASC 26.

<sup>90</sup> Unrep., SA Sup Ct, Wells J, 14 May 1976.

"[T]he real reason why I was disinclined to impose an immediate custodial sentence was because I would almost have been committing the prisoner to a living death while he was in custody and he might very well have gone into a decline and, in fact, have died. The fact was that he spoke very little English; it would have been impossible for him to have communicated with the staff of the prison or with any fellow prisoners, or to have related to them in any way. He would, in effect, have been in solitary confinement. To condemn a tribal Aborigine to such a fate was something which I wished, if possible, to avoid."<sup>91</sup>

- **The impact of a sentence of imprisonment on an Aboriginal person in the light of his or her social and cultural background may be taken into account**

**Case: *State of Western Australia v Richards* [2008] WASCA 134**

Facts: the respondent, a 27 year old Aboriginal man from a traditional community in the Western Desert region, had been convicted after a jury trial of sexual penetration without consent. The complainant was a 46 year old female, who, in Anglo-Australian terms, was the cousin of the respondent's father. In Aboriginal cultural terms, the complainant was the respondent's aunt. The respondent had been sentenced to a term of three years and six months imprisonment, which imprisonment would be suspended conditionally for two years. The State appealed against the sentence.

Held: appeal allowed. Martin CJ commented that the court can and must take into account all the circumstances of the offence, and of the complainant and the offender and his or her background, which are relevant to the sentence to be imposed. Accordingly, "while Aboriginality of itself must be irrelevant to the sentencing process" the fact that the offender "has spent his entire life in a remote community and has a cultural and spiritual connection to the land of that community and has difficulties with the English language" would properly be taken into account in sentencing since "they bear upon the impact which a sentence of imprisonment will have upon that offender."<sup>92</sup>

Steytler J (with whom the other members of the Court of Appeal agreed on this point) remarked that, if imprisoned, the respondent would serve his term of imprisonment "in circumstances in which he is distant from his community, isolated from his culture, unable to be visited by his family and friends and subject to communication problems arising from his difficulties with the English language". However, just as it was important for the court to make allowances for those very real disadvantages, "it is at least as important to recognise (as the sentencing judge did) that women in remote communities require no less protection from sexual offenders than any other women. If sentences imposed in cases of sexual violence are unduly lenient, they will do little to protect those women."<sup>93</sup> His Honour concluded that the allowance for subjective factors, weighty though they may be, should not be so great as to result in a penalty that undervalued the offence, and the need for personal and general deterrence. The Court imposed a three year sentence of imprisonment.

Note: the decision of the Court in *Juli* and in *Rogers and Murray*, discussed below, may need to be re-considered in the light of the decision of the Court of Appeal in *State of Western Australia v Richards* [2008] WASCA 134.

<sup>91</sup> *R v Sydney Williams* quoted in ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 493. (Accessed 5 July 2008)

<sup>92</sup> *State of Western Australia v Richards* [2008] WASCA 134 at [7].

<sup>93</sup> *State of Western Australia v Richards* [2008] WASCA 134 at [46].

**Case: *Juli* (1990) 50 A Crim R 31**

Facts: the applicant, an Aboriginal male from a remote community, had pleaded guilty to charges of sexual assault and aggravated sexual assault. He had a disturbed family background characterized by alcohol abuse, violence and instability. At the time of the offences the applicant was intoxicated and suffering from a paranoid psychosis. The applicant had been sentenced to a total of 10 years imprisonment. He sought leave to appeal.

Held: application granted and appeal allowed. Malcolm CJ commented that the sentencing judge should take into account the impact of a sentence of imprisonment on an Aboriginal person in the light of his or her social and cultural background. Citing Muirhead J in *Iginiwuni*<sup>94</sup> Malcolm CJ stated:

“Both Aboriginal and white people are generally speaking subject to the same laws. For years, however, the Judges of this Court in dealing with aborigines have endeavoured to make allowance for ethnic, environmental and cultural matters...”

His Honour added that “[t]his is equally true of the judges of the courts of Western Australia; but it does not seem to have been adverted to in this case.”<sup>95</sup>

Wallace J declared that the sentenced imposed “upon the 25 year old mentally deficient applicant, which will result in his complete removal from his Kimberley environment, is crushing in nature and in breach of the totality principle.”<sup>96</sup>

**Case: *Rogers and Murray* (1989) 44 A Crim R 301**

Facts: the first applicant, an Aboriginal male from a remote community, had pleaded guilty to a charge of sexual assault upon a seven year old girl. At the time of the commission of the offence the applicant, who had no prior convictions, was intoxicated. He appealed against the severity of his sentence (imprisonment for six years with eligibility for parole).

Held (by majority): leave to appeal granted and appeal allowed, on the grounds of the applicant’s timely plea of guilty, his contrition, his inexperience with alcohol and the fact that it was a first offence. Malcolm CJ considered that the fact that the applicant’s prison sentence had to be served far from home was a strongly mitigating factor:

“Having regard to all the circumstances of the case... Rogers is entitled to a significant discount on account of mitigating factors and also on account of the fact that he will be called upon to serve his sentence in the south of this State out of his ordinary environment.”<sup>97</sup>

See also:

- *Russell v R* (1995) 84 A Crim R 386
- *Webb v R* (1994) WAR 257
- *Police v Abdulla* (1999) 74 SASR 337
- *R v Tjami* [2000] SASC 311
- *R v Elemes* [2000] NSWCCA 235

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<sup>94</sup> Unreported, Supreme Court, NT, SCC No 6 of 1975, 12 March 1975.

<sup>95</sup> *Juli* (1990) 50 A Crim R 31 at 37.

<sup>96</sup> *Juli* (1990) 50 A Crim R 31 at 39.

<sup>97</sup> *Rogers and Murray* (1989) 44 A Crim R 301 at 311.

### 8.5.8 Customary Punishment

The nature and forms of Aboriginal customary punishment were discussed in **Chapter Two**, and summarized again briefly at the beginning of this Chapter.

Customary punishment operates to free the family concerned from its guilt<sup>98</sup> and to restore peace between the victim and the perpetrator respectively<sup>99</sup>. It may take the form of the infliction of physical violence upon an offender by one or more members of the Aboriginal community. Often, the offender is willing to submit to such punishment, which may cause serious injuries. An offender may also, or in the alternative, be banished from the community.

Where an Aboriginal accused is willing to undergo customary punishment, legal issues arise first, in respect of the power of the courts to facilitate that accused person's release on bail where physical harm will be inflicted; and secondly, in respect of the extent to which an accused can consent to the deliberate infliction of harm. In respect of the former, the authorities suggest that not all physical retribution is necessarily unlawful, but that the courts should not facilitate the commission of an unlawful act<sup>100</sup>. In respect of the latter, it appears that a person may not consent to the infliction of punishment which will result in grievous bodily harm<sup>101</sup>. There is also the issue of an offender being twice punished.

In *The Recognition of Aboriginal Customary Law* the Australian Law Reform Commission (ALRC) examined the interaction of Aboriginal customary laws and Anglo-Australian sentencing principles. The ALRC recommended that general legislative endorsement be given to the principle that, where an offender is a member of an Aboriginal community in which customary laws apply, Aboriginal customary law may be taken into account in sentencing<sup>102</sup>.

See also discussion by the Law Reform Commission of Western Australia in its *Aboriginal Customary Laws Discussion Paper*<sup>103</sup> and *Final Report*<sup>104</sup>.

In *Walker v New South Wales*<sup>105</sup> Mason CJ held that customary Aboriginal criminal law is not recognised by the common law of New South Wales. His Honour held, further, that no rule of construction precludes the application of criminal statutes to persons of Aboriginal descent. Mason CJ held that even if the customary criminal law of Aboriginal groups had survived colonisation by the British, it was extinguished by the passage of criminal statutes of general application<sup>106</sup>.

<sup>98</sup> *R v Minor* (1992) 2 NTLR 183 at 193 per Mildren J.

<sup>99</sup> See *R v Jungarai* (1981) 9 NTR 30 at 31 per Forster J; *R v Wilson* (1995) 81 A Crim R 270 at 276 per Kearney J. See also S Bielefeld "The Culture of Consent and Traditional Punishments under Customary Law" (2003) 7 *Southern Cross University LR* 142, pp 145-146.

<sup>100</sup> *R v Minor* (1992) 2 NTLR 183 at 196 per Mildren J.

<sup>101</sup> *R v Donovan* [1934] All E Rep 207 at 210 per Swift J; cf *R v Brown* [1993] 2 All ER 75 at 79 per Lord Templeman.

<sup>102</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986

([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 517. (Accessed 5 July 2008)

<sup>103</sup> LRCWA *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)). (Accessed 3 July 2008)

<sup>104</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006)

([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) , p 170. (Accessed 5 July 2008); See also Judge HH Jackson 'Can the Judiciary and Lawyers Properly Understand Aboriginal Concerns?' *Brief*, Law Society of Western Australia, May 1997, 12; P Vincent *Aboriginal People, Criminal Law and Sentencing* LRCWA, Project No 94, Background Paper 11 (February 2005) ([www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-15.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-15.pdf)) (Accessed 29 March 2008).

<sup>105</sup> (1994) 182 CLR 45.

<sup>106</sup> *Walker v New South Wales* (1994) 182 CLR 45 at 50.

- **The fact or likelihood of customary punishment being inflicted may be taken into account in sentencing**

**Case: *Jadurin v R* (1982) 44 ALR 424**

Facts: the appellant, an Aboriginal male from the Gurindji community, had pleaded guilty to a charge of manslaughter. At the times of the offence he had been affected by alcohol. The appellant had been sentenced to four years' imprisonment with a non-parole period of one year and appealed against the severity of the sentence. The appellant submitted that he had already undergone traditional punishment: payback injuries were inflicted with a boomerang and a nulla nulla). In the sentencing court the appellant's father, a senior member of the Gurindji people, had given evidence that it was likely that the appellant would undergo further punishment and he gave a detailed description of that punishment.

Held: appeal dismissed, the Full Court of the Federal Court finding that the sentencing judge clearly had taken the likelihood of further punishment into account in imposing the sentence. The Court recognized that the sentencing court was entitled to take the group's retribution into account, but emphasized that this did not amount to sanctioning such retribution:

"In the context of Aboriginal customary or tribal law questions will arise as to the likelihood of punishment by an offender's own community and the nature and extent of that punishment. It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not sanction itself. *But to acknowledge that some form of retribution may be exacted by an offender's own community is not to sanction that retribution: it is to recognise certain facts which exist only by reason of that offender's membership of a particular group.* That is not to say that in particular case questions will not arise as to the extent to which the court should have regard to those facts or as to the evidence that should be presented if it is to be asked to take those facts into account."<sup>107</sup> (emphasis added)

Note: in *Hales v Jamilimira*<sup>108</sup> the Chief Justice of the Northern Territory Martin CJ and Midren J commented on the weight to be given to an offender's liability to customary punishment, although this point was not directly in issue. Martin CJ, noting that the cultural environment had permitted the commission of the offence, observed that "the court can no more condone that element of Aboriginal customary law than it condones assault in the context of payback"<sup>109</sup>. His Honour distinguished between "taking into account the custom which leads to an offender being punished in accordance with both the law of the Territory and by the Aboriginal community, and circumstances such as this where the custom gives rise to the commission of the offence" and added that, in his view, "the latter circumstance does not permit mitigation to the same degree as may be available in the former"<sup>110</sup>.

Midren J commented that the principle that the law of the land must prevail whenever it conflicts directly with Aboriginal customary law "does not deny that social pressures brought to bear on an Aboriginal defendant are not relevant to moral blame and therefore to sentencing"<sup>111</sup>. His Honour stated that "[t]he weight to be given to the effect of customary law or cultural factors by a sentencer will vary according to the circumstances" which circumstances would include:

"the strength of the customary law in the area in which the offender lives and the degree of punishment or social ostracism the offender is likely to suffer should he or she refuse to conform to the rules of the community in which he or she lives."<sup>112</sup>

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<sup>107</sup> *Jadurin v R* (1982) 44 ALR 424 at 429 per the Court.

<sup>108</sup> (2003) 12 NTLR 14.

<sup>109</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [28].

<sup>110</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [28].

<sup>111</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [52].

<sup>112</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [52].



See also:

- *R v Minor* (1992) 2 NTLR 183
  - *R v Thompson* (Unrep., WA Sup Ct, Roberts-Smith J, No 199 of 2000, 20 February 2001)
  - *R v Richter* (Unrep., WA Sup Ct, McLure J, No 34 of 2002, 30 April 2002).
- **Evidence must be adduced of the connection between the injuries inflicted and the relevant customary law punishment**

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

Facts: the two female Aboriginal respondents had attacked the victim in her own house. One of the respondents had poured a frying pan filled with boiling water and food over the victim, causing severe burns to her body<sup>113</sup>. It appeared that the purpose of the attack was to punish (or pay back) the victim for an assault which the victim had perpetrated upon one of the respondents the year before.

The sentencing judge did not impose a custodial sentence had noted that neither of the respondents could be sentenced in the community. His Honour had commented that both respondents had led “a traditional tribal existence”, and each had large families. His Honour had also stated that in sentencing the respondents he had to take into account their traditional ways and the long-standing ill-will between the women. The Crown appealed.

Held (by majority): appeal allowed. Malcolm CJ commented that, although the offence may have been by way of “payback”, that “payback” was out of all proportion to the act which had been the catalyst for it. Moreover, the assaults had not been explained by reference to principles of customary punishment:

“It is very significant that there was no attempt made on behalf of the respondents to justify the attack and the nature of the assaults on the victim by reference to any particular aspect of Aboriginal law or custom, or otherwise.....

In these circumstances, the mere fact that the applicants were living a tribal or semi-tribal culture with a background of ill-feeling was an insufficient basis on which to decide not to impose a custodial sentence. The learned Judge recognised that these were very serious offences and ones which would ordinarily involve a term of imprisonment. His Honour went on to say that he had ‘to take into account your traditional tribal ways’ and the longstanding ill-feeling ‘arising out of this’. There was no elaboration of the tribal ways, apart from the matters to which I have referred. Likewise, there was no attempt to assess the relationship between the nature of the attack on the victim and what would have been justified in accordance with any applicable Aboriginal law or custom.”<sup>114</sup>

Franklyn J (concurring) commented that the sentencing judge had given insufficient weight to a number of factors. These included the planned nature of the attack, the fact that the respondents were armed with various weapons, the fact that boiling water had been poured upon the victim and the fact that a child had been encouraged to participate in the offence. His Honour also commented that the sentencing judge had given undue weight to facts personal to the respondents, such as their maternal responsibilities, traditional community associations, pleas of guilty and expressions of remorse. Franklyn J concluded that that there were insufficient mitigating circumstances to dissuade a court from imposing a sentence of imprisonment.

Wallwork J (dissenting) held that the sentencing discretion had not miscarried: in fact, his Honour expressed the view that the sentencing judge’s approach had been “most constructive and in the community’s best interests.”<sup>115</sup>

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<sup>113</sup> The evidence did not establish which of the two respondents was responsible for this act.

<sup>114</sup> *R v Brand* [1998] WASCA 279 pp 8-10 per Malcolm CJ.

<sup>115</sup> *R v Brand* [1998] WASCA 279 p 10 per Wallwork J.

The respondents were ordered to serve a sentence of two years' imprisonment with eligibility for parole.

Note: in *R v Gordon* [2000] WASCA 401 the sentencing judge had remarked to the offender: "I'm told that you face severe tribal punishment."<sup>116</sup> Wheeler J commented that while it might not be necessary to go into detail in every case, in this particular case there had been "no evidence and not even any assertion....as to what the tribal punishment would consist of."<sup>117</sup>

See also:

- *Marimika v R* (1982) 5 A Crim R 354
  - *R v Minor* (1992) NTLR 183
- **A sentencing court may take into account the fact that an offender has suffered injuries, even if those injuries were not inflicted in accordance with traditional law**

**Case: *Marimika v R* (1982) 5 A Crim R 354**

Facts: the appellant, an Aboriginal male from a traditional community in Groote Eylandt, had been drinking alcohol with the victim. In the course of an argument, the offender had fatally stabbed the victim; whereupon other members of the community had set upon the appellant, inflicting a number of stab wounds. The appellant was convicted of manslaughter and sentenced to seven and a half years imprisonment with a non-parole period of two years. The sentencing judge had rejected a plea from the appellant's community that the appellant be banished from the community for three years, rather than be imprisoned. On appeal, the respondent contended although the attack upon the appellant had occurred in accordance with tribal "custom", it did not constitute punishment in accordance with traditional "law", because there had been no meeting of the community or its elders to express a considered view as to the punishment which the appellant should undergo.

Held: that evidence needed to be adduced that the injuries inflicted upon the appellant were by way of traditional punishment:

"[I]f it is to be asserted that conduct of this sort should be seen as a reflection of the customary law of an Aboriginal community or tribal group, we are of the opinion that there should be evidence before the court to show that was indeed the case and that what happened was not simply the angry reaction of friends of the deceased, particularly when the killing of the deceased and the injuring of the appellant occurred at a time when some, if not all, of those participating had been drinking."<sup>118</sup>

The Court concluded that, in any event, the attack upon the appellant could be taken into account in determining the sentence:

"[We believe that] the Court should approach this matter on the basis that, by reason of his actions, the appellant brought upon himself the anger of the members of the community and that as a result he received severe injuries from which he fortunately made a good recovery. So seen, it is properly to be taken into account in determining an appropriate sentence, without giving any sanction to what occurred."<sup>119</sup>

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<sup>116</sup> *R v Gordon* [2000] WASCA 401 at [21].

<sup>117</sup> *R v Gordon* [2000] WASCA 401 at [22].

<sup>118</sup> *Mamarika v R* (1982) 5 A Crim R 354 at 357 per the Court.

<sup>119</sup> *Mamarika v R* (1982) 5 A Crim R 354 at 357.

- **The courts will take customary punishment into account to avoid an Aboriginal offender being punished twice for the same offence**

**Case: *R v Minor* (1992) NTLR 183**

Facts: the respondent had pleaded guilty to two counts of manslaughter, one count of unlawfully causing grievous bodily harm and one count of aggravated assault. The sentencing judge had imposed a sentence of 10 years imprisonment, and directed that the respondent be released on a three-year bond after serving four years of the sentence. In calculating the sentence the judge had taken into account evidence concerning prospective payback by the community. The Crown appealed against the sentence.

Held: appeal allowed to the extent that the bond was set at six years rather than three. The appeal was otherwise dismissed on the grounds that payback punishment, either past or prospective, was a relevant sentencing consideration, and that a person should not be punished twice for the same offence. Mildren J (citing the Australian Law Reform Commission's *Recognition of Aboriginal Customary Law*) stated that payback was a relevant sentencing consideration which derived from "an important principle of the common law, that a person should not be punished twice for the same offence" noting that "in practice it appears that some balancing of punishments is done within both systems"<sup>120</sup>.

See also:

- *R v Desmond Gorey* (Unrep., NT Sup Ct, No 107 of 1978, Gallop J, 20 June 1978)
- *Jadurin v R* (1992) 44 ALR 424
- *Hales v Jamilmira* (2003) 12 NTLR 14

- **It is not appropriate to imprison an Aboriginal offender for the purpose of protecting him or her from the infliction of customary punishment**

**Case: *Jamieson v R* (Unrep., WA Sup Ct, Wolff CJ, 7 April 1965)**

Facts: the Aboriginal appellant from a traditional community in the Eastern goldfields had pleaded guilty to the manslaughter of his wife. He had been intoxicated at the time that he attacked her. The appellant had been sentenced to 12 years imprisonment.

Held: appeal allowed, and a sentence of five years imprisonment substituted. Wolff CJ noted that the sentencing judge had provided a report which indicated that the deceased's relatives "would exact tribal vengeance and that the appellant would be protected for a time." Wolff J commented:

"These are kindly motives but are inappropriate in considering sentence."<sup>121</sup>

In *The Recognition of Aboriginal Customary Law* the ALRC recommended that imprisonment should not be used "as a device for a paternalistic form of preventative detention"<sup>122</sup>. However, the ALRC also noted that a custodial sentence may operate as a useful mechanism to permit tempers to cool within the traditional community<sup>123</sup>.

<sup>120</sup> *R v Minor* (1992) 2 NTLR 183 at 194, citing ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 508 (Accessed 11 July 2008).

<sup>121</sup> *Jamieson v R* (Unrep, WA Sup Ct, Wolff CJ, 7 April 1965) p 2. See also *R v Harry Gilmiri* (Unrep., NT Sup Ct, Muirhead J, 21 March 1979).

<sup>122</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 505. (Accessed 5 July 2008)

<sup>123</sup> ALRC, *The Recognition of Aboriginal Customary Law*, Report No 31, 1986 ([www.austlii.edu.au/au/other/alrc/publications/reports/31/](http://www.austlii.edu.au/au/other/alrc/publications/reports/31/)) para 508. (Accessed 5 July 2008)

### 8.5.9 The Wishes of the Aboriginal Community

- **The wishes of an Aboriginal community may be taken into account in sentencing**

**Case: *R v Miyatatawuy* (1996) 87 A Crim R 574**

Facts: the Aboriginal offender, while intoxicated, had stabbed her husband in the chest, puncturing one of his lungs. She pleaded guilty to a charge of unlawful bodily harm. In the sentencing court the victim, who was also an elder of the community, requested that a sentence of imprisonment not be imposed. This was because first, such a sentence would destroy their marriage in the eyes of their community; and secondly, because the offender had already been dealt with under customary law. The victim submitted, further, that he would be punished if he did not uphold the decision already made by the community. His evidence was supported by others in the community.

Sentence: Martin J ordered that the offender be released upon her own recognisance in the sum of \$1000.00 to be of good behaviour for 18 months. His Honour accepted that the wishes of the community could properly be taken into account in passing sentence, commenting:

“I am not satisfied that the wishes of a victim of an offence in relation to the sentencing of an offender can usually be relevant. The criminal law is related to public wrongs, not issues which can be settled privately. But here, it was not so much the wishes of the victim that were placed before the court, but the wishes of the relevant community of which the victim also happened to be a leading member and on behalf of which he spoke. Those wishes may not be permitted to override the discharge of the judge’s duty, but have been taken into account as a mitigatory factor.”<sup>124</sup>

**Case: *R v Gondarra* [2005] Unreported, Sup. Ct NT, Southwood J, SCC20407332**

Facts: the offender, who lived in a traditional community on Elcho Island, had set fire to bedlinen in his house, causing extensive damage. At the time he was intoxicated and had had an argument with his wife, Evidence was given that the offender had been placed by community elders in “territorial asylum” for a period of seven months. The conditions of that asylum included restrictions on the offender’s movements and prohibitions of smoking and drinking. The offender had also attended two of three stages of a “chamber of law” every day for three months, during which he was instructed in the ways of practising traditional law. The community’s objectives were to deter the offender from further offending, to rehabilitate him and to facilitate his acceptance of greater responsibilities within the community. The community expressed its wishes, through the elders, that the offender not be sent to gaol.

Sentence: Southwood J, accepting the evidence of the elders, sentenced the offender to three years imprisonment, suspended immediately on conditions including that he complete the third stage of the chamber of law.

See also:

- *R v Iginuwuni* (Unrep., NT Sup Ct, Muirhead J, No 6 of 1975, 12 March 1975)
- *Jadurin v R* (1992) 44 ALR 424
- *Wunungmurra v R* [2006] NTCCA 3

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<sup>124</sup> *R v Miyatatawuy* (1996) 87 A Crim R 574 at 580.

### 8.5.10 The Impact of Traditional Belief

- **Where the reason for the commission of an offence stems from traditional Aboriginal belief or culture, evidence of that belief or culture may be mitigating**

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

Facts: the appellant, a 36 year old Aboriginal male had pleaded guilty to charges of arson and assaulting a police officer with intent to resist arrest. The appellant had lit a number of fires in a paddock, and threw a knife at a pursuing police officer. Shortly before these events the appellant's father had threatened him with punishment by *kadaitcha* men. In the sentencing court, counsel for the appellant had submitted that the appellant believed that his pursuer (the policeman) was a *kadaitcha* man. The sentencing judge had imposed prison terms of one year for the arson, and five years for the assault, to be served concurrently. The appellant appealed against that sentence.

Held: appeal allowed. In their reasons Olsson J and Zelling J considered the question of the appellant's belief about the *kadaitcha* man. Olsson J commented:

"The learned trial judge was told that the motivation for lighting the fires was that the appellant.... thought that this would form a barrier between him and any danger and also serve to bring a lot of people, and in particular a lot of white people, who would then frighten the evil spirits away. This was consequent upon the appellant being fearful following his father threatening him with the "kadaitcha" men....

It was explained to the learned sentencing judge that, in the Aboriginal culture, the *kadaitcha* men are a little akin to a Mafia reprisal squad in the more modern idiom. It is not clear whether they are thought to be actual or mythical persons, but it is apparent that mention of them tends to strike fear in the hearts of many Aborigines....

It was the appellant's assertion .... that, at the time of the assault, due to his emotional state, the shining of powerful lights towards him and the general noise at the time he neither appreciated that [T] was a police officer nor heard him say that he was.....[W]hen apparently surrounded by a circle of khaki-clad men....who shouted at him and shone lights towards him, the already drunken and disturbed appellant became even more disturbed and thought that he was about to be set upon by some Australian equivalent of the Ku Klux Klan. "<sup>125</sup>

Zelling AJ commented:

"The [appellant] ... says that at the time of committing this offence he had recently been threatened by his father with punishment at the hands of *kadaitcha*..... men and that he was agitated and in fear in consequence of the threat.

It is very unfortunate that the learned sentencing judge was not given a comprehensive view of the impact of such a threat on an Aborigine. The need for the help of trained persons such as anthropologists to be given to the court in such situations is stressed in many recent publications on the topic: see eg Australian Law Reform Commission Report No 31, *The Recognition of Aboriginal Customary Laws* (1986), Ch 21 (passim).

I am aware that such help has its limitations....but courts have to accept those limitations in relation to the receipt of expert evidence in many areas of the law. In some cases, in order to do justice, it may be necessary to accord standing to the Aboriginal community to bring forward its collective point of view....

<sup>125</sup> *Shannon v R* (1991) 57 SASR 14 at 15-16.

Under Aboriginal law and custom.....[s]entence is pronounced by the person or group exercising judicial power and is carried out with utmost secrecy. Accordingly.....any sightings of kadaitcha tracks caused an immediate superstitious panic, and no doubt a threat of use of kadaitcha would produce the same result in the mind of the person threatened. [The appellant] was put literally in fear for his life. If the foregoing had been put in its entirety to the learned sentencing judge, it is most unlikely that the maximum sentence would have been imposed by him."<sup>126</sup>

The Court allowed the appeal, and ordered that the appellant's sentence on the second charge be reduced to three years imprisonment.

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

Facts: the Aboriginal appellant had pleaded guilty to a charge of arson. He had set fire to his house, in which house, one month earlier, a friend had died. In the sentencing court evidence had been given of the appellant's learning deficit, his socially disturbed background, and post-traumatic stress syndrome. Evidence was also given that the appellant held a spiritual belief that the dead friend's spirit was haunting the house, which spirit would be set to rest only by the appellant setting fire to the house. The appellant, who had been sentenced to four years imprisonment, appealed against the sentence.

Held: appeal allowed. Mulligan J commented that there was no reason to doubt the veracity of the evidence given in the sentencing proceedings:

"This is a very unusual case and for that reason it is necessary to mention some matters in detail about the circumstances of the offence and of the appellant. He is an Aboriginal man aged 33 years. He lived at the Point Pearce Community and set alight to a house at Point Pearce on 10 June 1994....

Earlier.....there had been a fire at the same house, with a cause unassociated with the appellant, in which a man had died. That man was a close friend of the appellant and cared for him and assisted him in his daily life. The earlier fire had caused a considerable amount of damage to the house and the subsequent fire lit by the appellant is acknowledged to have totally destroyed the remainder of the house....

[P]rior to this offence, the appellant was suffering from a post-traumatic stress disorder .....[the] symptoms [of which] were exacerbated whenever he was there and he found it difficult to reside in the house due to his spiritual and cultural beliefs. He was not alone in believing that the restless spirit of [the deceased friend] was still present in the house. His neighbour, who was mentioned by [the consultant psychologist] in his report, told him that she had seen the restless spirit of [the deceased friend]. As a consequence she was too frightened to go outside her house to hang her washing out to dry. Mr Goldsmith believes that [the deceased friend's] spirit will be able to rest in peace. He derives a sense of solace in knowing this..... However, there is no reason to propose that [the sentencing judge] did not accept the opinions and observations of [the consultant psychologist] about the appellant, the existence of the appellant's belief and that he held it genuinely, and further, that they constituted the reason for setting fire to the house."<sup>127</sup>

Mulligan J (DeBelle and Nyland JJ concurring) held that the sentencing judge had given emphasis to the seriousness of the crime of arson and to the principle of general deterrence, but inadequate emphasis to the unusual features of this matter, which comprised the background personal circumstances and condition of the appellant, and of his beliefs and reason for committing the crime. His Honour ordered that a sentence of two years imprisonment be substituted for the term of four years. That sentence was to be suspended as had been ordered by the sentencing judge.

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<sup>126</sup> *Shannon v R* (1991) 57 SASR 14 at 19-20.

<sup>127</sup> *Goldsmith v R* (1995) 65 SASR 373 at 374-376.

- **The court may take into account the fact that an Aboriginal person has committed a crime because he is acting in accordance with traditional Aboriginal law but this does not override the objective seriousness of the case**

**Case: *Hales v Jamilimira* (2003) 12 NTLR 14**

Facts: the respondent, a 49 year old Aboriginal man from an outstation in the Northern Territory, pleaded guilty to a charge of unlawful sexual assault of a 15 year old girl. The investigating police officer had asked the respondent whether he was aware that it was an offence to have sex with a fifteen year old girl and he had replied: “Yes I know; it’s called carnal knowledge, but its Aboriginal custom – my culture. She is my promised wife”<sup>128</sup>. The respondent appealed against his sentence of 13 months imprisonment.

Held (by majority): appeal allowed. Martin CJ was satisfied that the respondent was “truthfully reflecting upon the position as he saw it that the victim was his promised wife and that he had rights to touch her body according to Aboriginal custom and culture”<sup>129</sup> but noted that the respondent had acknowledged that “he was aware of the law of the Northern Territory...that he knew that he was breaking it and he did so because he wanted to observe the traditions of his culture”<sup>130</sup>. Martin CJ commented that “[p]ersonal and general deterrence must feature as significant factors in sentencing for an offence such as this”<sup>131</sup> and continued:

“I am of the opinion that notwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of 16 from sexual intercourse is a value to the wider community which prevails over that of this section of the Aboriginal community. To hold otherwise would be to trivialize the law and send the wrong message not only to Aboriginal men, but others in aboriginal society who may remain supportive of the system which leads to this offence.”<sup>132</sup>

Martin CJ observed that in this case, the cultural environment had permitted the commission of the offence and “the court can no more condone that element of Aboriginal customary law than it condones assault in the context of payback”<sup>133</sup>. His Honour distinguished between “taking into account the custom which leads to an offender being punished in accordance with both the law of the Territory and by the Aboriginal community, and circumstances such as this where the custom gives rise to the commission of the offence”<sup>134</sup> and commented:

“In my view, the latter circumstance does not permit mitigation to the same degree as may be available in the former”<sup>135</sup>.

Martin CJ (Riley J concurring) concluded that the substituted sentences were clearly inadequate and ordered that a sentence of 12 months imprisonment be substituted for the first count. [His Honour was in a minority in allowing the appeal on the second count.]

Midren J (dissenting) held that the sentencing judge had not erred in the exercise of his sentencing discretion. His Honour, commenting that “the fact that this offence was committed because of social pressures which have been brought to bear is a relevant mitigating circumstance” accepted the appellant’s propositions “that young Aboriginal girls are entitled to the protection of the law as much as other young girls and that Aboriginal offenders are not to be treated differently to other offenders merely because they are Aboriginal”<sup>136</sup>. Midren J added:

<sup>128</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [5].

<sup>129</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [24].

<sup>130</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [25].

<sup>131</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [26].

<sup>132</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [26].

<sup>133</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [28].

<sup>134</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [28].

<sup>135</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [28].

<sup>136</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [51].

"[B]ut the latter proposition accepts that there are appropriate exceptions to it. The respondent was not dealt with differently *merely* because he is Aboriginal: it is the pressure placed upon him by his cultural belief that reduces his culpability for his offending."<sup>137</sup> (emphasis in original)

Midren J observed that the principle that the law of the land must prevail whenever it conflicts directly with Aboriginal customary law "does not deny that social pressures brought to bear on an Aboriginal defendant are not relevant to moral blame and therefore to sentencing"<sup>138</sup>. His Honour continued:

"The weight to be given to the effect of customary law or cultural factors by a sentencer will vary according to the circumstances. Those circumstances will include the strength of the customary law in the area in which the offender lives and the degree of punishment or social ostracism the offender is likely to suffer should he or she refuse to conform to the rules of the community in which he or she lives."<sup>139</sup>

Midren J, noting that prosecution for this type of offence was extremely rare, commented that the fact that the Court had not previously dealt with such a case provided a strong reason for acting cautiously.

Note: in *R v GJ* [2005] NTCCA 20 a 55 year old Aboriginal man pleaded guilty to charges of sexual intercourse with a minor and aggravated assault. The victim was a 14 year old girl. During the sentencing proceedings the appellant submitted in mitigation that he believed that he had been exercising his customary right, as he had been promised the girl as his wife. The State accepted that the respondent believed at the time of committing the material offences, that having sexual intercourse with the child was acceptable because she had been promised to him as his future wife. The sentencing judge held that to recognize the respondent's beliefs and their effect upon his culpability was "not to condone what you did, but simply to recognize as a factor relevant to sentence the effects of your culture and your state of mind at the time."<sup>140</sup>.

An appeal by the Crown against the leniency of the sentence was allowed, the Northern Territory Court of Criminal Appeal concluding that the trial judge had failed to give sufficient weight to the objective seriousness of the offence. Mildren J accepted that an Aboriginal person who commits a crime because he is acting in accordance with traditional Aboriginal law is less morally culpable because of that fact. However, on the facts of the case, less weight could be attached to that factor, because customary law did not require the offender to act as he had acted.

Note 2: in *R v Riley* [2006] NTCCA 10 the respondent, a 26 year old Aboriginal male, had been convicted of sexual intercourse without consent and indecent assault upon a two year old Aboriginal girl. An appeal by the Crown against the leniency of the sentence was successful, the Chief Justice of the Northern Territory, Martin CJ, commenting that there was "no suggestion that the respondent's crimes are in any way related to traditional Aboriginal law or culture"<sup>141</sup> and that there was nothing to support a lenient view being taken of the respondent's moral culpability.

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<sup>137</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [51].

<sup>138</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [52].

<sup>139</sup> *Hales v Jamilimira* (2003) 12 NTLR 14 at [52].

<sup>140</sup> *R v GJ* [2005] NTCCA 20 at 23.

<sup>141</sup> *R v Riley* [2006] NTCCA 10 at 15.



## 8.6

### SENTENCING: OTHER

#### 8.6.1 The Principles in *R v Fernando*

- **The *Fernando* principles encapsulate the leading authorities on the sentencing of Aboriginal offenders**

In *R v Fernando*<sup>142</sup> Wood J formulated a series of general principles relating to the sentencing of Aboriginal offenders. Those principles encapsulated leading authorities including *Neal v The Queen*, *Rogers v Murray* and *Juli* and were informed by influential reports and papers including RCIADIC and the “Sentencing of Aboriginal Offenders”<sup>143</sup>. Although the principles formulated in *Fernando* have been referred to extensively in Australian case-law, it appears that they have not been mentioned often in Western Australian courts.

#### **Case: *R v Fernando* (1992) 76 A Crim R 58**

**Facts:** the respondent, an Aboriginal man from Walgett, New South Wales, had pleaded guilty to the malicious wounding of his wife. The victim did not sustain serious or permanent damage from the knife wounds. The respondent, who had an extensive criminal record and a history of alcohol abuse, had been drinking heavily at the time of the offence. He claimed to have no recollection of the attack. A psychometric assessment revealed that the appellant was of low/average intelligence and that he displayed some possible signs of organic brain damage, consistent with chronic alcohol abuse.

Wood J commented that the sentencing exercise before him was a difficult one, given that the wounding of the victim was objectively very serious, but at the same time impulsive and totally unpremeditated. His Honour then set out the following eight principles:

- “(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of a particular ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders’ membership of such a group.
- (B) The relevance of the aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.
- (C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.
- (D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

<sup>142</sup> (1992) 76 A Crim R 58.

<sup>143</sup> The Hon Justice John Toohey, Paper delivered to the Second International Criminal Law Congress, 19-24 June 1988, Surfers’ Paradise, Queensland.

- (E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralizing factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.
- (F) That in sentencing persons of aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.
- (G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.
- (H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.”<sup>144</sup>

- **Different views have been expressed about the scope of the *Fernando* principles**

Different views have been expressed about the scope for application of the principles in *R v Fernando*. In *Police v Abdulla*<sup>145</sup> Perry J rejected the view that the *Fernando* principles should be interpreted narrowly:

“Some of [Wood J’s] comments are as to crimes of violence, but the general thrust of his observations [in *Fernando*] is applicable to the sentencing of Aborigines generally.

[A]n examination of the foundations underlying the propositions enunciated by Wood J indicates that they are of broader application [not restricted to Aborigines living in the more remote communities].”<sup>146</sup>

Similarly, in *R v Smith*<sup>147</sup> Lander J pointed out that “Wood J’s dicta [in *Fernando*] is not restricted to traditional Aborigines.”<sup>148</sup>

However, during the last several years a number of cases, most particularly (but not exclusively) decisions of the New South Wales Court of Criminal Appeal, have signaled an intention to construe the *Fernando* principles narrowly. Some of those cases have been presided over by Wood CJ, who, as Wood J, formulated the *Fernando* principles in 1992. One of those cases, *Ceissman*, is discussed below..

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<sup>144</sup> *R v Fernando* (1992) 76 A Crim R 58 at 62 – 63.

<sup>145</sup> (1999) 74 SASR 337.

<sup>146</sup> (1999) 74 SASR 337 at 342-344.

<sup>147</sup> (2003) 86 SASR 132.

<sup>148</sup> *R v Smith* (2003) 86 SASR 132.

**Case: *Ceissman* (2001) 119 A Crim R 535**

Facts: the respondent had pleaded guilty to one count of being knowingly concerned in the importation of a trafficable quantity of cocaine and had been sentenced to three years imprisonment with a non-parole period of 18 months. The respondent, who was 20 years old at the time of the offences, had received drugs, and held them for collection by others, for which he received \$50 on each occasion. The DPP appealed on the grounds inter alia that the sentencing judge had misapplied the principles relating to the punishment of persons of Aboriginal descent. The respondent's background was a very disadvantaged one; both his parents had died from drug-related causes when he was a child; he suffered from both psychological and physical impairment, and he had the care of his younger brother.

Held (by majority): appeal allowed, and a sentence of four and a half years imprisonment substituted, with a non-parole period of two years and nine months. Wood CJ commented that it appeared that the sentencing judge "was at risk of misapplying the decision in *Fernando*"<sup>149</sup>:

"As I endeavoured to explain in *Fernando*, the eight propositions there enunciated were not intended to mitigate the punishment of persons of Aboriginal descent: but rather to highlight those circumstances that may explain or throw light upon the particular offence, or upon the circumstances of the particular offender which are, referable to their aboriginality, particularly in the context of offences arising from the abuse of alcohol."<sup>150</sup>

His Honour continued:

"The present is not such a case, nor is it one which needs to be understood as having occurred in a particular local or rural setting, or one involving an offender from a remote community for whom imprisonment would be unduly harsh because it was to be served in an environment that was foreign to him or her.....

"The [*Fernando*] principles...should not be elevated so as to create a special class of principles for whom leniency is inevitably to be extended, irrespective of the objective and special circumstances of the case. To do so would be discriminatory of others.

In the instant case, I am unable to see the existence of any factor arising from the fact that the respondent's grandfather was part-Aboriginal that would, in accordance with *Fernando*, attract special consideration."<sup>151</sup>

Simpson J, dissenting, noted that the respondent had grown up in extreme poverty, and was the eldest child of drug addicted parents; his mother had been a prostitute and he had witnessed extreme physical violence between his parents. His parents and grandparents had died by the time that he was 14 years old. His Honour commented:

"Unsurprisingly, these circumstances impacted upon his emotional well-being and on his behaviour as a child. His education suffered. This combination of circumstances is available to be taken into account in mitigation not because he is Aboriginal but because, in the manner outlined by Wood J, as he then was, in *Fernando*...of the combination of the circumstances of deprivation."<sup>152</sup>

Simpson J noted that the respondent did not consume alcohol to excess, or use drugs, and that he had taken on quasi-parental responsibility for both his brother and a young cousin. His Honour concluded that this was "an exceptional case that warranted, and indeed called for, individualised justice."<sup>153</sup>

<sup>149</sup> *Ceissman* (2001) 119 A Crim R 535 at 539.

<sup>150</sup> *Ceissman* (2001) 119 A Crim R 535 at 540.

<sup>151</sup> *Ceissman* (2001) 119 A Crim R 535 at 540.

<sup>152</sup> *Ceissman* (2001) 119 A Crim R 535 at 543.

<sup>153</sup> *Ceissman* (2001) 119 A Crim R 535 at 544.

See also:

- *Newman and Simpson* (2004) 145 A Crim R 361
- *R v Fuller-Cust* (2002) 6 VR 496
- *R v Pitt* [2001] NSWCCA 156
- *R v Walter & Thompson* [2004] NSWCCA 304
- M Flynn "Not 'Aboriginal Enough' For Particular Consideration When Sentencing" (2005) 6(9) ILB 15
- R Edney *The Retreat from Fernando and the Erasure of Indigenous Identity in Sentencing* [2006] ILB 11

### 8.6.2 **Dangerous Sexual Offenders Act 2006 (WA)**

The *Dangerous Sexual Offenders Act 2006 (WA)* provides for the continuing detention in custody, or supervision in the community, of people considered to pose a “serious danger to the community”, as defined by s 7 of that Act<sup>154</sup>. For an application to succeed, the Supreme Court must be satisfied that if the person were not subject to a continuing detention order or supervision order under the Act, there would be an unacceptable risk that the person would commit another serious sexual offence<sup>155</sup>.

- **The psychiatric assessment risk tools currently used to predict propensity to commit future serious sexual offences may not be appropriate for predicting the risk factors for Aboriginal offenders**

Particular problems may exist in predicting the likelihood of future sexual offending by Aboriginal offenders. In *DPP v Williams*<sup>156</sup>, a case concerning an Aboriginal offender, a court-appointed psychiatrist commented that there might be risk factors for sexual offending by Aboriginal people which were as yet unknown. The psychiatrist acknowledged that because Static 99 (an instrument used to gauge the level of risk) had not been validated for Aboriginal persons, it might not be accurate when applied to an Aboriginal offender:

“It’s not that [Static 99 and other risk assessment instruments] don’t predict with any validity whether someone will reoffend. We don’t know if they do. So they may well predict. It’s just that if it hasn’t been validated on [the Aboriginal] population, we don’t know... until further studies actually validate it in that population we don’t know.”<sup>157</sup>

Having regard to the expert evidence, McKechnie J was “far from satisfied ... that the use of STATIC-99 is a sufficient predictor of the propensity to commit serious sexual offences in the future so as to discharge the onus under the *Dangerous Sexual Offenders Act* s 7(2).”<sup>158</sup>

- **In particular, there are concerns about the reliability of tools which have not been devised for and/or do not necessarily take account of the social circumstances of indigenous Australians in remote communities**

Similar concerns to those raised in *DPP v Williams* were raised in *DPP v Mangolamara*<sup>159</sup>. The respondent in the latter case was an Aboriginal male from the remote North West. Objections were raised as to both the admissibility and weight of the predictive instruments. Hasluck J commented:

“Having regard to the admissions made under cross-examination that the tools were not devised for and do not necessarily take account of the social circumstances of indigenous Australians in remote communities, I harbour grave reservations as to whether a person of the respondent’s background can be easily fitted within the categories of appraisal presently allowed for by the assessment tools.”<sup>160</sup>

The issue of the suitability of predictive assessments with respect to Aboriginal persons with respect to whom DSO applications are made has not yet been considered by the Court of Appeal.

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<sup>154</sup> *Dangerous Sexual Offenders Bill 2005* Explanatory Memorandum.

<sup>155</sup> The standard of proof required was discussed by Murray J in *State of WA v Latimer* [2006] WASC 235 at 13; cf *DPP (WA) v Williams* [2007] WASCA 206 at 266 per Martin CJ.

<sup>156</sup> [2007] WASCA 206.

<sup>157</sup> *DPP v Williams* [2007] WASCA 206 at 35.

<sup>158</sup> *DPP v Williams* [2007] WASCA 206 at 35.

<sup>159</sup> [2007] WASCA 71.

<sup>160</sup> *DPP v Mangolamara* [2007] WASCA 71 at 166.

### 8.6.3 Section 16A (2A) and (2B) *Crimes Act 1914 (Cth)*

- **Section 16A of the *Crimes Act 1914 (Cth)* prohibits judicial officers taking into account, when sentencing, “any form of customary law or cultural practice” relevant to the criminal behaviour to which a Commonwealth offence relates**

Section 16A of the *Crimes Act 1914 (Cth)* (*Crimes Act*) governs the sentencing of persons who offend against Commonwealth laws. In 2006 the *Crimes Act* was amended by the insertion of subsections 16A (2A) and 2(B). Those provisions prohibit judicial officers taking into account, when sentencing, “any form of customary law or cultural practice” relevant to the criminal behaviour to which a Commonwealth offence relates. Subsections 16A (2A) and 2(B) provide as follows:

“ 16A.....

(2A): However, the court must not take into account under subsection (1) or subsection (2) any form of customary law or cultural practice as a reason for:

- (a) excusing, justifying, authorizing, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
- (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

(2B): In subsection (2A) “criminal behaviour” includes:

- (a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and
- (b) any fault element relating to such a physical element.”

The terms “customary law” and “cultural practice” are not defined.

It appears that the 2006 amendments are at odds with s 16A (2)(m) *Crimes Act*, which expressly requires judicial officers to take the “cultural background” of an offender into account in sentencing, where that background is known and relevant.

Mr Dennis Eggington, Chief Executive Officer, Aboriginal Legal Service of Western Australia, has commented that the enactment of 16A (2A) and 2(B) *Crimes Act* permit judicial officers to ignore cultural facts which may underpin offending behaviour. Mr Eggington stated that overwhelmingly Aboriginal offending against Commonwealth laws takes the form of Centrelink fraud and that often cultural factors are causative factors:

“Aboriginal culture is predicated on familial obligation and the sharing of property and resources, including money. Those who commit Centrelink fraud regularly do so to support family members, both immediate and extended. There is no intended or actual personal enrichment of the offender”<sup>161</sup>

Mr Eggington commented that most Aboriginal offenders come from backgrounds of serious disadvantage with poor literacy and numeracy skills; and that those who committed Centrelink fraud “invariably” had a limited capacity to complete Centrelink’s complex documents.

See also:

- Her Honour Judge MA Yeats “Aboriginal Customary Law and Sentencing”<sup>162</sup>.

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<sup>161</sup> Submission to the Acting Committee Secretary, Senate Standing Committee on Constitutional Affairs, 16 October 2006, p 4-5.

<sup>162</sup> Conference Paper delivered at *The Judicial Conference of Australia Colloquium 2007*, Sydney, 5-7 October 2007 (www.jca.asn.au).

## 8.7

**ABORIGINAL COURTS**

In its *Aboriginal Customary Law: Final Report* the Law Reform Commission of Western Australia (LRCWA) recommended that Aboriginal Courts for both adults and children be established in both regional locations and the metropolitan area as a matter of priority. The LRCWA also recommended that adequate resources be applied for the appointment of additional judicial officers and court staff<sup>163</sup>. Those recommendations reinforced recommendations made by The *Royal Commission into Aboriginal Deaths in Custody* in 1991<sup>164</sup>.

Aboriginal sentencing courts designed to administer therapeutic justice have been introduced in a number of Australian States in the last decade. In 1999 the Nunga Court was established in Port Augusta, South Australia, with the objectives of providing a more culturally-appropriate setting for Aboriginal offenders who had entered pleas of guilty, thereby reducing the over-representation of Aboriginal people in custody<sup>165</sup>. Subsequently the Murri Court was established in Queensland, and Koori courts in Victoria. Aboriginal circle sentencing has also been introduced into a number of New South Wales' courts and in the Australian Capital Territory. The Darwin Community Court (an Aboriginal court, which is open to non-Aboriginal offenders) was established in 2005.

Proponents of Aboriginal courts argue that, in addition to significantly assisting Aboriginal people who become involved in sentencing proceedings, the use of Aboriginal sentencing courts reduces rates of Aboriginal recidivism<sup>166</sup>.

Commentators have called for the proper and systematic evaluation of Aboriginal sentencing courts (for example through an analysis of rates of re-offending and re-entry into custody) in order to ensure that the outcomes are consistent with the benefits which are claimed<sup>167</sup>. In addition, there is a qualitative dimension to such evaluation: the improvement of the procedures and specifically the inclusion of elders and reduction of formality: “[t]he involvement of the Aboriginal community in sentencing courts...[makes] the entire court process a much more meaningful one for Aboriginal offenders”<sup>168</sup>.

**8.7.1 Aboriginal Courts in Western Australia**

- **Yanderyarra Aboriginal Circle Court**

The Yanderyarra Aboriginal Circle Court was established in the remote Yanderyarra Aboriginal Community near Port Hedland in 2003. The court involved a local magistrate sitting on the bench with community Elders to determine sentences in cases where selected offenders pleaded guilty and were prepared to accept responsibility for their actions. It was not available for offences where immediate imprisonment was warranted. This and similar arrangements in Wiluna, Geraldton, and the Ngaanyatjarra Lands, as well as in other states, have been described as “less formalised practices... [in which] a judicial officer may solicit (or receive) sentencing related information from Indigenous people”<sup>169</sup>.

<sup>163</sup> LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006), p 136, Recommendation 24 ([www.lrc.justice.wa.gov.au/094-FR.html](http://www.lrc.justice.wa.gov.au/094-FR.html)) (Accessed 5 July 2008)

<sup>164</sup> RCDIAC, Vol 3, Chapter 22, Recommendations 104, 111-115 ([www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/40.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol3/40.html)) (Accessed 6 July 2008)

<sup>165</sup> LRCWA *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)) p 148. (Accessed 3 July 2008)

<sup>166</sup> Department of Justice (Vic), *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004* (2006), Chapter 5.

<sup>167</sup> R Edney and M Bagaric *Australian Sentencing*, Cambridge Press, 2007, Chapter 10, pp 270-271.

<sup>168</sup> Letter from D Eggington, Chief Executive Officer, Aboriginal Legal Service of Western Australia, to the Acting Committee Secretary, Senate Standing Committee on Constitutional Affairs, 16 October 2006, p 8.

<sup>169</sup> E Marchette & K Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model*, *Sydney Law Review*, Vol 29:415, 2007, p 416.

- **Community Court, Kalgoorlie**

An Aboriginal sentencing court was introduced in Kalgoorlie, Western Australia as a pilot project in November 2006. Unlike the Victorian Koori Court, it was not created pursuant to specific enabling legislation but, similar to the Yanderyarra and Norseman courts, was established under general provisions allowing for the administrative creation of a separate division of the Magistrates Court to deal with a specified class of offenders<sup>170</sup>. Dr Kate Auty SM initiated the pilot project, which will be reviewed at the end of 2008.

Bradley Mitchell, formerly an Aboriginal Project Officer attached to the Community Court, comments on its operation as follows:

“Panellists are selected in a process similar to that of a job application. They fill in an expression of interest form detailing why they want to be an Aboriginal Court panellist and informing us of their exposure to the justice system and their work history. The nominated panellist will also apply for a criminal clearance from the dept. Even if they do have a criminal history it will not necessarily exclude them. They maybe afforded the clearance depending on the length of time from their last criminal offence, the circumstances around that offence and the type of offences listed.

Each sitting day is very different and we have a roster system in place that is managed by the Court. The Project Manager will look at the sittings and depending on which offenders will be appearing will depend on the panellists chosen. We try to ensure that there is a gender balance at every sitting. If we know that there will be traditional people who are appearing who might have trouble with English then we will try to have one of our panellists that speak language sit on that day as well. The Project Manager will look at any conflicts that may arise eg family or cultural and discuss this with the panellists to see how this might be managed. If the conflict is unavoidable with one case (as is the case often) then that panellist will declare an interest at the time of the case and not participate. To ensure this process is maintained and effective on the day of the sitting the panellists meet with the project manager and magistrate at 9:00am for about an hour to discuss these issues.

Sentencing is determined by the magistrate and it is important that this is reflected in the sitting so that there is no community reprisal should the offender or their family not agree with it. The magistrate does however ask that panellists what they think of the sentence. The panellists have received training in relation to sentencing options and if they believe that there is a better option they have the capacity to suggest this to the magistrate.

I am not able to tell what proportion of offenders elect to go to the sentencing Court but as time has gone on we are now getting more people who are nominating to go into the court.”

- **Aboriginal Court, Norseman**

A community sentencing court was established in Norseman in March 2006, consisting of Elders, community members, a school principal, a local magistrate and a police prosecutor. This court was described as not being ‘formally endorsed’, distinguishing it from the Community Court in Kalgoorlie.

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<sup>170</sup> LRCWA *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) ([www.lrc.justice.wa.gov.au/094-DP.html](http://www.lrc.justice.wa.gov.au/094-DP.html)) p 157 (Accessed 3 July 2008). For a general discussion of the development of Aboriginal courts see ([http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/DP/Part\\_05E.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/DP/Part_05E.pdf)). (Accessed 3 July 2008). See also E Marchetti and K Daly, “Indigenous Courts and Justice Practices In Australia” *Trends and Issues in Crime and Criminal Justice*, AIC, May 2004



## APPENDICES TO CHAPTER EIGHT

### Sentencing

#### Appendix A: Comments on Sentencing - the Hon Justice Murray of the Supreme Court of Western Australia

“As to sentencing, there is, of course, the well-known difficulty which may arise in remote areas in respect of non-custodial dispositions which involve supervision in the community, but these are problems which in such areas affect non-Aboriginal persons as much as they do persons of Aboriginal descent. Further, a sentence of imprisonment or other detention may, as you know, in some cases be a more severe punishment to an aboriginal person, particularly if it involves not only incarceration, but transfer out of the prisoner’s own country. The courts well recognise such matters as being valid grounds for leniency, but the matter remains one to be dealt with in the exercise of the discretion of the sentencing judge.

I am also inclined, as the authority of decided cases supports, to treat more leniently a person who has suffered or will suffer tribal punishment, but I always make clear the fact that I do not condone the infliction of such punishment, particularly if it involves acts which are criminal in character or otherwise contrary to the law. I do not amend a punishment so as to reduce it below that which, in my judgment, the law would otherwise require, for the express purpose of permitting the early release of a convicted Aboriginal person so that he or she might voluntarily submit themselves to acts of tribal punishment. It would very often be the case that to do so would, in my opinion, involve the court in condoning an unlawful activity.

In passing sentence I would, of course, in the remarks I make in open court, make it clear that I have relied upon any special factors such as those mentioned above. Otherwise, when passing sentence upon an Aboriginal person, as in the case of every other accused person, I try always to bear in mind that the sentencing remarks are primarily directed to the convicted person before the court, to his or her victim and to his or her family and community. I try therefore to speak in terms which I hope those persons may understand so they will know upon what basis the court has acted to impose the sentence which has been passed.”

Note: In *State of Western Australia v Sturt*, 5 of 2004, Justice Murray sentenced an Aboriginal woman from a traditional community at Kalamburu, who had been convicted of the manslaughter of her husband. His Honour took into account that upon release from prison the offender would be required to undergo traditional punishment.

See also *State of Western Australia v Charles*, 72 of 2007, in which Justice Murray sentenced an Aboriginal woman from the Western Desert community who had been convicted of the manslaughter of her child, and in which traditional punishment considerations were examined.

## **Appendix B: Comments on Criminal Proceedings and Sentencing Remarks - the Hon Justice Owen of the Supreme Court of Western Australia**

"I attach my sentencing notes in relation to a 34 year old Aboriginal man [R] whom I sentenced recently. It is fairly typical of the way I sentence Aboriginal people. I always do it in writing so that their lawyer can go through it with them at leisure. You will note a few things:

1. The word 'Aboriginal' does not appear.
2. There is an oblique reference to what was a very important but culturally-sensitive issue: the death of his father. The old man had been killed as tribal punishment. This is at the root of the offender's problems. He cannot identify with Aboriginal law because he believes that his father was wrongly treated. I thought it was very important for the offender to know that I had taken it into account but I did not wish to go into culturally-sensitive areas. He also feels that the white man's law has treated him unfairly (a typical attitude) and this has deepened his identity crisis.
3. You will note also my recommendations to put this man in touch with the old people to help him work out his problems. I use this quite a lot."

### Extracts from Sentencing Remarks

*[The offender [R], an Aboriginal male aged 34 years, was convicted by a jury of one count of aggravated burglary and one count of armed robbery in [Town A]. Five days later he was convicted by a jury of one count of aggravated burglary, one count of armed robbery and one count of attempted armed robbery in [Town B]. The two sets of convictions arose from separate incidents.]*

### **Owen J:**

*[His Honour set out the facts giving rise to the convictions and the penalties which were applicable, and the need for specific and general deterrence in relation to offences of these types.]*

"I now turn to matters personal to you that will have an effect on the sentencing process. At the time of the offences you were 34 years of age. You are now 36 years of age. You were the third of eight children. Your father died when you were about 12 years of age and although your mother tried valiantly to look after her children she had her own problems and for a period of two years or so there was a lack of parental supervision and care and you began to steal and commit other offences. You are single but until March 2000 you had been in a 10 year de facto relationship that produced three children. You have no contact with your de facto or the children. You have a 20 year old daughter from a previous relationship and have some contact with her.

I am told that the circumstances of the death of your father (which I do not wish to discuss on the public record) and of the breakdown of your most recent relationship have had a profound effect on you. The latter led to you attacking your former de facto with a machete, for which you were charged with unlawful wounding. I have seen references from [TW], [NK] and [SD] which all attest to the great esteem in which your father was held and which confirm what you have said about the traumatic effect which his death had on you. I have also read letters from your mother and sister. They are to the same effect. They also show that you retain strong family support. This will be important to you as you try to rebuild your life. The tragedy of your life is brought out in a comment made by your mother, "if his father was around you would not have heard his name in a court room but on a football field".

You have very little formal education. You attended primary school but, apart from intermittent studies while in various correctional institutions, have had very little schooling at secondary level. You have had virtually no employment history. I understand that you

felt traumatised by the death of your father and that this disrupted any chances you had of going on with your education.

It is apparent that you have a very serious substance abuse problem. You have a long history of alcohol abuse and commenced using benzodiazapines from the age of 17 years, which you say is your drug of choice. You have also used cannabis, heroin, amphetamines, LSD, Ecstasy and inhaled volatile substances. I have had the advantage of a thorough and comprehensive pre-sentence report and psychological report. The author of the pre-sentence report says that you have previously completed substance abuse counselling but that while you were able to “verbalise” what actions you needed to take and the outcomes you wished to achieve, there had been little real desire to rid yourself of the use of illicit drugs.

Your prior criminal record is bad. It can be summarised in this way. From 1977 to 1981 (as a juvenile) you appeared before courts on 63 charges. Between 1983 and 1998 the adult courts saw you on 111 charges. Most of the offences were property related but they also include assaulting a public officer, assault occasioning bodily harm, unlawful wounding, stealing with violence and firearms offences. There has been an escalation in the seriousness of the offences and, perhaps inevitably, you have now committed crimes which carry life imprisonment.

It is clear that your constant use of benzodiazapines has been a major contributing factor to your continual unlawful behaviour. You admit that you were under the influence of those substances at the time when you committed these offences and that you were after money to buy more drugs, and did so. This may be an explanation for your offending behaviour but it is not an excuse.

It is an extremely sad fact that, in approximate terms, you have spent 18 of the last 23 years in detention or in gaol. This illustrates the point... that imprisonment achieves virtually nothing other than to exact some form of retribution and transitory incapacitation. What it does achieve is a hardening of the attitude of the offender and the completion of his or her “education” in the ways of crime. It also demonstrates that society has now yet been able to identify (or if it has, then to counter) the underlying social and cultural disadvantages that lead to grossly offending behaviour of this type. You told the author of the pre-sentence report that you “do gaol time easy but then stuff up on drugs” when you are released.

The psychological report indicates that the circumstances of your father’s death, your initial experiences with incarceration, breakdowns in relationships and drug abuse have all contributed to your present situation. You have what the psychologist described as personal identity problems which are culturally sensitive. You also have a deep distrust of “the system”, which you say has been unfair and has not given you a chance. There are many unresolved issues in your life.

One of the issues that causes you to have a distrust for the system is the number of “straight” sentences you have been ordered to serve, the lack of opportunities for parole or other forms of community based orders and the fact that you have most often been held in a maximum security establishment. In 1993 you successfully completed (after some initial problems) a two month community based order and in 1994 you successfully completed a six month parole order.

Both the pre-sentence report and the psychological report indicate that your attitude to counselling and rehabilitation programs in the past has been ambivalent and has been directed more at securing your release from custody rather than on addressing the underlying issues that you face. However, both reports suggest that there may be a change in your attitude this time. While you have been in custody you have organised and completed some painting work through the prison and have encouraged other prisoners to assist you in creating a garden area. This is a positive initiative and indicates that you can take some responsibility and can achieve when you set your mind to it. The author of the pre-sentence report suggests that you may now have accepted the need to address factors influencing your negative lifestyle and that you may, at last, be considering your future in a more positive manner. The psychological report is to similar effect.

The references from [TW], [NK] and [SD] all support the tentative views expressed in the reports that you may have made a significant decision to address your problems, to accept your family responsibilities and to lead a productive life.

In one of the references submitted on your behalf I was urged not to impose a prison sentence. I have seriously considered whether any form of non-custodial sentence is appropriate. However, the offences and the circumstances in which they were committed are very serious. While you may have come to the realisation that you have to make changes it is very early days and the process will be long and, I suspect, at times painful. You will have to come to grips with the personal identity problems that you face and work through them. Until you cure your substance abuse problem and attack the personal issues that confront you I think you are at risk of re-offending. For these reasons, and unfortunately, I think a prison term is inevitable.

It is a difficult sentence to structure. I have to bear in mind the sentence I imposed on [B] for the [Town B] offences, which was effectively 5 years imprisonment. He was entitled to some credit for a plea of guilty and for his offer to co-operate in giving evidence in this matter. Nonetheless, like you, [B] fell to be sentenced for the other offences as well and I had to take into account the totality of the terms of imprisonment. That will make comparing the sentences imposed on you and [B] difficult.

I have come to the view that the overall criminality of your offences, even giving full weight to the deprived nature of your background and the cultural and social issues that you have faced and continue to face, demands a sentence of imprisonment of 9 years. ....[S]ome of the individual terms may be less than would otherwise be the case.

*[His Honour then specified the terms to be served in respect of each count.]*

### Parole

I have decided that you should be eligible for parole in respect of each of the sentences that I have imposed. I do so for two reasons. First, you are still a young man. If the resolve that you seem to be showing continues then by the time you become eligible for release you will be a more capable person than you are at the present. It is imperative that you take stock of your situation and, while in custody, engage in programs to overcome substance abuse. If you do, your prognosis should improve markedly. I think you need also to talk to the old people of your race in order to help you address the personal identity issues that have been mentioned. Secondly, it will be in the public interest that when the time comes for you to be released into the community, you be under formal supervision so that your progress in overcoming your drug problem can be monitored. It will also provide a support mechanism to assist you in reintegration into the community. This will mean that the time actually spent in prison will be somewhat less than the term that I have mentioned. However, you should appreciate that the balance of the term will remain very much a part of the sentence and will be served in the community and under strict supervision. You will be required to comply with such conditions as the Parole Board may set and if you breach those conditions or offend again, you could well find yourself back in prison serving further time.

One of your problems seems to be a distrust of the "system". I hope that the fact that you have been made eligible for parole indicates, perhaps only a small way, that "the system" is prepared to give you this opportunity. I have no power to direct the prison authorities to grade you in such a way as to make you eligible for transfer to a medium or minimum security institution. All I can do is place on the public record (in the hope that the authorities will see it) that you believe that the more you are given incentives to change the greater will be the changes of you accepting responsibility and acting accordingly. To me that makes sense and I would hope that in due course you will be given such opportunities. Much will, of course, depend on your own behaviour and development.

I note also the recommendations in the psychological report (with which I agree) that you would benefit from specialist input including:

- (a) psychological counselling focussed on unresolved personal issues and the development of victim empathy;
- (b) life skills training; and
- (c) specialist drug rehabilitation preferably on a one to one basis.

To these I would add the opportunity to speak to the old people and other Aboriginal mentors to assist in resolving cultural issues.

### **Appendix C: Comments on Criminal Proceedings - the Hon Justice Templeman of the Supreme Court of Western Australia**

“[I refer] to the sentencing of Aboriginal persons convicted of serious offences. I note that in your template you refer to discussion of charges arising from the carrying out of traditional punishments. There is, however, the other aspect of traditional punishment; the extent to which the likelihood of such punishment being carried out should be taken into account in sentencing the offender.

Obviously a person who administers traditional punishment is guilty of an offence. However, the reality is that traditional punishments are meted out and may involve serious injury to the victim.

My personal view is, that, in sentencing an Aboriginal offender, it is appropriate to acknowledge the fact that there is likely to be a traditional or tribal punishment; assuming, of course, that this is established. It is a matter which I would ask a community corrections officer to consider when preparing a pre-sentence report. I appreciate that this may be seen as condoning assaults. However I consider it wrong to ignore the reality.

In the case to which I referred, above, I sentenced the young woman to a community-based order because she had already spent a considerable time in prison awaiting trial and because it was likely that she would receive traditional punishment. The Crown did not appeal.”

## Appendix D: Extracts from Sentencing Remarks - the Hon Justice McLure

*[The offender, from a remote community in the Western Desert region of Western Australia, had pleaded guilty to manslaughter. Following the offence he was speared 12 times in the legs by members of his community. At that time he was 19 years old.]*

### McLure J:

"[R], you have been convicted on your own plea of guilty of one count of manslaughter. As the witnesses to the offence had been drinking over the course of the day in question, it's not possible to obtain an entirely reliable picture of relevant events, in particular in the order in which they occurred. However, I find the facts to be as follows.

You and the deceased man lived at the [X] Aboriginal community situated approximately 180 kilometres east of [S]. You and the deceased, both from a traditional Aboriginal background, were close friends. Some time after 8 pm on 18 April 2001 you went into the yard in which the deceased's house was situated. Before you arrived at the yard you had altercations with a number of other persons at the community.

You were angry because the deceased had requested you for tribal reasons not to go out with a particular girl. The deceased was related to that girl and had been an outspoken opponent of your relationship with her. Further, you were told something shortly before the killing which caused you to become very angry with the deceased. There was a confrontation between you and the deceased in which blows were exchanged and you left the deceased's yard.

You and the deceased, being of a similar weight and height, were very intoxicated. You returned to the yard carrying a sharp object and hit the deceased at least once while he was sitting on the ground. The deceased suffered an injury to the side of his head which caused him to fall on to the ground. However, a short time later he stood up and chased you out of the yard.

You and the deceased ran away from the house, although it's not clear who was chasing who. At some distance from the house you and the deceased stopped and had an argument. You grabbed a branch from a tree and struck the deceased with that branch a number of times. The deceased fell to the ground and started bleeding from the mouth. You left for a short while and on your return the deceased was dead.

You collected articles of clothing and left the community. On the way out of the community you saw the deceased's mother and told her that her son was dead. The injury that caused the death was inflicted by a blunt weapon, the tree branch, being applied to the back of the head. The fatal blow could have been delivered by one blow to the neck, using moderate force which ruptured a vertebral artery. The deceased suffered other injuries, including nine injuries to the scalp, a fracture to the jawbone and fractured ribs.

You were born on 1 July 1982 and were 19 years of age at the time the offence was committed. You were born in the Great Victorian Desert, and you and your family lived a traditional and nomadic lifestyle until you were 4 years old. You then lived at the [Y] Aboriginal community and from time to time at the [Z] Community. That community is 800 kilometres north-east of [S] and was set up by the [Y] Community as an alcohol-free community in 1998. [Y] has had an alcohol problem for some time.

As a teenager you became exposed to fringe dweller camps and urbanised lifestyles in [S] which exposed you to substance abuse and antisocial behaviour. You attended formal education at the communities in which you have lived and although your literacy skills and formal education is limited, you are assessed as an intelligent young man with prospects of rehabilitation. Mr [T] spoke highly of you.

It's clear that your alcohol abuse was the major contributing factor to the commission of this offence. Your relatively late introduction to alcohol consumption was by way of binge drinking and there was little safe or moderate drinking education or example available to you. All your employment to date has been undertaken on community development employment programs in which your referees describe you as a very reliable and hardworking person.

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

You accept that your spearing was part of tribal law and have expressed considerable shame and remorse for what you have done. You do not have an extensive record of offending and this is your first offence in which violence was a significant element. It's against this background that I must consider the sentencing options. A sentence must be commensurate with the seriousness of the offence, this being determined by taking into account the statutory penalty, the circumstances of the commission of the offence, any aggravating factors and any mitigating factors.

A sentence of imprisonment should not be imposed unless it's justified by the seriousness of the offence or the protection of the community requires it. The serious nature and circumstances of the offence you committed means that only a sentence of immediate imprisonment can be imposed.

However, there are a number of mitigating factors which must be taken into account in determining the appropriate sentence. Firstly, you pleaded guilty to manslaughter at the first reasonably available opportunity, having regard to the fact that you were originally charged with murder. The second mitigating factor is your youth; you were 19 at the time of the offence. Thirdly, I have taken into account your relatively and relevantly minor record of offences prior to the commission of the offence for which you are being sentenced today. Fourthly, I take into account that you have already received tribal punishment from your community.

It's well recognised in the authorities that payback punishment is a relevant sentencing consideration because fairness and justice require a court to have regard to all material facts, including those which exist only by reason of an offender's membership of an ethnic or other group. I also accept that you are truly remorseful for what you have done.

I also accept that alcohol and alcohol-induced rage was the immediate cause of the offence, and that your alcohol abuse reflects the circumstances and environment in which you have spent a significant part of your life today. However, all members of the community are entitled to the protection to which the sentencing aims of just punishment and deterrence are directed. In the circumstances I propose to sentence you to a term of 5 years' immediate imprisonment which will be backdated to 26 April 2001.

Please stand. [R] you are sentenced to a term of 5 years' imprisonment backdated to 26 April 2001, the date upon which you were taken into custody for this offence. I also order that you be eligible for parole. Please stand down. The court will now adjourn."

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