

**New South Wales
Law Reform Commission**

**Report
96**

**Sentencing:
Aboriginal offenders**

October 2000

New South Wales. Law Reform Commission.
Sydney 2000
ISSN 1030-0244 (Report)

National Library of Australia
Cataloguing-in-publication entry

New South Wales. Law Reform Commission.
Sentencing: Aboriginal offenders.

Bibliography
ISBN 0 7313 0446 2

1. Discrimination in criminal justice administration – New South Wales. 2. Community-based corrections – New South Wales. 3. Alternatives to imprisonment – New South Wales. 4. Aboriginal Australian prisoners – New South Wales. 5. Customary law – New South Wales. 6. Sentences (Criminal procedure) – New South Wales. I. Title. (Series : Report (New South Wales. Law Reform Commission) ; 96).

345.0772089915

New South Wales Law Reform Commission

To the Honourable Bob Debus MLC
Attorney General for New South Wales

Dear Attorney

Sentencing: Aboriginal offenders

We make this final Report pursuant to the reference to this Commission dated 12 April 1995. This is the second Report published by the Commission under this Reference. The first, Report 79 entitled Sentencing, was published in December 1996.



The Hon Justice Michael Adams
Chairperson

His Honour Judge Bob Bellear

The Hon Justice John Dowd AO, Deputy Chairperson (until December 1999)[†]

The Hon Justice Greg James

Her Honour Judge Angela Karpin

October 2000

[†] Justice Dowd has continued to participate in the finalisation of the Report as a consultant.

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Terms of reference

To inquire into and report on the laws relating to sentencing in New South Wales with particular reference to:

- (i) the formulation of principles and guidelines for sentencing;
- (ii) the rationalisation and consolidation of current sentencing provisions;
- (iii) the adequacy and use of existing non-custodial sentencing options with particular reference to home detention and periodic detention;
- (iv) the adequacy of existing procedures for the release of prisoners by the Offenders Review Board and the Serious Offenders Review Council and the benefits that might accrue from the review of the decisions of the Offenders Review Board and the Serious Offenders Review Council by judicial officers; and
- (v) any related matter.

In undertaking this reference, the Commission should have regard to the proposals in relation to sentencing contained in the Australia Labor Party policy documents formulated in Opposition.

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon Justice Michael Adams*
The Hon Justice John Dowd AO (until December 1999)
His Honour Judge Bob Bellear
Her Honour Judge Angela Karpin
The Hon Justice Greg James
(* denotes Commissioner-in-Charge)

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LIST OF RECOMMENDATIONS

RECOMMENDATION 1 (page 96)

Where a person, who is, or was at a relevant time, a member of an Aboriginal community, is convicted of an offence, in determining the sentence, the court shall have regard to any evidence concerning the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which the victim was a member at a relevant time.

RECOMMENDATION 2 (page 131)

Pilot schemes for Circle Sentencing and adult conferencing should be instituted in consultation and collaboration with Aboriginal communities.

RECOMMENDATION 3 (page 163)

The Department of Corrective Services should establish a mentoring program for young adult offenders based on the Young Offenders' Mentoring Program conducted for juvenile offenders by the Department of Juvenile Justice and the Crime Prevention Division of the Attorney General's Department.

RECOMMENDATION 4 (page 164)

A pilot program based on the Pitjantjatjara community service program in South Australia should be established in New South Wales in consultation and collaboration with the Aboriginal Justice Advisory Council.

RECOMMENDATION 5 (page 168)

The Department of Corrective Services should establish more Attendance Centres in rural areas.

RECOMMENDATION 6 (page 168)

Courts should have the power to order that participation in approved community-based, personal development programs may be credited towards Community Service Orders.

RECOMMENDATION 7 (page 182)

The following statistical information about Aboriginal offenders, with breakdown into gender categories, should be compiled and published at regular intervals:

- the numbers coming into the criminal justice system;
 - the numbers being convicted of a criminal offence;
 - a breakdown into types of offences for which a conviction is entered;
 - a breakdown into types and lengths of sentences given; and
 - the numbers in all correctional centres.
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RECOMMENDATION 8 (page 198)

Programs to raise awareness in the judiciary, and all others involved in the sentencing process, of cross-cultural issues should include a component dealing specifically with Aboriginal women offenders. Among other things, such programs should focus on increasing awareness and understanding of:

- the circumstances surrounding the offences committed by Aboriginal women, including their historical and current social contexts;
 - the role which Aboriginal women play within the family and community;
 - the potential for Aboriginal women to suffer from both racism and sexism; and
 - the impact of imprisonment upon women and their families.
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RECOMMENDATION 9 (page 203)

The Department of Corrective Services should give consideration to accommodating women serving short sentences at minimum security correctional centres rather than at Mulawa Correctional Centre.

RECOMMENDATION 10 (page 205)

The Department of Corrective Services should institute *Mothers' and Children's Programs* at all correctional centres accommodating women.

RECOMMENDATION 11 (page 206)

In accordance with the recommendation contained in its report, *Women's Action Plan – A Three Year Strategy for Female Inmates in NSW Correctional Centres*, the Department of Corrective Services should construct additional transitional centres for female inmates in regions of greatest need, and expand the eligibility criteria for all centres.

RECOMMENDATION 12 (page 211)

A multi-purpose community cultural centre should be trialled in a regional area with a significant Aboriginal population. In addition to serving a variety of community needs, the centre should organise and co-ordinate programs satisfying community service orders.

EXECUTIVE SUMMARY

This Report into the sentencing of Aboriginal offenders forms part of a general referral to the Commission in 1995 by the then Attorney General, the Hon Jeff Shaw QC, to review sentencing law in New South Wales. The Commission published a report on the general principles of sentencing (LRC 79) in December 1996. This Report focuses on the special issues which arise in relation to the sentencing of Aboriginal offenders.

The Report details the over-representation of Aboriginal people in the criminal justice system and notes that this disparity is increasing. The rate of recidivism for Aboriginal offenders is a matter of serious concern. Aboriginal people are also dying in custody in increasing numbers. There have been 147 Indigenous deaths in custody since the Royal Commission into Aboriginal Deaths in Custody, compared with 99 deaths in the previous decade.

The explanation for this over-representation is complex and multi-layered. A significant contributing factor is the socially, economically and culturally disadvantaged position of many Aboriginal people. They belong to a substantially alienated, marginalised, disempowered segment of Australian society, suffer systemic discrimination and are frequently extremely disadvantaged in almost every aspect of society, especially in terms of life expectancy, health, housing, education, employment and income. They suffered dispossession of their land and have been subjected to government policies which forced the removal of their children.

The increasing over-representation of Aboriginal people in the criminal justice system, rising levels of incarceration and deaths in custody signalled an urgent need to review the availability and appropriateness of sentencing options for Aboriginal offenders.

The Report considers whether legislation should contain special principles which would apply to the sentencing of Aboriginal offenders. It concludes that the existing common law principles of sentencing are sufficiently flexible to take account of the circumstances of Aboriginal offenders.

The Commission's terms of reference specifically asked the Commission to consider whether there should be legislative endorsement of the court practice of taking into account Aboriginal customary laws when relevant in sentencing Aboriginal people. The Commission has concluded that, despite the common law precedent for judicial discretion to recognise Aboriginal

customary law, there should be legislative endorsement of the common law discretion. The totality of reasons for recognising Aboriginal customary law are outlined in Chapter 3. Legislating for recognition of Aboriginal customary law has potential symbolic significance for New South Wales' credibility in the reconciliation process; for redress of the alarming consequences of Aboriginal contact with the criminal justice system, and the incidence of incarceration and deaths in custody; and for according respect to Aboriginal people, and real value to Aboriginal culture.

The Report also looks at the involvement of Aboriginal communities in the sentencing process and examines community-based initiatives, in particular, conferencing and circle sentencing. These are discussed in Chapter 4.

The Report discusses the current sentencing options, including alternatives to full-time custody and non-custodial options, and evaluates their cultural appropriateness and effectiveness in achieving rehabilitation and reducing recidivism. The Royal Commission into Aboriginal Deaths In Custody emphasised that, for Aboriginal people who were already caught up in the criminal justice system, what is of immediate concern is that policies and programs are applied which might direct them away from that system wherever possible; or, if not, might provide alternatives to imprisonment. The Royal Commission also expressed concern that, in New South Wales, non-custodial sentences appeared to be under-utilised as an alternative punishment for Aboriginal offenders.

The special needs of Aboriginal women offenders are looked at in Chapter 6. There are a number of reasons why, in a report on sentencing Aboriginal offenders, separate consideration of female Aboriginal offenders is necessary. In particular, Aboriginal women are over-represented in prisons to an even greater extent than Aboriginal men and this over-representation is increasing. In spite of this, Aboriginal women remain largely invisible in the picture of criminal justice. Research, policies, programs and correctional institutions focus almost entirely on the needs of the male offender.

Chapter 7 discusses the difficulties which many Aboriginal people experience in communicating effectively, both as witnesses in the courtroom and as defendants in the sentencing process, and suggests ways in which these difficulties may be ameliorated.



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Chapter 7 discusses the difficulties which many Aboriginal people experience in communicating effectively, both as witnesses in the courtroom and as defendants in the sentencing process, and suggests ways in which these difficulties may be ameliorated.

1. Introduction

- Background
- Terminology
- Background to sentencing of Aboriginal offenders
- Other relevant inquiries
- The international scene
- Statement of commitment to Aboriginal people
- Nature and conduct of the Commission's inquiry
- The Commission's approach

BACKGROUND

1.1 On 12 April 1995, the then Attorney General, the Hon Jeff Shaw QC, referred the reform of sentencing law to the New South Wales Law Reform Commission (the “Commission”).¹ For the purposes of managing such a review, the Commission divided the reference into three phases:²

- The first phase, an evaluation of the general principles of sentencing law in New South Wales, was the subject of the Commission’s Report entitled *Sentencing*.³
- The second phase, of which this Report is the first publication, involves a review of the particular problems which arise in sentencing groups of offenders who require special consideration.
- The third phase will involve the review and rationalisation of the maximum penalties prescribed by statute in New South Wales.

1.2 At the request of the Attorney General, the Commission commenced the second phase of the reference by considering sentencing law and practice in relation to Aboriginal offenders. Consequently, no specific terms of reference apply to the recommendations contained in this Report. Further, the Attorney General requested that the Commission consider Recommendation 20 in the Report of the Australian Law Reform Commission (“ALRC”), entitled *Recognition of Aboriginal Customary Laws*.⁴ Recommendation 20 concerns the legislative endorsement of the court practice of taking into account Aboriginal customary laws when relevant in sentencing Aboriginal people. Chapter 3 of this Report deals with recognition of customary laws.

1.3 This Report predominantly considers adult Aboriginal offenders, both male and female. Consideration of the sentencing of juvenile Aboriginal offenders is deferred to the Commission’s review of general juvenile sentencing practices to be conducted at a later stage of the reference.

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1. The background to the reference is outlined in New South Wales Law Reform Commission, *Sentencing* (Discussion Paper 33, 1996) (“NSWLRC DP 33”) at para 1.1-1.9.
 2. See NSWLRC DP 33 at para 1.11-1.20.
 3. New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996) (“NSWLRC Report 79”).
 4. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) (“ALRC 31”). That request was made by letter dated 9 January 1996.

TERMINOLOGY

1.4 The terminology used by the Commission in this Report varies, reflecting inconsistency and diverse terms used in sources. “Aboriginal” in most contexts should be taken to include all Indigenous people and communities. The term “Indigenous” encompasses both Aboriginal people and people from the Torres Strait Islands. While the Commission acknowledges that people with Torres Strait Island origins are a separate people with a different heritage, they are not distinguished separately in this Report because, in the context of the Commission’s recommendations for sentencing, it is not considered necessary to make such a distinction. Further, the Commission’s consultations did not indicate the need for separate consideration.

1.5 Over the years, the law has determined who is to be defined as an Aboriginal person for various purposes.⁵ The Commission is of the view, however, that such a definition is unnecessary for the purpose of sentencing law. Where Aboriginality is raised as an issue in court, its relevance should be assessed on a case-by-case basis.

5. See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1 at 274 (Deane J). See also *Aboriginal Land Rights Act 1983* (NSW) s 4(1); *Crimes Act 1900* (NSW) s 355(1); and *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 3.

BACKGROUND TO SENTENCING OF ABORIGINAL OFFENDERS

1.6 The question may be asked: why accord Aboriginal offenders special consideration? In comparison with their percentage of the general population, Aboriginal people are over-represented in the criminal justice system, with that disparity increasing over time. Nationally, Indigenous people constitute 2.1 per cent of the total Australian population.⁶ However, in 1998, the National Prisoner Census showed that 18.8% of all prisoners were Indigenous.⁷

The imprisonment rate for Indigenous males was 12 times higher than the rate for all males, and the rate for Indigenous females was 14 times higher than for all females.⁸ The Australian Bureau of Statistics (“ABS”) reported that, on the night of 1 December 1999, New South Wales had the highest number of Indigenous prisoners of any State or Territory in Australia (1,117 out of 3,916 nationally).⁹ In New South Wales Local Courts, Indigenous people convicted of an offence are more likely to be sentenced to a term of imprisonment: in 1999, 15.2% of Indigenous offenders received the penalty of imprisonment compared with 6.6% of offenders overall.¹⁰

1.7 Studies have shown that Aboriginal people are more likely than others to be charged with minor offences, particularly public order offences such as offensive language or behaviour, and resisting arrest.¹¹ During 1998, a total

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6. Australia, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Aboriginal and Torres Strait Islander Social Justice Commission Annual Report 1999* (Dr W Jonas, Sydney, 2000) (the “Social Justice Commissioner Report (1999)”) «www.hreoc.gov.au/sj_report99» at 21.
 7. Australian Bureau of Statistics, *Prisoners in Australia, 1998* (ABS, Canberra, June 1999) (“*Prisoners in Australia 1998*”) at 14 and 65. See also the Social Justice Commissioner Report (1999) at 17-19.
 8. *Prisoners in Australia 1998* at 12, 14, 62-63 and 65.
 9. ABS, *Corrective Services Australia, Publication No 4512.0, Summary of Findings* «www.abs.gov.au/ausstats» (“ABS Publication No 4512.0”).
 10. New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1999* (Statistical Report Series, 2000) at xiv.
 11. A 1997 study of public order legislation by the Bureau of Crime Statistics and Research (“BOCSAR”) revealed that the rate of court appearances for what is known as the “quinella” (offensive behaviour or language, resist arrest and/or assault police) is highest in areas with high Aboriginal populations. Overall, this research indicated that Aboriginal people in NSW are far more likely to face charges of offensive behaviour and offensive language than

of 6,558 people were prosecuted for offensive language or offensive conduct in New South Wales. Of those, 1350 (or 20.59%), were Aboriginal people.¹² Studies have shown that these relatively minor offences have serious long-term consequences for many Aboriginal people and communities, as they increase the likelihood of further contact with the criminal justice system.¹³

1.8 Similarly, there is evidence suggesting higher rates of recidivism in Aboriginal offenders.¹⁴ The Royal Commission into Aboriginal Deaths in Custody (“RCIADIC”) found that many Aboriginal people presented to the courts for sentencing with prior convictions, and that Aboriginal recidivism was a matter of serious concern.¹⁵ The levels of over-representation of Aboriginal youth now seen in the juvenile justice system suggest even greater problems in the future.¹⁶

1.9 Aboriginal people are also dying in custody in increasing numbers.¹⁷

non-Aboriginal people, and are less likely to have those charges dismissed: R Jochelson, “Aborigines and Public Order Legislation in New South Wales” *Crime and Justice Bulletin No 34* (NSW, BOCSAR, February 1997); see also NSW, Anti-Discrimination Board, *A Study of Street Offences by Aborigines* (Sydney, June 1982).

12. Aboriginal Justice Advisory Council, *Policing Public Order: Offensive Language and Conduct, the Impact on Aboriginal People* (No 1, September 1999) «www.lawlink.nsw.gov.au/ajac/publications» (“AJAC Public Order Report”).
13. See AJAC Public Order Report «www.lawlink.nsw.gov.au/ajac/publications».
14. 1998 figures showed that 78% of male and 70% of female Indigenous prisoners had previously been sentenced to prison, compared with 63% of male and 55% of female prisoners generally: *Prisoners in Australia 1998* at 17 and 66. See also B Thompson, *Recidivism in NSW: A General Study* (NSW, Department of Corrective Services, Research Publication No 31, May 1995); R Broadhurst and R A Miller, “The recidivism of prisoners released for the first time: reconsidering the effectiveness question” (1990) *Australian and New Zealand Journal of Criminology* 88.
15. Australia, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (Five Volumes) (E Johnston, Royal Commissioner, AGPS, Canberra, 1991-92) (the “RCIADIC Report”) vol 3 at 67-71.
16. See Social Justice Commissioner Report (1999) at Chapter 5.
17. See V Dalton, “Australian Deaths in Custody and Custody-related Police Operations 1997” *Trends and Issues in Crime and Criminal Justice* (No 80, AIC, Canberra, March 1998); V Dalton, “Prison Deaths 1980-97: National Overview and State Trends” *Trends and Issues in Crime and Criminal Justice* (No 81, AIC, Canberra, March 1998) (“*Prison Deaths 1980-97*”).

The Aboriginal and Torres Strait Islander Social Justice Commissioner reported that there have been 147 Indigenous deaths in custody since the Royal Commission into Aboriginal Deaths in Custody (“RCIADIC”), compared with 99 deaths in the previous decade.¹⁸

Explaining over-representation

1.10 Seeking to explain what may cause the disproportionate levels of involvement of Aboriginal people in the criminal justice system is of direct relevance to this Report. Explanations are complex; most identify a number of factors responsible, but differ as to the combinations of factors thought to be at work.¹⁹ Some interpretations attribute over-representation to discriminatory treatment at various stages within the criminal justice system, including sentencing. Intentional or unintentional bias is often asserted but difficult to evaluate in a systematic way.²⁰ Other explanations look to the incidence and patterns of offending,²¹ while many concentrate on the “underlying issues”, that is, those

18. Social Justice Commissioner Report (1999) at 86.

19. See, eg, C Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission in Aboriginal Deaths in Custody* (Office of Public Affairs, ATSIC, Canberra, 1997) (“Cunneen and McDonald 1997”) at 42-54; R Broadhurst, *Aborigines and Crime in Australia* (University of Chicago, 1997); R Lincoln and P Wilson, “Aboriginal Offending: Patterns and Causes” in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (Sydney, 1994) at 61; R Smandych, R Lincoln, and P Wilson, “Towards a Cross-Cultural Theory of Aboriginal Criminality” in K Hazlehurst (ed), *Perceptions of Justice: Issues in Indigenous and Community Empowerment* (Avebury, Aldershot, 1995) at 245. Similar debates regarding explanations of over-representation occur in relation to Indigenous minorities overseas: see, eg, New Zealand, Ministry of Justice, *Sentencing Policy and Guidance: Discussion Paper* (Wellington, 1997) at Chapter 10; and C LaPrairie, “The Role of Sentencing in the Over-Representation of Aboriginal People in Correctional Institutions” (1990) 32 *Canadian Journal of Criminology* 429.

20. A number of studies indicate disparities in outcomes: see P Gallagher and P Poletti, *Sentencing Disparity and the Ethnicity of Juvenile Offenders* (Judicial Commission of New South Wales, Sydney, 1998); NSW, BOCSAR, *New South Wales Criminal Courts Statistics 1997* (June 1998) at xii-xiv, Tables 1.6, 1.6a.

21. Broadhurst (1997) at 409, 413ff, and 463.

factors which bring Aboriginal people into conflict with the criminal justice system in the first place. At the 1997 National Summit on Indigenous Deaths in Custody, the Commonwealth and State and Territory Governments reaffirmed the position that addressing the underlying issues is fundamental to the achievement of long term solutions to Indigenous incarceration and deaths in custody.²²

1.11 The RCIADIC Report argued that the most significant contributing factor to over-representation was the socially, economically and culturally disadvantaged position of many Aboriginal people. They belong to a substantially alienated, marginalised, disempowered segment of Australian society. Indigenous people are frequently extremely disadvantaged in almost every aspect of society, especially in terms of life expectancy, health,²³ housing,²⁴ education,²⁵ employment and income.²⁶ High levels of violence and substance abuse are often experienced in many Aboriginal communities.²⁷

1.12 The Aboriginal Justice Advisory Council (“AJAC”) is of the view that, while some Government initiatives are helping to address the RCIADIC recommendations and are aimed at diverting people from the criminal justice system, other measures have the effect of increasing Aboriginal contact with the system.²⁸ AJAC maintains that truth in sentencing principles, the increase of police powers under laws such as the *Crimes Amendment (Police and Public Safety) Act 1998* (NSW) and the *Children (Protection and Parental Responsibility) Act 1997* (NSW), the failure to decriminalise offensive

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22. Ministerial Summit on Indigenous Deaths in Custody, *Outcomes Statement* (4 July 1997): see below para 1.25-1.26.
 23. Australia, HREOC, *Bringing Them Home*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (April 1997) (“*Bringing Them Home*”) at 548-549.
 24. RDIADIC Report, vol 2 at para 18.1.1-18.1.6; *Bringing Them Home* at 549-550.
 25. RDIADIC Report, vol 2 at para 16.4.2-16.4.25; *Bringing Them Home* at 552-555.
 26. RDIADIC Report, vol 2 at para 17.2.8-17.2.21; 17.3.56-17.3.57; *Bringing Them Home* at 551-552.
 27. RDIADIC Report, at para 15.2.12; 15.2.20; *Bringing Them Home* at 546-548.
 28. NSW, AJAC, *Review of the NSW Government Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (September, 2000) (“AJAC Implementation Review”) at 5, 6 and 8.

language, and the current police practice of targeting recidivists, impact disproportionately on Aboriginal people, increasing the likelihood of their involvement in the justice system.²⁹

Unique position of Indigenous Australians

1.13 Also relevant to the context in which Aboriginal people are sentenced is the unique position they occupy in the legal system as an Indigenous minority.³⁰ As Australia's original inhabitants, members of Aboriginal communities exercised sovereignty, with their own system of land ownership and laws. Upon colonisation, that ownership of land was denied and systems of customary law displaced. Consequently, Aboriginal people have been disadvantaged in a way which distinguishes them from immigrant minorities.

1.14 Over the two centuries since colonisation, the criminal justice system has frequently served further to entrench the disadvantage of Aboriginal people. Rather than protecting them from unlawful violence, the legal system often criminalised and subjugated Aboriginal people.³¹ Aboriginal people have also faced legal, institutionalised racism, in relation to freedom of movement, employment, education and welfare.³²

1.15 The impact of colonisation continues to affect Indigenous people today:

Aboriginal people remember this history and it is burned into their

29. AJAC Implementation Review at 8.

30. As distinct from the position of immigrant minorities: see para 3.33.

31. The experiences of Aboriginal people have been depicted in several studies, for example, E Eggleston, *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, (ANU Press, Canberra, 1976); K Hazlehurst, *Ivory Scales: Black Australians and the Law*, (UNSW Press, Kensington, 1987); P Hanks and B Keon-Cohen, *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (Allen and Unwin, Sydney, 1984); G Bird, *The "Civilising Mission": Race and the Construction of Crime* (Monash University, Melbourne, 1987); J Basten et al, *The Criminal Injustice System* (Australian Legal Workers Group, 1982).

32. M Lucashenko, *Policy and Politics in the Indigenous Sphere: An Introduction for Bureaucrats* (Aboriginal Politics and Public Sector Management Research Paper No 1, Centre for Australian Public Sector Management, Griffith University, June 1996) <www.cad.gu.edu.au/capsm/Lukashen.htm>.

consciousness ...³³

Resultant feelings of disempowerment, dependence, loss of self-esteem, despair, and cultural erosion shape the actions and lives of Aboriginal people to a greater or lesser extent. These are potent forces, capable of influencing the involvement of Aboriginal people in the criminal justice system in a way that non-Aboriginal people, to a greater or lesser extent, may find difficult to understand.

A fundamental conclusion of the RCIADIC was that:

[i]t is important that we understand the legacy of Australia's history, as it helps to explain the deep sense of injustice felt by Aboriginal people, their disadvantaged status today and their current attitudes towards non-Aboriginal people and society.³⁴

1.16 Aboriginal people suffer compound discrimination. They are subjected to discrimination on the basis of race and colour, and class or socio-economic background. For Aboriginal women, sex discrimination may also be experienced.³⁵

1.17 This Report examines ways in which the criminal justice system can ensure offenders, when sentenced, are not disadvantaged by reason of their Aboriginality. No criminal justice system should create or perpetuate disadvantage. In the Commission's view, recognition of cultural difference and accommodation of diversity is not inconsistent with equality before, and equal protection under, the law.³⁶

International obligations

1.18 Consideration of Aboriginal people's involvement in the criminal justice system, as well as the broader social justice issues, should be viewed

33. RCIADIC Report, *Overview and Recommendations* (AGPS, Canberra, 1991) at para 1.5.2.

34. RCIADIC Report, vol 2, at Chapter 10.

35. See Western Australia, *Report of the Chief Justice's Taskforce on Gender Bias* (1994). The sentencing of Aboriginal women is examined in Chapter 6 of this Report.

36. See S Yeo, "The Recognition of Aboriginality by Australian Criminal Law" in G Bird, G Martin, and J Neilsen (eds), *Majah: Indigenous Peoples and the Law* (Federation Press, Sydney, 1996) at 228.

in the light of international conventions and obligations.³⁷ The International Covenant on Civil and Political Rights (“ICCPR”) and the International Convention on the Elimination of All Forms of Racial Discrimination, both ratified by Australia, call for equality before the law for minority groups. The right of Indigenous people to self-determination is enshrined in the ICCPR and the United Nations Draft Declaration on the Rights of Indigenous Peoples.³⁸ Though not formally part of the law of New South Wales, the principles such conventions embody should form a basis for the interpretation of our law and the development of government policy.³⁹

OTHER RELEVANT INQUIRIES

1.19 The Commission’s inquiries have been conducted in the context of several other significant inquiries and reports in recent years which impact on the sentencing of Indigenous offenders. They contain useful analyses and recommendations in relation to sentencing, and the underlying factors affecting Aboriginal over-representation in the criminal justice system. It could be argued that had the many sound recommendations in those reports been implemented, the need for this Report would have been significantly reduced. Our recommendations should be considered in conjunction with the following reports and inquiries.

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37. See M Dodson, *Indigenous Social Justice: A Submission to the Parliament of the Commonwealth of Australia on the Social Justice Package* (April, 1995) vol 2 at 130-164; and M Dodson “Linking International Standards with Contemporary Concerns of Aboriginal and Torres Strait Islander Peoples” in S Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (Federation Press, Sydney, 1998) at 18.
38. The Australian Government has withdrawn support for the concept of self-determination in domestic Indigenous affairs policy and support for the Draft Declaration: see M Dodson and S Pritchard, “Recent Developments in Indigenous Policy: The Abandonment of Self-Determination?” (1998) (4)15 *Indigenous Law Bulletin* 4.
39. See B R Opeskin and D R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, Melbourne, 1997); S Pritchard “The significance of international law” at 2, in Pritchard (1998).

Royal Commission into Aboriginal Deaths in Custody

1.20 Reducing the rate at which Aboriginal people were sentenced to prison was a principal focus of the landmark RCIADIC, conducted between 1987 and 1991. It investigated and reported on the deaths of some 99 Aboriginal people who had died while detained in police, prison or juvenile detention custody between 1980 and 1989, and on the underlying issues associated with the deaths. It was the RCIADIC's conclusion that Aboriginal people are more likely than non-Aboriginal people to die in custody because they are more likely to be in custody.⁴⁰ The RCIADIC's Final Report contained a total of 339 recommendations, many aimed at preventing deaths in custody, and others directed at eliminating the social, economic and cultural disadvantages that Aboriginal people suffer. The RCIADIC strongly emphasised the need for Aboriginal and Torres Strait Islander people to be fully involved in the implementation of its recommendations. Empowerment and self-determination were seen as key elements in overcoming disadvantage.⁴¹ This theme has been adopted by the Commission in relation to its inquiries into sentencing.

1.21 The section of the RCIADIC Report containing recommendations designed to reduce the rate of incarceration of Aboriginal people is particularly relevant to this Report. The RCIADIC Report considered how the court process, particularly sentencing, contributed to the rate of imprisonment. It drew attention to the way court processes could disadvantage Aboriginal people. For example, the Report analysed the way in which a person's prior history of contact with the criminal justice system can impact on the sentence received, the problem of imprisonment for fine default, and the role that non-custodial sentencing options can play in reducing levels of incarceration. Principal recommendations called for enshrining in legislation the principle of imprisonment as a last resort;⁴² legislating to expunge past convictions from criminal records;⁴³ ensuring an adequate and appropriate range of non-custodial sentencing options for Aboriginal offenders; and providing for greater involvement of Aboriginal communities in sentencing.⁴⁴ Related to sentencing are recommendations

40. RDIADIC Report, *Overview* at para 1.3.1.

41. RDIADIC Report, vol 2 at para 20.1.1-20.1.8 and more generally para 20.2-20.6.4; vol 4 at para 27.1-27.92.

42. RDIADIC Report, vol 2 at para 22.1.14 (Recommendation 92).

43. RDIADIC Report, vol 2 at para 22.1.14 (Recommendation 93).

44. RDIADIC Report, vol 2 at para 22.4.51 (Recommendation 104), and 22.5.13 (Recommendations 110 and 111).

about policing, arrest and bail practices, the use of diversionary strategies and policies for juveniles.

1.22 In its latest review of the Government's implementation of the RCIADIC Report, AJAC criticised not only the Government's response to the Report, but also the RCIADIC recommendations themselves.⁴⁵ AJAC considered that, among other things, the recommendations focused on procedure rather than intended outcomes, leaving unaddressed broader questions concerning the underlying causes of Aboriginal contact with the criminal justice system, and the structural deficiencies in the way in which the system deals with Aboriginal offenders. In other respects, AJAC argued, the recommendations are so broad as to be meaningless.

Implementation of Royal Commission recommendations

1.23 Implementation by Governments of recommendations is monitored in numerous ways, including statistical collection by the Australian Institute of Criminology, regular reports by Governments, AJAC and the Deaths in Custody Watch Committees in each jurisdiction. The Aboriginal and Torres Strait Islander Commission ("ATSIC") has reported on behalf of the Commonwealth Government, and also in specially commissioned reports.⁴⁶ The Aboriginal and Torres Strait Islander Social Justice Commissioner's annual reports, and reports emanating from independent sources, including Amnesty International, also review progress on implementation.

45. AJAC Implementation Review.

46. For example, Cunneen and McDonald (1997); and Office of the Social Justice Commissioner, *Indigenous Deaths in Custody 1989-1996* (ATSIC, Canberra, 1996).

1.24 In its latest implementation review, AJAC noted that, of the 229 RCIADIC recommendations that apply directly to New South Wales, approximately one half have not been implemented.⁴⁷ Of the other half, AJAC argued that the actual level of implementation must be questioned for lack of definable outcome or performance measures, or any sustained improvement. Implementation is apparently more effective in some areas than others. For example, AJAC reported that recommendations concerning coronial inquiries and custody practices have virtually all been implemented. The areas most neglected are those which apply to the whole of Government, and involve the inclusion of Aboriginal people in the development, delivery and evaluation of programs and services that affect them.⁴⁸

1997 Ministerial Summit

1.25 In July 1997, the Commonwealth Government convened a national Ministerial Summit on Indigenous Deaths in Custody to deal with strategies to reduce deaths in custody and the over-representation of Indigenous people within the criminal justice system. It was preceded by an Indigenous Summit in February 1997, which emphasised that governments should recognise the important role Indigenous people must play in the design and delivery of successful strategies and programs to reduce incarceration rates. Presented to the Summit were best practice examples from all jurisdictions. The recommendations made in this Report concerning the role of the Aboriginal community in sentencing are drawn from some of those examples.

1.26 The Ministerial Summit issued an Outcomes Statement⁴⁹ committing Governments, in partnership with Indigenous peoples, to develop strategic plans for funding and service delivery for Indigenous programs to address underlying social, economic and cultural issues, justice issues, customary laws, law reform and funding.

47. AJAC Implementation Review at 8.

48. AJAC Implementation Review at 8. The Commission discusses the involvement of Aboriginal communities in the criminal justice system in Chapter 4.

49. Signed by most Indigenous and Government representatives, including the then NSW Attorney General, the Hon J W Shaw QC MLC. ATSIC, Mick Dodson, the former Social Justice Commissioner, and the Northern Territory Government, did not sign the Statement.

Other inquiries

1.27 Matters relevant to sentencing of Australia's Indigenous people, and their involvement in the criminal justice system, have been the subject of investigation and report in numerous other inquiries. Prominent among those is the ALRC's Report on *The Recognition of Aboriginal Customary Laws*.⁵⁰ The five reports produced by the former Aboriginal and Torres Strait Islander Social Justice Commissioner between 1993-1997,⁵¹ and the first report by the current Commissioner,⁵² deal with the issues underlying Indigenous imprisonment, as well as juvenile justice and diversionary strategies. Reports by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs also contain relevant recommendations.⁵³

1.28 Reports of the Australian National Committee on Violence⁵⁴ and the National Inquiry into Racist Violence⁵⁵ recommend means to deal with extreme levels of violence in some Aboriginal communities and the endemic problems of racist violence. Proposals relevant to aspects of sentencing of Aboriginal offenders are contained in numerous reports on general criminal

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50. ALRC 31. That Report's relevance for sentencing is discussed in detail in Chapter 3.
 51. Australia, Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report* (M Dodson, AGPS, Canberra, 1993); Australia, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report* (M Dodson, AGPS, Canberra, 1994); Australia, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report* (M Dodson, AGPS, Canberra, 1995); Australia, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fourth Report* (M Dodson, AGPS, Canberra, 1996) – see especially Chapter 2: "Diversion from Custody"; Australia, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fifth Report* (M Dodson, AGPS, Canberra, 1997).
 52. Social Justice Commissioner Report (1999).
 53. See, eg, Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Mainly Urban* (November 1992); Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Aboriginal Legal Aid* (AGPS, Canberra, 1980); Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our Future, Our Selves* (1990).
 54. Australian National Committee on Violence, *Violence: Directions for Australia* (AIC, Canberra, 1990) at 165ff.
 55. Australia, HREOC, *Racist Violence: Report of the National Inquiry into Racist Violence* (AGPS, Canberra, 1991) ("HREOC Racist Violence Report").

justice issues such as juvenile justice,⁵⁶ female prisoners,⁵⁷ and the children of imprisoned parents.⁵⁸ Numerous studies into specific aspects of the involvement of Aboriginal people with the criminal justice system also deal with sentencing.⁵⁹

Bringing Them Home

1.29 In 1997, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families submitted its report, *Bringing Them Home*. The Human Rights and Equal Opportunity Commission (“HREOC”) conducted this inquiry into what has become known as “the Stolen Generations”, that is, the large numbers of Indigenous children forcibly removed from their families and communities for the greater part of the twentieth century. The Report highlights the effect of separation on individuals, the families and communities from whom they were taken, and on succeeding generations.

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56. See, eg, NSW, Community Services Commission, *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals* (Discussion Paper, December 1996); Juvenile Justice Advisory Council of NSW, *Future Directions in Juvenile Justice in New South Wales* (Green Paper, February 1993); NSW, Department of Juvenile Justice, *Breaking the Crime Cycle: New Directions for Juvenile Justice in NSW* (White Paper, 1994); NSW Parliament, Legislative Council Standing Committee on Social Issues, *Juvenile Justice in New South Wales* (Report No 4, May 1992); NSW, Youth Justice Coalition, *Kids in Justice: A Blueprint for the 90s* (Sydney, 1990).
57. See NSW Parliament, *Report of the NSW Women in Prison Task Force* (March 1985).
58. See NSW Parliament, Legislative Council Standing Committee on Social Issues, *A Report into Children of Imprisoned Parents* (Report No 12, July 1997).
59. See, eg, International Commission of Jurists, Australian Section, *Report of the Aborigines and the Law Mission* (1992); Amnesty International, *Australia: A Criminal Justice System Weighted Against Aboriginal People* (January 1993); Amnesty International, *Australia, Deaths in Custody: How Many More?* (June 1997); C Cunneen, *A Study of Aboriginal Juveniles and Police Violence* (HREOC, November 1990); C Cunneen and T Robb, *Criminal Justice in North-West New South Wales* (Bureau of Crime Statistics and Research, Sydney, 1987); F Gale, R Bailey-Harris, and J Wundersitz, *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice* (Cambridge University Press, 1990); G Luke and C Cunneen, *Aboriginal Over-Representation and Discretionary Decisions in the New South Wales Juvenile Justice System* (Juvenile Justice Advisory Council of NSW, January 1995).

In proposing minimum standards for treatment of Indigenous children, the Report recommended that custodial sentences should be a last resort, and that Indigenous organisations and communities play a major role in the sentencing of Indigenous juvenile offenders.

1.30 Many Aboriginal offenders (or their families) are members of the Stolen Generations. Its effect on contemporary Aboriginal people was frequently made known to the Commission during consultations. The inter-generational impact of removal policies on the mental health of individuals and communities, the parenting skills of those growing up in institutions, the loss of family and the sense of identity and heritage, and the residue of unresolved anger and grief in the Aboriginal community, is such that courts should be aware of its relevance in the lives of Aboriginal people being sentenced.⁶⁰

THE INTERNATIONAL SCENE

1.31 Australia is not unique in the manner in which its Indigenous population suffers from dispossession, and severe socio-economic disadvantage, alienation and extremely high levels of involvement in the criminal justice system.⁶¹ In Canada, several inquiries have considered strategies for improving the treatment of Indigenous people in the criminal justice system and developing policies more sensitive to their traditional legal customs and cultures. The most recent was the Royal Commission on Aboriginal Peoples.⁶² The Governments of Alberta,⁶³ Manitoba⁶⁴

60. See *Bringing Them Home*; and Aboriginal Legal Service of Western Australia (Inc), *Telling Our Story: A Report by the Aboriginal Legal Service of Western Australia (Inc) on the removal of Aboriginal Children from their families in Western Australia* (July 1995).

61. See Cunneen and McDonald (1997), Tables 16 and 17 at 35-36.

62. See Canadian Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Canada Communication Group, Ottawa, 1996); Minister of Supply and Services, *Aboriginal Peoples and the Justice System: Report of the Round Table on Aboriginal Justice Issues* (Ottawa, 1993).

63. R A Cawsey, *Justice on Trial, Report of the Task Force on the Criminal Justice System and its Impact on Indian and Métis People* (Alberta, Edmonton, 1991).

64. A C Hamilton and C M Sinclair, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of*

Saskatchewan⁶⁵ and Nova Scotia,⁶⁶ as well as the Law Reform Commission of Canada,⁶⁷ have also investigated these issues. In New Zealand, aspects of Indigenous justice systems have been examined, and, in the case of conferencing, adopted into the formal justice system.⁶⁸ One of the functions of the Law Commission of New Zealand is to consider the Maori perspective in developing proposals for reform.

1.32 The newly independent nations in the South Pacific have pluralist legal systems which retain Indigenous customary law systems for the majority Indigenous population, integrated in various ways into common or civil law systems. Local court systems in ex-colonial nations such as Papua New Guinea, Vanuatu, Tuvalu, Western Samoa, Kiribati and the Solomon Islands, apply customary law for offences of a criminal nature, although usually with limited jurisdiction.⁶⁹

The relevance of the international scene

1.33 Within Indigenous communities throughout the world, the place of custom-based resolutions, restorative justice and community healing in the criminal justice system, have been explored in recent years, opening channels for the formal legal system to deal with offenders in ways that show greater understanding of the nature of those communities. Several countries, notably

Manitoba: volume 1, The Justice System and Aboriginal People (Queen's Printer, Winnipeg, 1991); L McNamara, "Autonomy-Based Solutions and Criminal Justice Reform: A Comparison of the Recommendations of the Australian RCIADIC and the Aboriginal Justice Inquiry of Manitoba" (1992) 2(54) *Aboriginal Law Bulletin* 4.

65. P Linn, *Report of the Saskatchewan Indian Justice Review Committee* (1992); P Linn, *Report of the Saskatchewan Métis Justice Review Committee* (1992).
66. Nova Scotia, *Royal Commission of Inquiry into the Donald Marshall Jr Prosecution* (1988).
67. Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and Search for Justice* (Report 34, 1991).
68. See M Jackson, *The Maori and the Criminal Justice System: A New Perspective: He Whaipanga Hou* (Wellington, 1988); New Zealand, Ministry of Justice, *Sentencing Policy and Guidance* (Discussion Paper, Wellington, 1997) at Chapter 10; New Zealand, Ministry of Justice, *Restorative Justice: A Discussion Paper* (Wellington, 1996). For a discussion of conferencing in New Zealand see para 4.29.
69. M Findlay, "Decolonising Restoration and Justice" (1998) 10 *Current Issues in Criminal Justice* 85. See also D Weisbrot, A Paliwala, and A Sawyerr (eds), *Law and Social Change in Papua New Guinea* (Butterworths, Sydney, 1982).

New Zealand and Canada, have instigated programs to facilitate greater participation of Aboriginal people in the criminal justice system. These examples provide valuable guidance for making the criminal justice system more responsive to the needs of Australian Indigenous people.

1.34 As successful as some overseas initiatives in sentencing appear to have been, the Commission is wary of recommending that particular programs or processes developed specifically within Indigenous communities in other locations be transplanted into Indigenous communities in New South Wales. It is a dangerous and simplistic assumption to equate cultural norms, so that a theory or model developed in one culture is co-opted for application in an alien environment. The functioning of programs and processes in other Indigenous communities, for example, sentencing circles or healing lodges in Canada, are very culturally specific.⁷⁰ However, their philosophy and principles are relevant and can inspire and inform decisions about adopting similar approaches locally. This is to be encouraged. An example can be found in plans for Department of Corrective Services personnel to investigate the operation of healing lodges in Canada so as to develop alternatives to imprisonment for Aboriginal women,⁷¹ and AJAC's consideration of sentencing circles.⁷²

STATEMENT OF COMMITMENT TO ABORIGINAL PEOPLE

1.35 In November 1997, *The New South Wales Government Statement of Commitment to Aboriginal People* was published, setting out the Government's determination to lead Australia towards justice and equality for Aboriginal people. The Statement addresses numerous areas of Government policy as it affects the Aboriginal people of this State, expressing the Government's priorities for redressing the complex and inter-related disadvantages experienced by Aboriginal people. The Government proposes in the Statement to move forward in true partnership with Aboriginal people, and with an integrated approach by Government agencies.

1.36 In relation to the "Government's commitment to a more responsive

70. See J Roberts and C LaPrairie, "Sentencing Circles: Some Questions Unanswered" (1996) 39 *Canadian Law Quarterly* 69.

71. See Chapter 6.

72. See para 4.32-4.34.

justice system”, promised strategies include encouraging Aboriginal involvement in the formulation of policies and programs within law and justice; collaboration with Aboriginal communities in the implementation of non-custodial and post-release programs; and making preventative measures central to law and justice policy. The special needs of Aboriginal women with regard to domestic violence, legal representation and the impact of incarceration of male family members, are recognised. The Government proposes a range of initiatives such as: improved reporting on the implementation of RCIADIC recommendations,⁷³ employing Aboriginal Court Liaison Officers; increasing access for convicted Aboriginal offenders to non-custodial options such as home and periodic detention; making custodial practices more responsive to the needs of Aboriginal detainees and assisting them to develop skills to help them break the reoffending cycle; and innovative strategies for young offenders to divert them from contact with the criminal justice system.

1.37 The Statement of Commitment indicates that the Government has accepted in principle the need to work in partnership with Aboriginal people on law and justice issues. Many significant initiatives have already been implemented or are under active consideration. It is in this context that the Commission makes the recommendations in this Report.

Delivery of programs for Aboriginal people

1.38 Development and delivery of programs in relation to sentencing should be conducted in accordance with the *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders*, endorsed by the Council of Australian Governments in 1992. This document indicates the roles and responsibilities of Governments in planning and delivering programs and services which redress the inequality and disadvantage of Australian Indigenous peoples.

73. Although AJAC was critical of the Government’s reporting on RCIADIC implementation in its latest implementation review: see AJAC Implementation Review at 8, and para 1.12 of this Report.

NATURE AND CONDUCT OF THE COMMISSION'S INQUIRY

1.39 In preparing this Report, the Commission sought comments and submissions from organisations and individuals in New South Wales with an interest in Aboriginal offenders. In particular, comments were sought from AJAC, Aboriginal legal services, relevant government departments, courts, the legal profession, and academics in other jurisdictions. Written submissions received are listed in Appendix A.

1.40 The two major issues on which the Commission sought guidance were the recognition of Aboriginal customary laws in the context of sentencing, and the need for legislative statement of the sentencing principles to be applied to Aboriginal offenders. The other main focus of the Commission's inquiries was the provision of culturally appropriate sentencing options for Aboriginal offenders. The use of community justice mechanisms and the roles which could be played by the community in sentencing were extensively explored. Subsidiary issues raised in consultation included problems with particular sentencing options currently in use in New South Wales, the specific needs of female Aboriginal offenders, issues relating to legal representation, difficulties for Aboriginal offenders with language in the court room, and cross-cultural awareness for the judiciary and other personnel in the criminal justice system. An important aspect of the Commission's inquiries was to identify those programs and processes followed in other jurisdictions which could be considered appropriate to recommend for use in New South Wales.

1.41 No consultation paper was published by the Commission. The issues were clear in the light of the numerous other reports previously noted, and the extensive public debate and writing in the area. Consequently, consultation occurred in the main by direct contact with organisations and individuals identified as being able to contribute to our deliberations. Co-operation came from within the Attorney General's Department, specifically the Aboriginal Justice Advisory Council, the Norimbah Unit, and the Aboriginal Staff Network. The Indigenous Services Unit within the Department of Corrective Services provided insight into the position of Aboriginal offenders serving sentences of imprisonment, and the practicalities involved in providing culturally appropriate sentencing options. Also from that Department, the Women's Unit and the Probation and Parole Service gave valuable assistance.

1.42 The Commission conducted surveys of both District Court judges and Local Court magistrates in relation to various issues being considered for this Report. We acknowledge the co-operation given by officers of the Judicial Commission, the Chief Judge of the District Court, the Chief Magistrate and Deputy Chief Magistrates of the Local Court, and all those judges and magistrates who completed a questionnaire. Public Defenders also completed a similar questionnaire.

1.43 Every effort was made to direct our inquiries to Aboriginal people, and we met with several representative organisations, as well as Aboriginal people individually. One of the Commissioners on this reference's Division is His Honour Judge Bob Bellar, the first Aboriginal judge in this State. Those contributions were vital to our understanding of the issues with which this Report deals. The Commission expresses its thanks to them.

1.44 The consultation process open to the Commission is inherently limited. While it has been important to try to understand what Aboriginal and Torres Strait Islander people in New South Wales think about the issues under consideration, Indigenous communities do not speak with one voice, but, like all communities, embody differences of opinion. The Commission was made aware of these diverse views, and has made an independent assessment in developing the recommendations in this Report.

THE COMMISSION'S APPROACH

The role of the Aboriginal community

1.45 The Commission is acutely aware of its position in making recommendations to the Attorney General about sentencing Aboriginal offenders and the role the Aboriginal community might play in sentencing and the criminal justice system generally. It is our contention that the best solutions to the problems confronting the Government and the community will come from the Aboriginal community itself, and that there must be a partnership between the two in order to implement lasting and effective strategies to deal with the issues. Our recommendations reflect this position.

Recommendations as to sentencing

1.46 The number of Indigenous people in prison and before the criminal

courts indicates a growing social, cultural and economic problem, not just for the Aboriginal and Torres Strait Islander communities, but for New South Wales and Australia as a whole. It points to a climate which is failing Indigenous people in the following ways. First, there is a lack of adequate or appropriate social and economic support structures to facilitate a life without crime. Secondly, once an offence has been committed, the criminal justice system often fails to consider cultural factors which may seem irrelevant to the non-Indigenous community, but may be crucial to explaining the demeanour of an Indigenous person in court or the context in which the offence was committed. Thirdly, in some cases, the system does not provide the infrastructure necessary to make non-custodial sentences a viable option. Finally, the criminal justice system is not achieving sufficient levels of rehabilitation of Indigenous offenders, resulting in high levels of recidivism.

1.47 This is not to say that Indigenous offenders are not responsible for their actions and the crimes they commit. Rather, it puts into context the Commission's recommendations, which are aimed at slowing the increase in the numbers of Indigenous offenders, not by imposing more stringent penalties, but by attempting to address some of the underlying causes of Indigenous over-representation in prison.⁷⁴ The Commission is strongly of the view that diversionary strategies which look at the causes of offending behaviour, developed in consultation with Indigenous communities, would be far more effective than harsh enforcement measures in reducing the numbers of Indigenous offenders before the courts.

Structure of the Report

1.48 Sentencing principles, and their application to Aboriginal and Torres Strait Islander people, are discussed in Chapter 2. The recognition of Aboriginal customary laws within sentencing is considered in Chapter 3.

1.49 For sentencing to be truly effective in achieving goals not only of punishment, but also rehabilitation and community healing, sentencing initiatives must be relevant and responsive to particular community needs. Chapter 4 examines local and overseas programs aimed at achieving Aboriginal input into the sentencing process.

74. The Commission is limited in this respect by its Terms of Reference, which ask it to look only at the sentencing aspect of the criminal justice system.

1.50 The operation of sentencing options is considered in Chapter 5, while Chapter 6 focuses on particular issues relevant to the sentencing of Aboriginal women offenders. Matters relating to the need for cross-cultural understanding, including aspects of communication, are considered in Chapter 7.

Beyond sentencing

1.51 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. In consultations, many people raised legitimate concerns about various aspects of the criminal justice system, for example, practices of police and prosecuting counsel, and bail decisions and conditions and how they apply in practice. The Commission considers, however, that these matters lie outside the scope of this Report. Notwithstanding these limitations, the recommendations made by the Commission in relation to sentencing will inevitably reach out to the criminal justice system generally.

1.52 Given that the root causes of Indigenous offending lie in disadvantage and despair occasioned by poverty, unemployment, addictive behaviour, poor levels of education and health, and social and economic disempowerment, addressing them will not be easy. Commitment to effecting positive changes in these areas is essential, however, to create a climate whereby Aboriginal people have true equality before the law.

Reconciliation

1.53 During the course of this inquiry, Australia has been involved in taking steps towards national reconciliation with Aboriginal and Torres Straight Islander peoples.⁷⁵ The recommendations of this Report are intended to be consistent with the spirit of reconciliation.

75. The Council for Aboriginal Reconciliation was established by the Council for Aboriginal Reconciliation Act 1991 (Cth). On 27 May 2000, at Corroboree 2000 in Sydney, the Council presented its national reconciliation documents, *Corroboree 2000: Towards Reconciliation* and the *Roadmap for Reconciliation*.

2. Sentencing principles

- Introduction
- General sentencing discretion
- Sentencing principles and Aboriginal offenders
- Specific factors considered in sentencing Aboriginal offenders
- The need for legislative provisions

INTRODUCTION

2.1 In cases coming before the criminal courts, the judge or magistrate exercises a discretion in determining an appropriate sentence. Judicial officers are guided in the exercise of that discretion by sentencing principles developed through the common law, supplemented to some extent by statute. These general principles apply to every offender being sentenced, regardless of race or background. In applying sentencing principles, a judicial officer is required to consider all of the material circumstances of each case and each individual offender. To do otherwise would be an arbitrary and inflexible application of the law.

2.2 The cultural or social background of the offender may be a relevant consideration. Aboriginality does not of itself mean that an offender will automatically receive special or lenient treatment, since it may have no bearing on the commission of the offence. However, in some cases the sentencing judge may decide that, because of an offender's Aboriginality, he or she has been so disadvantaged that it would be unfair not to take this into consideration in determining the level and type of sentence to be imposed. The cultural context in which an offence is committed, together with the impact of Aboriginal customary law on sentencing, is discussed in Chapter 3.

2.3 This chapter focuses on cases where a person's Aboriginality is relevant to determining the appropriate sentence. Where such relevance has been established, the Commission looks at how the general sentencing principles may be applied, and the type of specific factors that courts may consider. It also examines the limitations of sentencing in reducing recidivism and in addressing the basic problems which contribute to Aboriginal over-representation in the criminal justice system.

GENERAL SENTENCING DISCRETION

2.4 In exercising sentencing discretion, a judicial officer selects an appropriate sanction from within the range of penalties prescribed for a particular offence, endeavouring to "make the punishment fit the crime, and the circumstances of the offender, as nearly as may be".¹ The sentence should

1. *Webb v O'Sullivan* [1952] SASR 65 at 66 (Napier CJ); see also *Budget Nursery Pty Ltd v FCT* (1989) 42 A Crim R 81 at 85.

be the minimum necessary to achieve the purposes of punishment.² The objectives and aims of punishment are traditionally stated as retribution, deterrence, rehabilitation and incapacitation. The Commission, in its earlier publications on sentencing, added to these the further objective of denunciation, but not that of reparation.³ In its first Report on Sentencing, the Commission recommended that legislation should expressly provide a statement of the purposes for which a court may impose sentence,⁴ but a statutory hierarchy of purposes was rejected. The process of sentencing, it was recognised, involves a complex and intricate interplay, and the sentence determined by the court in any particular instance emerges as an instinctive synthesis, resulting from a compromise between “distinct and partly conflicting principles” as applied to the almost infinitely variable facts and circumstances of the individual case.⁵

2.5 One of the core principles which govern the exercise of the courts’ discretion in sentencing is that of proportionality. This principle states that a punishment must not exceed that required by the objective seriousness of the offence, independent of concerns for the protection of the public or the rehabilitation of the offender.⁶ Factors relevant to determining proportionate punishment are the degree of harmfulness of the conduct, and the extent of the offender’s culpability.⁷ Other common law principles which courts apply in sentencing are consistency (avoiding inexplicable disparities between the sentences given to co-offenders and between offenders generally accused of the same or similar types of offences)⁸ and totality (ensuring that the aggregate sentence for a series of convictions is just and appropriate to the totality of the criminal behaviour).⁹ Courts are also to reserve the maximum

2. *Webb v O’Sullivan* [1952] SASR 65.

3. See New South Wales Law Reform Commission, *Sentencing* (Discussion Paper 33, 1996) (“NSWLRC DP 33”) at para 3.2-3.24; and New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996) (“NSWLRC Report 79”) at para 14.10-14.18. See also the discussion in *R v Veen (No 2)* (1988) 164 CLR 465.

4. NSWLRC Report 79, Recommendation 85 at para 14.10.

5. H L A Hart, *Punishment and Responsibility* (Clarendon Press, Oxford, 1968) at 1. See also *R v Engert* (NSW, CCA, No 60654/95, 20 November 1995, unreported) at 1-2 (Gleeson CJ); NSWLRC Report 79 at para 14.13.

6. *R v Veen* (1979) 143 CLR 458 at 467, 468, 482-483, and 495.

7. See *R v Veen (No 2)* (1988) 164 CLR 465.

8. See *Lowe v The Queen* (1984) 154 CLR 606; *Bugmy v The Queen* (1990) 169 CLR 525.

9. See NSWLRC DP 33 at para 3.41.

punishment available for an offence for the most serious type of offence in each category to which that punishment applies,¹⁰ and only pass sentence for the elements of the crime which have been proved against the accused.¹¹

Imprisonment as a sanction of last resort

2.6 Perhaps the most fundamental principle of sentencing is that imprisonment should be a punishment of last resort, to be imposed only where a non-custodial punishment is inappropriate.¹² This principle has statutory recognition in New South Wales,¹³ and in several other Australian jurisdictions.¹⁴ It is a principle acknowledged to be of great importance for the sentencing of Indigenous offenders whose rates of imprisonment show a significant degree of over-representation.¹⁵

2.7 In its Discussion Paper on Sentencing, the Commission considered whether there was a need to give greater effect to the principle of imprisonment as a sanction of last resort in New South Wales.¹⁶ The Commission proposed that, where possible, offenders guilty of offences which would attract short terms of imprisonment should generally be diverted from custodial sentences. This would affect a large number of offenders, given that of the 7,121 offenders sentenced to a term of imprisonment in the Local Courts in 1999, 6,145 (86.29%) were given a sentence of an average of six months or less. The average term of imprisonment for all offences in the

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10. *R v Oliver* (1980) 7 A Crim R 174; *ibbs v The Queen* (1987) 163 CLR 447 at 451-452.
 11. *De Simoni v The Queen* (1981) 147 CLR 389.
 12. *R v Parker* (1992) 28 NSWLR 282.
 13. The *Justices Act 1902* (NSW) s 80AB prevents a magistrate from imposing an order involving full-time imprisonment “unless satisfied, having considered all possible alternatives, that no other course is appropriate”. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1); *Children (Criminal Proceedings) Act 1987* (NSW) s 33(2); and *Young Offenders Act 1997* (NSW) s 7a in relation to juveniles.
 14. *Crimes Act 1914* (Cth) s 17A; *Sentencing Act 1991* (Vic) s 5(4); *Penalties and Sentences Act 1992* (Qld) s 9(2)(a)(i); *Crimes Act 1900* (ACT) s 429C; *Sentencing Act 1995* (WA) s 6(4).
 15. The RCIADIC recommended that governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort: Recommendation 92.
 16. NSWLRC DP 33 at para 3.26-3.34.

Local Courts was 4.8 months.¹⁷ The figures for Aboriginal offenders are comparable: of the 1,323 Aboriginal offenders sentenced to a term of imprisonment in the Local Courts in 1999, 1,143 (86.39%) were given a sentence of an average of six months or less. The average term of imprisonment for all offences by Aboriginal offenders in the Local Courts was 4.6 months.¹⁸

2.8 In Report 79, the Commission recommended that judges and magistrates should provide reasons justifying any decision to impose a sentence of imprisonment of six months' duration or less, including reasons why a non-custodial sentence is not appropriate.¹⁹ The Commission holds firmly to the view that the recommendation in its final form will have the effect of directing the mind of the sentencing court not only to the suitability of imprisonment, but also to the suitability of other sentencing options.²⁰

Limits on the principle of imprisonment as a last resort

Mandatory sentencing

2.9 In some States and Territories, the principle of imprisonment as a last resort is over-ridden by statutes making imprisonment mandatory for certain offences.²¹ While not directly relevant to the position in NSW, the

17. New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1999* (Statistical Report Series, 2000) at Tables 1.7, 1.11.

18. New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1999* at Tables 1.8, 1.12. The Australian Bureau of Statistics reported that, in 1998, 46.5% of Indigenous prisoners were serving sentences of 12 months or less, compared with 37.7% of the non-Indigenous prison population: ABS, *Prisoners in Australia: Results of 1998 National Prisoner Census* (ABS, June 1999) ("*Prisoners in Australia 1998*") at 50 and 78.

19. NSWLRC Report 79, Recommendation 40, para 8.2-8.7.

20. Sentencing options are examined in detail in Chapter 5.

21. Western Australia imposes a minimum term of 18 months imprisonment where an offender is convicted of certain serious offences for the third or subsequent time: see *Young Offenders Act 1994* (WA) s 124 in relation to juveniles, and *Criminal Code* (WA) s 401 in relation to adult offenders. The Northern Territory has mandatory sentencing provisions concerning property offences for juveniles and adults: see *Juvenile Justice Act 1996* (NT) s 53AE-G and *Sentencing Act 1995* (NT) s 78A-B, respectively. For judicial comment on the impact of these provisions on Aboriginal people: see *Wynbyne v*

Commission notes that the impact of these “mandatory sentencing” provisions, particularly as they apply to and affect young Indigenous people, has been the subject of much recent scrutiny, both in Australia and in the international arena. This focus reached its height in early 2000, following the death in custody of a 15 year old Aboriginal offender imprisoned under Northern Territory mandatory sentencing laws.²²

2.10 In March of 2000, the United Nations Committee on the Elimination of Racial Discrimination reported that the West Australian and Northern Territory’s mandatory sentencing schemes:

appear to target offences that are committed disproportionately by Indigenous Australians, leading to a racially discriminatory impact on (Indigenous people’s) rate of incarceration”.²³

The UN Committee expressed serious doubts as to the compatibility of mandatory sentencing laws with Australia’s international human rights obligations.²⁴ HREOC, the Aboriginal and Torres Strait Islander Social Justice Commission and the Law Council of Australia, have raised this same concern, and have called on the Federal Government to intervene to repeal these laws.²⁵ The Australian Senate Legal and Constitutional References Committee found that the West Australian and Northern Territory laws were in breach of the International Convention on Civil and Political Rights and the Convention on the Rights of the Child,²⁶ and recommended that the Commonwealth legislate to override the mandatory sentencing of juveniles in both states.²⁷ The Senate Committee also noted that the provisions had at least an indirect racially discriminatory effect, and called for this to be

Marshall (1997) 117 NTR 11.

22. M Kingston, “Sentencing laws linked to reconciliation” *The Sydney Morning Herald* (Saturday, 11 March, 2000) at 3.

23. Australia, Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing and Juvenile Offenders) Bill 1999* (AGPS, Canberra, 2000) (“SLCRC Report”) at 1.5.

24. “UN urges Howard to review State laws” *Sunday Telegraph* (Sunday, 26 March, 2000) at 19; “Australia thumbs nose at UN” *Sydney Morning Herald* (Friday, 31 March, 2000) at 1.

25. J Este and B Haslem, “Howard ‘must intervene’ on sentencing” *The Australian* (Friday, 18 February, 2000) at 14; for Law Council’s comments, see also K Lawson, “Top lawyer slates WA, NT sentencing” *The Canberra Times* (Friday, 18 February, 2000) at 3.

26. SLCRC Report at 5.91.

27. SLCRC Report at 8.19.

addressed.²⁸

2.11 Following debate of the Senate Committee's Report, the Prime Minister negotiated a compromise agreement with the Chief Minister of the Northern Territory to increase the use of diversionary proceedings as an alternative to mandatory sentencing, and to increase the age for "juveniles" from 17 to 18.²⁹ Under the agreement, diversion will be compulsory for minor offences committed by juveniles, and within police discretion for more serious offences, with the Commonwealth to allocate \$5 million in funding for this purpose.³⁰

2.12 The Northern Territory Law Society has objected to the agreement as a substitute for Commonwealth legislative action, on the basis that, by requiring offenders to admit to the offence prior to diversion, it compromises fundamental principles of justice such as the presumption of innocence.³¹ The Northern Territory Police Association has also expressed reservations in regard to the agreement, arising out of the broad discretion given to police in the decision to lay charges in relation to serious offences.³²

Lack of non-custodial options

2.13 The application of the principle of imprisonment as a last resort will be limited in situations where non-custodial alternatives are unavailable or impractical for various reasons. The Commission deals with sentencing options in Chapter 5.

28. SLCRC Report at 6.28.

29. M Grattan, "A sop, but enough to quell rebels" *The Sydney Morning Herald* (Tuesday, 11 April, 2000) at 2; B Lagan, "Lawyers ask: What about presumed innocence?" *The Sydney Morning Herald* (Wednesday, 12 April, 2000) at 4.

30. M Grattan, "A sop, but enough to quell rebels" *The Sydney Morning Herald* (Tuesday, 11 April, 2000) at 2; B Lagan, "Lawyers ask: What about presumed innocence?" *The Sydney Morning Herald* (Wednesday, 12 April, 2000) at 4.

31. B Lagan, "Lawyers ask: What about presumed innocence?" *The Sydney Morning Herald* (Wednesday, 12 April, 2000) at 4.

32. B Lagan, "Lawyers ask: What about presumed innocence?" *The Sydney Morning Herald* (Wednesday, 12 April, 2000) at 4. The NT Police Association expressed concern that the width of this discretion could open police decisions to direct legal challenge and the prospect of judicial review.

Factors relevant to sentencing generally

2.14 Within the framework provided by the general principles, the common law, and now legislation in several jurisdictions, indicates the various factors concerning the offence and the offender which may also be taken into account in determining an appropriate sentence. An extensive list of factors exists, derived from the common law.³³ A recent trend in sentencing in Australian jurisdictions has been to incorporate guidance within legislation as to those factors which should be taken into account, with the aim of achieving a more rational and consistent approach to sentencing.³⁴ The factors contained within the various pieces of legislation are generally drawn from the common law, but not exhaustively so, and differences exist between jurisdictions. In the Australian Capital Territory and at the Commonwealth level, sentencing legislation requires courts to take into account an offender's cultural background, when relevant to sentencing.³⁵

2.15 In its Report on Sentencing, the Commission declined to recommend that sentencing legislation in New South Wales follow the trend to include such factors, preferring reliance on the common law statement of principles.³⁶ The factors considered by the courts to be relevant fall into five broad categories,³⁷ namely:

- the nature of the offence;
- the nature of the offender;
- the offender's response to the charges;
- the effect of the offence and sanction; and

33. See, generally, NSWLRC DP 33 at Chapter 5.

34. *Criminal Law (Sentencing Act) 1988* (SA) s 10; *Crimes Act 1914* (Cth) s 16A; *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2); *Crimes Act 1900* (ACT) s 429A; *Sentencing Act 1995* (NT) s 5(2). But see *Sentencing Act 1995* (WA) s 6-8.

35. See *Crimes Act 1914* (Cth) s 16A(2)(m) and *Crimes Act 1900* (ACT) s 429A(1)(k).

36. See NSWLRC Report 79 at para 14.14-14.18. The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides for the NSW Court of Criminal Appeal to issue guideline sentencing judgments in relation to any matter on application from the Attorney General: s 37.

37. These categories are derived from R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (OUP, Melbourne, 1985) at Chapter 11, and K Warner, *Sentencing in Tasmania* (Federation Press, Sydney, 1991) at Chapter 11.

- the sentence imposed on a co-offender.

Within the broad category of the nature of the offender, a person's cultural or racial background may be a relevant factor to take into consideration.³⁸ Where an Aboriginal offender is being sentenced, his or her background is potentially relevant to all or most of the categories noted above. This is discussed below.

SENTENCING PRINCIPLES AND ABORIGINAL OFFENDERS

Relevance of Aboriginality to sentencing

2.16 Aboriginal people are subject to the protection and sanction of the criminal law in the same way as other members of the community. In *Mabo v Queensland (No 2)*,³⁹ the High Court considered recognition of Aboriginal criminal law as an alternative body of law operating alongside the Australian common law.⁴⁰

The court asserted the universality of the criminal law's operation, applying to people of Aboriginal descent as to all people in Australia, and not subject to their acceptance, adoption, request or consent. The basic principle of equality before the law is offended, the court ruled, when different criminal sanctions apply to different persons for the same conduct; different sanctions, that is, arising from separate systems of criminal justice and laws.⁴¹

2.17 Under the common law, the mere fact that an offender is an Aboriginal person is, of itself, irrelevant to sentencing. To discriminate on the grounds of race in sentencing an offender would violate the fundamental principle of equality before the law, and, in some circumstances, might also contravene section 9 of the *Racial Discrimination Act 1975* (Cth).⁴² Nevertheless, the Aboriginality of an offender in a

38. *Neal v The Queen* (1982) 149 CLR 305 at 326; *R v Fernando* (1992) 76 A Crim R 58 at 62.

39. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

40. *Walker v New South Wales* (1994) 182 CLR 45. See S Yeo, "Case Note: Walker v New South Wales" (1995) 19 *Criminal Law Journal* 160.

41. *Walker v New South Wales* (1994) 182 CLR 45 at 49; see N Lofgren, "Aboriginal Community Participation in Sentencing" (1997) 21 *Criminal Law Journal* 127 at 130.

42. See *R v Rogers and Murray* (1989) 44 A Crim R 301 at 307 (Malcolm CJ).

particular case may have a bearing upon the question of sentence.⁴³ The High Court expressed the position in the following terms:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.⁴⁴

2.18 The circumstances for considering Aboriginality as a relevant factor in sentencing are considered extensively by Justice Wood in *R v Fernando*.⁴⁵

- (A) The same sentencing principles are to be applied in every case irrespective of the identity of the particular offender or his membership of an ethnic or other group but that does not mean 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 with 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

43. Most judges and magistrates surveyed by the Commission indicated that they thought it was necessary to know the person being sentenced was Aboriginal.

44. *Neal v The Queen* (1982) 149 CLR 305 at 326 (Brennan J). See also *R v Iginiwuni (NT, CCA, Muirhead J, No 6 of 1975, 12 March 1975, unreported)* at 23-25; and *R v Rogers and Murray* (1989) 44 A Crim R 301 at 306-307 (Malcolm CJ).

45. (1992) 76 A Crim R 58 at 62-63.

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.

- (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 demoralising 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.

2.19 These principles clearly assert the non-discriminatory nature of the general sentencing discretion, but recognise that they will be applied differently in every case. Judges and magistrates apply both objective and subjective tests to the matters before them. They look objectively at the

nature and seriousness of the offence and the available penalty range. They look subjectively at the circumstances of the offence, such as the location in which it was committed, and any relevant characteristics of the offender which may impact on why the offence was committed and the penalty which should be applied. Because of the “tragic truth” of “the litany of disadvantage” which frequently accompanies Aboriginality,⁴⁶ it is viewed by the courts as one factor which may shed light on the circumstances of the offence and should be taken into consideration in imposing a sentence. The principles enunciated in *Fernando* also note the need to give due weight to the public policy behind sentencing, that is, punishment of wrong-doing, rehabilitation and avoidance of recidivism.

2.20 Whether the particular offender falls within the principles considered in *Fernando* will be determined in the individual case. Aboriginal offenders are not an homogenous group,⁴⁷ and the circumstances of each offender must be considered individually. In the absence of specific evidence that Aboriginality had any impact on the commission of the offence, it should be taken into account only in a general way.⁴⁸ As Justice Toohey has noted:

Aboriginality may in some cases mean little more than the conditions in which the offender lives. In other cases it may be the very reason why the offence was committed.⁴⁹

Cases which have applied the *Fernando* principles

2.21 The principles expounded in *Fernando* have been accepted and applied in New South Wales. In some instances, especially those involving murder, the court has treated the objective seriousness of the offence as outweighing *Fernando*-type subjective considerations in the determination of sentence.⁵⁰

46. *R v Hickey* (NSW, CCA, No 60410/94, Simpson J, 27 September 1994, unreported) at 4.

47. *R v Woodley* (1994) 76 A Crim R 302 at 305-308; *R v Russell* (1995) 84 A Crim R 386 at 392 (Kirby P); see also C Charles, “Sentencing Aboriginal People in South Australia” (1991) 13 *Adelaide Law Review* 90.

48. *R v Russell* (1995) 84 A Crim R 386 at 392 (Kirby P).

49. Toohey J, unpublished address given to the National Criminal Law Congress on Aboriginal Customary Law (24 June 1988). See also *R v Fernando* (1992) 76 A Crim R 58 at 62.

50. *R v JB* (NSW, CCA, No 60683/97, 27 April 1999, unreported). See also *R v Hickey* (NSW, CCA, No 60410/94, Simpson J,

Fernando was similarly adopted, but the subjective considerations it contains distinguished, by the Court of Criminal Appeal in *R v Carr*,⁵¹ when it held that the *Fernando* considerations are not enlivened merely by the fact that the defendant was Aboriginal and had been drinking prior to the offence, but required some further evidence or argument, which was not present in that case. In *R v Cutmore*,⁵² the court suggested that *Fernando* may have particular application to circumstances where the offender and victim had a long standing association and where the offence arose in this context.

27 September 1994, unreported); *R v Cutmore* (NSW, CCA, No 60672/98, 28 May 1999, unreported).

51. [1999] NSWCCA 200.

52. (NSW, CCA, No 60672/98, 28 May 1999, unreported).

2.22 Generally, a court must order that at least three-quarters of a custodial sentence be served in prison: the remainder may be served on parole.⁵³ The court may vary the ratio between parole and non-parole periods if special circumstances exist. In several recent cases in New South Wales, consideration of the defendant's history of disadvantage as an Aboriginal person and long history of substance abuse⁵⁴ has resulted in shorter custodial terms and longer parole periods than would otherwise have been handed down. For example, in *R v King*,⁵⁵ the Court of Criminal Appeal upheld a sentence of one year imprisonment with a three year parole period. Similarly, in *R v Stone*,⁵⁶ the defendant had initially been sentenced to a term of 3 years' imprisonment for the offence of using an offensive weapon to prevent lawful apprehension.

The Court of Criminal Appeal relied on *Fernando* to reduce the sentence to a minimum custodial term of 18 months, with an additional parole period of 18 months. In *R v Alh*⁵⁷ and *R v Dixon*⁵⁸, both involving pleas for manslaughter, a 3 ½ year minimum and 4 year additional term, and a 5 year minimum and 4 ½ year additional term, were imposed respectively. In *R v Little*, in relation to a plea for murder, an 11 year minimum term, with an additional 5 years was imposed, the court giving weight to the fact that the accused had entertained suicidal thoughts while in custody.⁵⁹ More recently in *R v Jancek*,⁶⁰ the offender was sentenced to a minimum term of 2 years in prison and an additional parole period of 4 years in relation to the offence of assault with intent to rob with an offensive weapon.

2.23 The *Fernando* principles (or equivalent) have also been adopted in

53. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

54. *Fernando* principles E and G.

55. *R v King* (NSW, CCA, No 60721/95, 27 November 1996, unreported).

56. *R v Stone* (1995) 84 A Crim R 218.

57. (NSW, Supreme Court, No 70106/94, Dunford J, 26 May 1995 unreported).

58. (NSW, Supreme Court, No 70033/95, Loveday AJ, 18 November 1994, unreported).

59. (NSW, Supreme Court, No 70030/96, Hidden J, 17 October 1997, unreported).

60. *R v Jancek* (NSW, Supreme Court, No 70015/98, James J, 23 November 1999, unreported). In this case, the *Fernando* principles in relation to alcohol abuse were extended to apply to other forms of substance abuse, including heroin addiction.

other Australian courts.⁶¹

2.24 The conclusion is made by some commentators that leniency is being shown by courts to avoid accusations of racial bias.⁶² This view has been rejected by the courts:

Any approach adopted could conceivably be criticised as racist. Sympathy for the plight of Aboriginal people can be portrayed as paternalistic and patronising, and the notion that Aboriginal offenders should be sentenced more leniently for violent offences is capable of conveying an implication of moral inferiority. On the other hand, there is compelling evidence of the disproportionately high representation of Aborigines in the criminal justice system, the severity of its impact on those who are incarcerated and the disastrous consequences which all too frequently ensue.⁶³

2.25 Other commentators support alternative explanations for mitigation of sentences based on the over-representation of Indigenous people in prison for less serious offences, their under-representation in non-custodial sentences, and the failure to be diverted from the criminal justice system at various points.⁶⁴

61. *Leering v Nayda* [1997] 4 NTSC 4; *Cook v Chute* [1997] NTSC 76; *Amagula v White* (NT, Supreme Court, No 92/97, Kearney J, 7 January 1998, unreported); *R v Daniel* [1998] 1 QdR 499; *Ingomar v Police* [1998] SASC 6875. This followed previous judicial consideration of the issue in *R v Anderson* (1954) NTJ 240; *R v Iginiwuni* (NT, CCA, Muirhead J, No 6 of 1975, 12 March 1975, unreported); *R v Friday* (1984) 14 A Crim R 471 at 472 (Campbell CJ); *R v Juli* (1990) 50 A Crim R 31. *R v Bulmer* (1987) 25 A Crim R 155; *R v Rogers and Murray* (1989) 44 A Crim R 301 at 306-307.

62. See, eg, J Walker and D McDonald, "The Over-Representation of Indigenous People in Custody in Australia" *Trends and Issues in Criminal Justice Series* (No 47, AIC, Canberra, 1995) at 4. One submission noted that some in the Aboriginal community consider that some judicial officers impose harsher sentences on Aboriginal people than on other Australians: G Hiskey, *Submission* at 3.

63. *R v Daniel* [1998] 1 QdR 499 at 530.

64. See discussion in R Broadhurst, A Ferrante and N Loh, *Crime and Justice Statistics for Western Australia 1992* (University of Western Australia Crime Research Centre, 1993).

SPECIFIC FACTORS CONSIDERED IN SENTENCING ABORIGINAL OFFENDERS

2.26 From an examination of the case law applying the general sentencing principles in circumstances where Aboriginality is a relevant concern, it is possible to discern a number of specific factors to which the courts give weight. As in any exercise of the sentencing discretion, the weight attributed to such factors will be a matter for determination in each case.⁶⁵ They can be categorised as follows:

- those relevant to traditional culture and customary law;
- those relevant to the communities from which the offender, and frequently the victim, come; and
- those associated with the background and life experiences of Aboriginal offenders.

Factors relating to Aboriginal law, tradition and culture

2.27 There are factors specifically related to Aboriginal law, culture and tradition which may be relevant to sentencing when the offender is an Aboriginal person. Recognition of customary laws by courts and examples of the direct impact of customary law on sentencing are discussed in detail in Chapter 3.

Factors relating to Aboriginal communities

2.28 Not only can a sentencing court have regard to the interests of the community at large, but the special interests of an offender's immediate community may be considered.⁶⁶ The communities from which many Aboriginal offenders come may have special characteristics, social structures and strictures, values and concerns, which exist solely by reason of the peoples' Aboriginality. The means by which such views can be put before the court is considered in Chapter 4.

65. See *R v Fern* (NSW, Supreme Court, No 70071/95, Abadee J, 21 August, 1997, unreported).

66. *R v Minor* (1992) 59 A Crim R 227; *R v Daniel* [1998] 1 QdR 499 at 534 (Moynihan J).

Opinions of the offender's and/or victim's community

2.29 Courts have regularly taken account of the opinion of an Aboriginal community about matters such as whether the offender should return to the community,⁶⁷ the seriousness of the offence,⁶⁸ the defendant's character,⁶⁹ and what an appropriate penalty might be,⁷⁰ although it is recognised that, as with the general community, these considerations should not prevail over what might otherwise be a proper sentence.⁷¹ The danger that an injustice may occur should the court pay attention to public pressure has also been recognised.⁷² Predominantly, but not exclusively,⁷³ such consideration of community values and beliefs has occurred when that community lives a discrete, usually tribal, existence.

The effect of the sentence on the community

2.30 In determining sentence, courts have taken into account the effect that particular sentences may have on relationships within a community.⁷⁴ In Victoria, there have been examples where offences committed between family members have been resolved informally by an apology or payment of

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67. *Ogle v Mahoney* (Qld, CCA, No 132/97, 5 August 1997, unreported).
68. *R v Mamarika* (NT, Supreme Court, No 23/78, Gallop J, 9 August 1978, unreported); *Robertson v Flood* (1992) 111 FLR 177; *Munungurr v The Queen* (1994) 4 NTLR 63 at 71; but see *R v Watson* (1986) 69 ALR 145, where acceptance in community of knife wounds was rejected as relevant.
69. *R v Mamarika* (NT, Supreme Court, No 23/78, Gallop J, 9 August 1978, unreported).
70. For example, *R v Minor* (1992) 59 A Crim R 227; *R v Friday* (1984) 14 A Crim R 471; *R v Davey* (1980) 50 FLR 57; *R v Keeway* (NT, Supreme Court, Foster CJ, 15 June 1981, unreported); *R v Mamarika* (NT, Supreme Court, SCC 23 of 1978, Gallop J, 9 August 1978, unreported), upheld on appeal: *Mamarika v The Queen* (1982) 63 FLR 202; *Robertson v Flood* (1992) 111 FLR 177; *R v Wilson Jagamara Walker* (1994) 68 ALB 26; and *Joshua v Thomson* (1994) 119 FLR 296.
71. *Robertson v Flood* (1992) 111 FLR 177 at 188 (MildrenJ); *R v Minor* (1992) 79 NTR 1; *Munungurr v The Queen* (1994) 4 NTLR 63 at 71.
72. *Joshua v Thomson* (1994) 119 FLR 296.
73. *R v Turner* (NT, Supreme Court, 28 November 1979, unreported) in which instance the community involved other fringe-dwelling Aborigines near Alice Springs.
74. *R v Minor* (1992) 59 A Crim R 227; *R v Jagamara* (NT, Supreme Court, Muirhead J, 28 May 1984, unreported); *Macdonald v Clarmont* (Qld, CCA, No 48/97, 15 April 1997, unreported).

a restitution, and courts have taken this into account in sentencing.⁷⁵

The effect of the sentence on victims

2.31 A dilemma inherent in mitigating sentences due to the subjective circumstances of the offender, is the danger that the victims may be denied the full protection of the law. Victims of Aboriginal offenders are often also Aboriginal people, frequently from the same community.⁷⁶ Aboriginal women and children have been seen as particularly vulnerable. The Report entitled *Heroines of Fortitude*, documented the accounts of a small number of victims of sexual assault in New South Wales, including Aboriginal women.⁷⁷ The Report highlighted the perception held by some Aboriginal women that lower sentences were given to Aboriginal men, sending a message to the community that offences committed by Aboriginal men against Aboriginal women were less of a crime. Judges have made clear the need for the criminal law to protect Aboriginal women from violence, in a manner consistent with the protection given to women in the rest of the community:

[Many offences] have involved violence against other Aborigines, frequently women and children. It would be grossly offensive of the legal system to devalue the humanity and dignity of members of Aboriginal communities or to exacerbate any lack of self-esteem felt within those communities by reason of our history and their living conditions ... Aboriginal women and children who live in deprived communities or circumstances should not also be deprived of the law's protection.⁷⁸

The importance to Aboriginal communities of the deterrent effect of an

75. Victorian Aboriginal Legal Service, *Submission* at 4.

76. *R v Fernando* (1992) 76 A Crim R 58 at 64; *R v Daniel* [1998] 1 QdR 499 at 531; *R v Friday* (1985) 14 A Crim R 471 at 472 (Connolly J).

77. NSW, Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (November 1996).

78. *R v Daniel* [1998] 1 QdR 499 at 530. See also, *R v Pat Edwards* (NT, Supreme Court, SCC No 155 -156/81, Muirhead J, 16 October 1981, unreported); *R v Woodley* (1994) 76 A Crim R 302 at 316, 318, 321; *R v Bell* (Qld, CA, No 116/94, 20 June 1994, unreported); *R v Telford* (Victoria, CA, No 267/95, 4 June 1995, unreported); *Amagula v White* (NT, Supreme Court, No 92/97, Kearney J, 7 January 1998, unreported); *The Queen v Hagen and Tilmouth* (NT, Supreme Court, Kearney J, 17 July 1990, unreported).

adequate sentence has also been recognised by the courts.⁷⁹

Factors relating to the lives of Aboriginal offenders

2.32 At paragraphs 2.16-2.20 above, the Commission discussed the relevance of Aboriginality and the general approach of the courts in applying sentencing principles to Aboriginal offenders. In *R v Daniel*, Justice Fitzgerald, then President of the Queensland Court of Criminal Appeal, highlighted some specific factors of which courts should be aware regarding Aboriginal offenders:

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, whose race has been tragically affected by the colonisation of this country, harsh treatment, dispossession, the separation of children from families, the introduction of European diseases, and the misuse of alcohol and, more recently, other drugs. A refusal to reduce the sentence which would otherwise be appropriate in all the circumstances, including considerations personal to the offender, can appear to be an obdurate denial of the harm experienced by the Aboriginal race since British settlement.⁸⁰

2.33 From this and other cases, it is possible to discern the following factors which may be relevant in determining the appropriate sentence for an Aboriginal offender. Obviously, not all of the factors will be relevant in every case, and the weight given to any particular factor will be a matter for the court to determine on a case-by-case basis:

- consideration of whether, given the background and circumstances of a particular offender, a custodial sentence may have an unduly harsh

79. *R v Rogers and Murray* (1989) 44 A Crim R 301 at 315 (Wallace J); *R v Davey* (1980) 2 A Crim R 254 at 259 (Muirhead J); *R v Bulmer* (1987) 25 A Crim R 155 at 158 (Connolly and McPherson JJ), and at 162 (Derrington J); *R v Watson* (1986) 69 ALR 145; *R v Friday* (1985) 14 A Crim R 471; *Ashwin v Morris* (WA, Supreme Court, No 1102/98, Miller J, 21 October 1998, unreported); *Brown v Police* (1997) 190 LSJS 11. See also C Baker, "North Queensland Aborigines and Criminal Justice in the Courts" (1992) 17 *University of Queensland Law Journal* 57 at 64.

80. [1998] 1 QdR 499 at 530.

effect,⁸¹

- the offender's residence in a remote, traditional Aboriginal community,⁸² including the special problems associated with living on reserves or in remote areas;⁸³
- the unique difficulties encountered by an Aboriginal person coming from a remote, traditional community in adjusting to an urban environment;⁸⁴
- the endemic nature of hearing loss among Aboriginal people and its contribution to development of social and psychological problems;⁸⁵ and
- the discrimination, exclusion and disadvantage evident in the background and upbringing of a particular Aboriginal offender.⁸⁶

2.34 Substance abuse, intellectual disability or mental illness, and lower life expectancy are other factors which may be relevant.

Offenders with substance dependencies

2.35 A study by the Department of Corrective Services estimated that 80% of all inmates were sentenced for drug-related matters, and more than 75% of Aboriginal offenders in the study were assessed as having indications of

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81. *R v Daniel* [1998] 1 QdR 499; *R v Fernando* (1992) 76 A Crim R 58; *R v Jungala* (NT, Supreme Court, No 97/77, Muirhead J, 8 December 1977, unreported); *R v Russell* (1995) 84 A Crim R 386; *R v Juli* (1990) 50 A Crim R 31; *Everett v The Queen* (1994) 75 A Crim R 550 at 556 (Ipp J).
82. *Leech v Peters* (1988) 40 A Crim R 350; *Roberts v Young* (SA, Supreme Court, No 9408/86, White J, 30 December 1986, unreported).
83. *Neal v The Queen*; *R v Friday* (1984) 14 A Crim R 471; *R v Bulmer*, *R v Yougi* (1987) 33 A Crim R 301; *Houghagen v Charra* (1989) 50 SASR 419; *Leech v Peters* (1988) 40 A Crim R 350.
84. *Harradine v The Queen* (1991) 61 A Crim R 201. See also *Leering v Nayda* [1997] 4 NTSC 4.
85. *R v Russell* (1995) 84 A Crim R 386; Howard et al, "Aboriginal Hearing Loss and the Criminal Justice System" (1993) 3 ALB 9; *The Queen v AT* (NT, Supreme Court, Thomas J, 26 October 1992, unreported). Some 20-40% of Aboriginal people reportedly have some form of hearing deficiency: see *R v Russell* (1995) 84 A Crim R 386 at 393 (Kirby P).
86. *R v Fernando* (1992) 76 A Crim R 58; *R v Clinch* (1994) 72 A Crim R 301; *E (A Child)* (1993) 66 A Crim R 14.

dependence.⁸⁷ The effect, particularly the ramifications for violent behaviour, that alcohol or drug addiction has on Aboriginal people and their communities has been considered by the courts.⁸⁸ Drug dependency is not of itself a mitigating factor,⁸⁹ but may, in individual cases, be relevant to explaining the commission of the offence, and the circumstances of the offender.⁹⁰ As outlined above, in *R v Fernando*, Justice Wood put it thus:

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 Aboriginal [people] 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.

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 demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.⁹¹

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87. “Drug” includes alcohol: see NSW, Department of Corrective Services, *Annual Report 1997-1998*; also M Kevin, *The Alcohol and Other Drug Screen with Inmate Receptions* (NSW, Department of Corrective Services, Research Bulletin No 19, Sydney, 1997).
88. See especially: *R v Fernando* (1992) 76 A Crim R 58; *R v Rogers and Murray* (1989) 44 A Crim R 301 at 305 (Malcolm CJ), at 315 (Wallace J); *Juli v The Queen* (1990) 50 A Crim R 31; *R v Charlie, Uhl and Nagamarra* (WA, Supreme Court, No 96/87, Burt CJ, 14 August 1987, unreported).
89. And is “not an excuse”: see *R v Henry & Ors* [1999] NSWCCA 111 in the guideline judgment on armed robbery.
90. See, eg, *R v Coleman* (1990) 47 A Crim R 306 at 327 (Hunt J); *R v Talbot* (1992) 59 A Crim R 383; and NSWLRC DP 33 at para 5.64.
91. *R v Fernando* (1992) 76 A Crim R 58 at 62 (Wood J).

2.36 In an attempt to address some of the dilemmas articulated by Justice Fitzgerald, the Drug Court of New South Wales has been established to deal specifically with offenders with drug dependencies.⁹² Exercising the criminal jurisdiction of the District and Local Courts,⁹³ the Drug Court's objective is to reduce the level of criminal activity that results from drug dependency by an integrated approach linking treatment providers, law enforcement agencies and the court. Non-violent drug-dependent offenders who would otherwise be imprisoned are diverted into programs designed to eliminate their dependency, with ongoing judicial supervision.⁹⁴

2.37 In its first year of operation, 224 drug-dependent offenders from greater Western Sydney were placed in rehabilitation programs. While early evaluation is proving difficult, it is encouraging that 87.1% of all participants did not re-offend while on the program. Of the 224 participants, just over 6% identified as being of Aboriginal or Torres Strait Islander background. The average length of the suspended custodial sentence received by all participants was 11.5 months, and all but one of the participants had at least one prior conviction.⁹⁵ As this accords with the profile of many Aboriginal offenders, it is conceivable that their participation rate in the program may increase.⁹⁶

Offenders with an intellectual disability or mental illness

2.38 Special considerations arise when any offender, including an Aboriginal person, with an intellectual disability and/or a mental illness is

92. The first in Australia, the Drug Court commenced operation on 8 February 1999, originally funded for a two year pilot: *Drug Court Act 1998* (NSW); G Murrell, "The Drug Court of New South Wales" (1999) 11 *Judicial Officers' Bulletin* 9.

93. *Drug Court Act 1998* (NSW) s 24(1).

94. Non-compliance renders the offender liable to sanctions, including imprisonment, or termination of the program, upon which the court reconsiders the initial sentence it imposed: *Drug Court Act 1998* (NSW) s 10, 11 and 15.

95. NSW, BOCSAR, *NSW Drug Court Evaluation* (No 50, April 2000) <www.lawlink.nsw.gov.au/bocsar1.nsf/pages/drugcourtevaltext>.

96. The Select Committee on the Increase in Prisoner Population has recommended that the New South Wales Bureau of Crime Statistics and Research include in its evaluation of the Drug Court the success or otherwise of the outcomes of Indigenous people who participate in the program: New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population, *Inquiry into the Increase in Prisoner Population: Issues Relating to Women*, rec 6.162. The Commission supports this recommendation.

being sentenced, particularly considering the lack of appropriate treatment options within the custodial system.⁹⁷ There is evidence to suggest that significant numbers of Aboriginal people in the criminal justice system have an intellectual disability and/or mental illness, and that there is a high rate of undiagnosed and untreated depression and other mental conditions among Aboriginal people.⁹⁸

2.39 The Commission has issued a Report entitled *People with an Intellectual Disability and the Criminal Justice System*,⁹⁹ containing a comprehensive package of reforms. The Commission does not consider it necessary or desirable that there be specific statutory provision in relation to sentencing offenders with an intellectual disability or mental illness. It is crucial, however, that sentencing courts receive adequate, and in the case of Aboriginal offenders, culturally sensitive, information to enable a proper assessment of an offender's circumstances. Recommendations about this are made in Chapters 4 and 7.

Lower life expectancy

2.40 Aboriginal people have significantly lower life expectancies than non-Aboriginal Australians.¹⁰⁰ It was submitted to the Commission that there should be legislative provision to take this fact into account in sentencing.¹⁰¹ It is argued that this accords with recognising facts material by reason of a person's ethnicity,¹⁰²

97. See Office of the Social Justice Commissioner, *Indigenous Deaths in Custody 1989-1996* (ATSIC, Canberra, 1996) at 142-143.

98. See S Hayes, *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts* (NSWLRC Research Report 5, 1996); S Hayes and D McIlwain, *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* (Report to the Criminology Research Council, Canberra, 1988).

99. NSWLRC, *People with an Intellectual Disability and the Criminal Justice System* (Report 80, 1996).

100. See P Anderson, K Bhatia and J Cunningham, *Occasional Paper: Mortality of Indigenous Australians* (Australian Bureau of Statistics & Australian Institute of Health and Welfare, Canberra, 1996); though reliable information on life expectancy and death is currently only available from South Australia, Western Australia and the Northern Territory: McLennan, R Maddern, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (ABS, Canberra, 1997) at 1.

101. Lofgren, *Submission* at 3.

102. *Neal v The Queen* (1982) 149 CLR 305 at 326 (Brennan J).

and would be consistent with Australia's international treaty obligations.¹⁰³ However, the common law already achieves the desired result. The application of sentencing law, particularly for more serious offences when a long term of imprisonment is likely, will always take into account the life expectancy of the individual offender, and whether the sentence will be harsher because of the person's lower life expectancy,¹⁰⁴ or state of health.¹⁰⁵

The limitations of sentencing

2.41 Judges and magistrates are well aware of the "seemingly endless cycle of offending and imprisonment, a perfunctory perpetuation of futility" for many Indigenous offenders.¹⁰⁶ The dilemma they face is unenviable. The priorities of the general community in relation to sentencing would seem to be punishment and retribution, leaving little scope for rehabilitation. The presumption that punishment is necessarily a deterrent to further offending may have little relevance for a person marginalised from the mainstream of society.¹⁰⁷

2.42 Sanctions imposed by the courts are often ineffective in rehabilitating Indigenous offenders and breaking the cycle of recidivism. This is particularly true regarding custodial sentences, and especially for young

103. That is, the *Universal Declaration of Human Rights*, Art 3; *International Covenant on Civil and Political Rights* [1980] ATS 23, Art 6; and *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* [1991] ATS 19 Art 1.

104. *R v Sopher* (1993) 70 A Crim R 570 at 573; *R v Hunter* (1984) 36 SASR 101; *R v Yates* [1985] VR 41.

105. *R v Smith* (1987) 44 SASR 587 at 589 (King J); *Bailey v DPP* (1988) 38 A Crim R 154 at 155 (Mason CJ, Brennan, Deane, Toohey JJ), at 158 (Wilson J).

106. *R v Woodley* (1994) 76 A Crim R 302 at 304.

107. For example, the assumption that a lengthy prison sentence will deter Aboriginal offenders and others in his (or her) community is feared to be a "vain expectation": Judge Forno, *Submission*. See also *Nelson v Chute* (1994) 72 ACrimR 85; *R v Yougi* (1987) 33 A Crim R 301; *R v Russell* (1995) 84 A Crim R 386; and P Chantrill, *The Kowanyama Justice Group: A Study of the Achievements and Constraints on Local Justice Administration in a Remote Aboriginal Community* paper presented at the Australian Institute of Criminology Occasional Seminar Series (Canberra, 11 September 1997 <www.aic.gov.au/cinferences/occasional/index.html>).

people, for whom prison may be “a further insidious way of dislocating and alienating ... youth from their culture, community and traditional values, which may guide them into more constructive lives”.¹⁰⁸ The former Social Justice Commissioner’s view is that for Indigenous youth “imprisonment simply does not work. It builds resentment, anger, and sows the seeds of further, more serious offending.”¹⁰⁹ Aboriginal prisoners themselves have stated that “the use of imprisonment for young people on short sentences for more minor offences had the effect of establishing prison as a learning centre with a revolving door”.¹¹⁰

2.43 Justice Fitzgerald articulated the dilemmas facing judges, and the limitations of the law, when he concluded that:

[t]he criminal law is a hopelessly blunt instrument of social policy, and its implementation by the courts is a totally inadequate substitute for improved education, health, housing and employment for Aboriginal communities. Irrespective of race, the criminal justice system increasingly merely punishes those who are the product of deficient or failed social policies. ... 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.¹¹¹

2.44 The remarks made by Justice Fitzgerald apply equally to the recommendations made by the Commission in this Report. While the recommendations would, if implemented, redress some of difficulties faced by Indigenous offenders, without attention being given to the basic, systemic causes of Aboriginal crime and punishment, the law must remain something of a “blunt instrument”.

THE NEED FOR LEGISLATIVE PROVISIONS

2.45 The Commission has considered the question of whether the common

108. Australia, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fourth Report* (M Dodson, AGPS, Canberra, 1996) (“Social Justice Commissioner Report (1996)”) at Chapter 2.

109. Social Justice Commissioner Report (1996) at Chapter 2.

110. Cunneen and McDonald (1997) at 126.

111. *R v Daniel* [1998] 1 QdR 499 at 530.

law sentencing discretion discussed in this chapter requires legislative statement in so far as its application to Aboriginal offenders is concerned. Legislation in other jurisdictions contains principles regarding sentencing and Aboriginal offenders.¹¹²

2.46 In its previous Report on *Sentencing*, the Commission rejected the proposition that the principles of sentencing should be reduced to statutory form, considering that the application of sentencing principles is best left to judicial discretion.¹¹³ In this Reference, the Commission has consulted on the desirability of incorporating into legislation principles which would apply to the sentencing of Aboriginal offenders, particularly the principles in *R v Fernando*. Overwhelmingly, such a move was not supported.

2.47 The Commission is of the view that legislative prescription of sentencing principles would add nothing to the existing common law and is consequently unnecessary. At present, the general sentencing principles may flexibly be applied to the individual circumstances of each case. As this chapter has shown, there are numerous precedents for regarding consideration of Aboriginality where it is a relevant factor in sentencing. This should ensure that all material factors which exist by virtue of an offender's Aboriginality can be considered by the sentencing court. The Commission acknowledges that the potential for discrimination against Aboriginal offenders still exists, but rejects the notion that this would be overcome by a legislative statement of sentencing principles. Rather, in serving justice to the maximum extent, the challenge is to ensure that all factors relevant to each case and each offender are presented to the court. The recommendations in the remainder of this Report are designed to facilitate this in relation to Aboriginal offenders.

112. See eg, *Crimes Act 1914* (Cth) s 16A(2)(m), *Crimes Act 1900* (ACT) s 429A(1)(k), and for juveniles, *Young Offenders Act 1993* (SA) s 3(3)(e) and the *Young Offenders Act 1994* (WA) s 46(2)(c).

113. NSWLRC Report 79 at para 14.14-14.18.

3 • Aboriginal customary law

- Introduction
- Defining Aboriginal customary law
- Background
- Defining the issues
- Recognition of Aboriginal customary law by the general criminal law – an evaluation
- Recognition of customary law on the basis of Mabo
- Recognition of customary law on the basis of the offender's cultural background
- Conclusion
- Evidence and procedure

INTRODUCTION

3.1 This chapter examines the relationship between Aboriginal customary laws and sentencing under the general criminal jurisdiction of New South Wales.

3.2 In 1986, the Australian Law Reform Commission (the “ALRC”) released its report, *The Recognition of Aboriginal Customary Laws*¹ (the “ALRC Report”), resulting from nine years’ research and inquiry into whether, generally, it would be desirable to apply Aboriginal customary law to Aboriginal people, and specifically, whether and in what ways Aboriginal customary law should be recognised within the framework of the general criminal law, and whether Aboriginal communities should have the power to apply their customary laws and practices in the punishment and rehabilitation of Aboriginal people.² The Report, a work of quality and sensitivity, is a comprehensive study of the issues involved, the arguments for and against recognition of Aboriginal customary law, and the manner of such recognition. It also thoroughly documents relevant case law up until 1986.

3.3 The ALRC Report has had favourable critical reviews³ and endorsement in subsequent reports, including the report of the Royal Commission into Aboriginal Deaths in Custody (the “RCIADIC”).⁴ The Commission also commends and endorses the ALRC Report. We do not propose, in this Report, to duplicate research or to set out again, in any great detail, historical context and description. We have confined our research to legislation, case law and secondary sources since 1986.

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1. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) (“ALRC 31”).
 2. ALRC 31, Terms of Reference at xxxv.
 3. See Editorial (1986) 60 *ALJ* 655-656; S Poulter, “Review Essay: Cultural Pluralism in Australia” (1988) 2 *International Journal of Law and Family* 127; C McLachlan, “The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm – A Review Article” (1988) 37 *ICLQ* 368; R Chisholm, “Aboriginal Law in Australia: The Law Reform Commission’s Proposals for Recognition” (1988) 10 *University of Hawaii Law Review* 47.
 4. Australia, *Royal Commission into Aboriginal Deaths in Custody, National Report* (Five Volumes) (AGPS, Canberra, 1991-92) vol 2 at 80, vol 3 at 75, vol 4 at 99-102, especially at 102.

“Urbanisation” of New South Wales’ Aboriginal population

3.4 It must be acknowledged that Aboriginal customary law may have considerably reduced impact in New South Wales compared with, for example, the Northern Territory or South Australia. New South Wales’ Aboriginal population is far more dislocated, and there has perhaps been a more marked breakdown of traditional ways, than in other States. However, the issue of whether it is valid to consider the application in New South Wales of Aboriginal customary law is not dependent upon categorising the Aboriginal population into “tribal”, “semi-tribal” and “urban”. This is too simplistic, and the process has been strongly criticised by Aboriginal writers:⁵

The categories “tribal”, “semi-tribal” and “urban Aborigines” are Colonial relics that, in the attempt to categorise, serve only to further mystify and confuse European conceptions of Aboriginal life.⁶

3.5 Whether it is relevant to consider Aboriginal customary law in a case before a court for sentencing will depend not on whether the offender can be described as “tribal”, “semi-tribal” or “urban”, but on evidence as to its application in the particular circumstances of that case.

3.6 The application of Aboriginal customary law may not be as overtly apparent in New South Wales as in other states, but Aboriginal groups and individuals emphasised, in consultations with the Commission, that it would be wrong to say that Aboriginal customary law does not operate at all. It may seem as if it does not exist because, in New South Wales, it is not played out as a physical presence. To use an obvious example, the incidence of punishment by spearing would be almost non-existent in New South Wales. On the other hand, a more subtle application of Aboriginal customary law in maintaining equilibrium within, and between, clans and communities is certainly in force. In particular, shaming and banishment are frequently used forms of Aboriginal punishment.

5. C Charles, “Sentencing Aboriginal People in South Australia” (1991) 13 *Adelaide Law Review* 90; G Cowlshaw, “Colour, Culture and the Aboriginalist” (1987) 22 *Man* 221; G Cowlshaw, “Aborigines and Anthropologists” (1986) 1 *Australian Aboriginal Studies* 2.

6. C Charles, “Sentencing Aboriginal People in South Australia” (1991) 13 *Adelaide Law Review* 90 at 92.

3.7 As well, even in urban areas there are discrete and strong Aboriginal communities with authority vested in an elder or elders, such as in Redfern, La Perouse, Blacktown, Mt Druitt and Parramatta.⁷

3.8 However, a contrary view has also been expressed to the effect that, because of the extent of assimilation of New South Wales' Aboriginal population into the general population, tribal issues no longer have relevance. Furthermore, for customary law to have authority over the lives of the community members, the tribal elders must have respect; some feel that in New South Wales, very few elders have the required respect of their communities, or the requisite knowledge and learning.

3.9 Bearing in mind this contrary view, the Commission nonetheless accepts that Aboriginal customary law may well be relevant in some New South Wales Aboriginal communities. As the ALRC found:

[d]espite the lack of detailed knowledge in certain areas, there are many indications that Aboriginal customary laws and traditions continue as a real controlling force in the lives of many Aborigines.⁸

The relevance of Aboriginal customary law ought to be considered in any examination of the sentencing of Aboriginal offenders in New South Wales.

Self-determination

3.10 Any discourse on Aboriginal customary law must confront the quest of many Aboriginal people to have complete jurisdiction over the legal regulation of their lives. Over many years, increasing in recent times, there has been extensive discussion of self-determination and self-management for Aboriginal people. There is, as well, an increasing international trend towards granting Indigenous peoples the right to self-determination where such groups are largely self-managing. The *International Covenant on Civil and Political Rights*⁹ and the *International Covenant on Economic, Social and Cultural Rights*,¹⁰ both of which Australia has ratified, contain articles dealing with self-determination:

7. Aboriginal Justice Advisory Council, *Consultation* (11 January 1999).

8. ALRC 31 at para 38.

9. The Covenant entered into force on 23 March 1976.

10. The Covenant entered into force on 3 January 1976.

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹¹

3.11 The draft *United Nations Declaration on the Rights of Indigenous Peoples* contains an almost identical article, except that “Indigenous peoples” is substituted for “all peoples”.¹² It also contains the following article:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards.¹³

3.12 For many Aboriginal people, the ideal is not merely for the general law to recognise Aboriginal customary law, but for there to be separate legislation providing for Aboriginal self-determination or self-management.¹⁴ A consideration of whether Aboriginal people can and should have exclusive jurisdiction over criminal matters arising within their communities is beyond the terms of reference of this Report. In this present undertaking, the Commission can only look at the application and relevance of Aboriginal customary law to sentencing within the general criminal justice system.

3.13 Nonetheless, the issue of whether Aboriginal customary law should be recognised by the general criminal justice system is significant in its own right, “however much it is necessary to place [it] in [its] proper context as part, and only part, of a wider debate”,¹⁵ and despite the reality that such recognition will not satisfy demands for self-government or autonomy.

DEFINING ABORIGINAL CUSTOMARY LAW

3.14 There is no generally accepted definition of what constitutes Aboriginal customary law,¹⁶ not least because, it is almost impossible to

11. Article 1 in each Covenant.

12. Draft Declaration as agreed upon by the members of the Working Group on Indigenous Populations at its Eleventh Session, Article 3.

13. Draft Declaration Article 33.

14. ALRC 31 at para 5.

15. ALRC 31 at para 5.

16. Even the term “Aboriginal customary law” is not accepted by all. In consultations between the Council for Aboriginal Reconciliation, ATSIC and Aboriginal and Torres Strait Islander peoples held in July-August 1994

describe comprehensively. There is secrecy surrounding many of the laws, some of which are “sacred and not to be spoken about to anyone”, except the members of the relevant tribal group.¹⁷ Tribal laws differ from community to community. Information obtained from one Aboriginal tribe would not include information about the laws of another tribe as they would not be permitted to speak about those other laws. A universal definition cannot be formulated by generalising from a sample description.

3.15 Further, Aboriginal laws are part of an oral culture, handed down from generation to generation by word of mouth.¹⁸ There is no written code or statement of customary laws.

3.16 Aboriginal law was encoded in each group’s religious tradition. This fusion of law and religion in Aboriginal culture gives rise to its own obstacle to defining that law. Eggleston has identified the difficulty in the following terms:

Law and religion were intimately bound up in Aboriginal society ... and any attempt to identify certain segments of Aboriginal life as “legal” involves the imposition of alien categories of thought on the tribal society. Some modern Aborigines have made comparisons between their law and the Australian legal system on the basis of common notions of rules and sanctions for their breach but they have also interpreted the word “law” to mean “way of life” and “religion” ... This is not to deny that there was a system of “law” in traditional Aboriginal society. I am using a functional definition of “law”, one which places primary emphasis on law as a means of social control ... The use of the word “law” to describe measures of social control in Aboriginal society is justified ... by the belief that every society must have means for settling disputes, and must have law in this sense, no matter how difficult it might be to identify binding rules or institutions corresponding to the legal system in our own society.¹⁹

and October-November 1994, the Queensland Metropolitan Zone and the Queensland North Zone submitted that the correct term is Aboriginal common law; the Victoria Zone submitted that the correct term is “Aboriginal lore”; and the Tasmania Zone submitted that the correct term is “Aboriginal community law”: Australia, Council for Aboriginal Reconciliation and ATSIC, *Towards Social Justice Compilation Report of Consultations* (AGPS, Canberra, 1995).

17. R Langford Ginibi, “Aboriginal Traditional and Customary Laws” (1994) 1 *Law/Text/Culture* 8 at 8 (“Langford Ginibi (1994)”).

18. Langford Ginibi (1994) at 8-9.

19. E Eggleston, *Fear, Favour or Affection: Aborigines and the Criminal Law in*

3.17 In *Milirrpum v Nabalco Pty Ltd*²⁰ the Solicitor-General argued that before any system could be recognised by non-Aboriginal law as a system of law, there must be not only a definable community to which it applies, but also some recognised sovereignty giving the law a capacity to be enforced. Justice Blackburn did not accept this argument. His Honour did not believe there was utility in attempting to provide a definition of law which will be valid for all purposes and answer all questions. However, if a definition of law had to be produced, His Honour preferred “a system of rules of conduct which is felt as obligatory upon them by the members of a definable group of people”.²¹

On this basis, His Honour recognised the institutions and traditions belonging to the North-East Arnhem Land people, as disclosed by the evidence, as a system of law, despite the fact that the precise edges of the community were “left in a penumbra of partial obscurity”.²²

3.18 Following Justice Blackburn’s approach, including acknowledging that it is probably inexpedient to attempt a definition, it may be possible to say that, in very broad terms, Aboriginal customary law is constituted by a body of rules, values and traditions which are accepted as establishing standards or procedures to be followed and upheld.²³ It is also the context of relationships between people within families and among groups across social systems.²⁴ Some generally applicable observations may be made.

3.19 The practice of Aboriginal customary law is:

the practice of well-health for the individual in the family and the group. Aboriginal Law was/is the maintenance and healing of relationships and was/is a constant process of negotiation, mediation and conciliation in managing and resolving the conflicts natural to all human associations.²⁵

Victoria, South Australia and Western Australia (Australian National University Press, Canberra, 1976) at 278.

20. (1971) 17 FLR 141.

21. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 266.

22. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267.

23. K Maddock, “Aboriginal Customary Law” in P Hanks and B Keon-Cohen (eds), *Aborigines and the Law* (Allen and Unwin, Sydney, 1984) 212 at 230-232.

24. J Atkinson, “A Nation is Not Conquered” (1996) 3(80) *Aboriginal Law Bulletin* 4 at 4.

25. Atkinson at 4.

3.20 Disputes within Aboriginal communities are not generally perceived as restricted to individuals. The negotiation, mediation and conciliation involves everyone in the community. In particular, where the conflict involves an offence perpetrated by one against another, members of both the offender's and victim's families become involved. If physical punishment is appropriate, it is inflicted not by an authorised law officer, but rather by the people personally aggrieved by the behaviour. It is not uncommon for members of the offender's family to be asked to accept punishment if the offender is in gaol and therefore unavailable.²⁶ In such circumstances, it is important for a sentencing judge or magistrate to be aware of the repercussions of his or her sentence on the offender's community. It also signals the potential value of conferencing and community involvement in the sentencing process, mechanisms which are discussed in Chapter 4.

3.21 Langford Ginibi, in describing her experience of the operation of customary law, relates that when there was a dispute, the elders met to discuss the punishments: their word was law.²⁷ Langford Ginibi has also observed that Aboriginal customary law is heavily influenced by the need to avenge the victim and that, to an outsider, punishments can at times appear arbitrary and harsh.²⁸ Serious transgressions, such as murder, may result in some form of physical punishment, such as a payback spearing. However, it is also important to note that physical punishment is only one way, and not the most common way, for Aboriginal disputes to be settled.²⁹

3.22 There are also numerous offences which are not recognised by non-Aboriginal law, such as insulting an elder, singing sacred songs in public, showing sacred objects to women and neglect of kinship obligations.³⁰ Where these offences have been committed, the community cannot look to non-Aboriginal law to punish the offender, nor provide a victim with redress. The only alternatives are to punish the offender under Aboriginal customary law, or not at all. If the punishment of these offences under Aboriginal customary law results in an offence under the criminal law of New South Wales, such as an assault, Aboriginal customary law will come into direct conflict with the criminal justice system. One of the issues canvassed in this chapter is how the

26. P Hennessy, "The Recognition of Aboriginal Customary Laws" paper presented at the NSW Young Lawyers Seminar on Native Title and Customary Law (Sydney, 21 September 1994) ("Hennessy (1994)") at 4.

27. Langford Ginibi (1994) at 8-9.

28. Langford Ginibi (1994) at 11.

29. Hennessy (1994) at 4.

30. Langford Ginibi (1994) at 8-9, 11.

courts should deal with such a situation.

3.23 The ALRC, in its Discussion Paper *Aboriginal Customary Law – The Criminal Law, Evidence and Procedure*³¹ stressed that:

[i]t should not be assumed that “traditional punishments” are only a response to “wrongful” acts, that they are closely regulated by rules, or that they are activated by some more or less collective decision, i.e. by a person or body authorised to act in the name of the community. Aboriginal “punishment” may be one of a range of possible outcomes of a dynamic process of dispute-settlement, with little or no resemblance to the impartial, impersonal application of defined sanctions in accordance with general rules which it is assumed by Anglo-Australian law. It does not follow that Aboriginal customary punishments (and dispute-resolving machinery generally) are not the product of something properly called “law”, or that they should be ignored because they do not reflect a particular conception of the administration of justice. But it does follow that the “recognition” of such punishments is likely to be a difficult matter, given the different assumptions behind the “two laws”.

3.24 In considering whether, and if so, how, there should be recognition of Aboriginal customary law in the sentencing process, it is essential to appreciate two things. First, Aboriginal laws, customs and traditions continue to exist in Australia and, like the common law, they are dynamic. As noted by Justices Deane and Gaudron in *Mabo v Queensland (No 2)*, traditional law or custom is not “frozen as at the moment of establishment of a Colony”.³² Aboriginal customary law has evolved with the needs of Aboriginal society. Secondly, as was discussed above, the existence of Aboriginal customary law, and its application, is not dependent on there being a traditional and isolated rural Aboriginal community. It is equally valid to speak of Aboriginal customary law in the context of Aboriginal people living in urban communities, or even in rural communities who appear to be living in otherwise non-traditional ways. The threshold question is not whether the offender is part of a rural, traditionally-living Aboriginal community, but whether he or she belongs to an Aboriginal community for which Aboriginal customary law is relevant, and by which the offender is wholly or partly governed.

31. ALRC, *Aboriginal Customary Law – The Criminal Law, Evidence and Procedure* (Discussion Paper 20, 1984) at 10-11.

32. (1992) 175 CLR 1 at 110.

3.25 Most importantly, what emerges from the foregoing discussion is that it is not necessary to define Aboriginal customary law as a prerequisite to its recognition in the general sentencing process. Evidence as to the relevance and content of Aboriginal customary law in the circumstances of a particular case can be put before the sentencing court in that case. This, it must be conceded, carries with it its own difficulties, discussed below under the heading “Evidence and Procedure”.

BACKGROUND

3.26 The ALRC Report chronicles the interaction between Aboriginal customary law and Anglo-Australian law, and the legislative, judicial and administrative recognition of Aboriginal customary law, following British settlement in 1788 up until the 1970s.³³ The account reminds us that British settlers imposed British law on a people having their own well-developed structures, traditions and laws.³⁴

3.27 In 1928, J W Bleakley, Chief Protector of Aborigines, commented on the injustice of applying British law to crimes involving tribal law and proposed some form of tribal court for hearing cases involving Aboriginal people. Bleakley’s was one of several government inquiries conducted during the 1920s and 1930s which considered possible recognition of customary laws.³⁵

33. ALRC 31 at Chapter 4.

34. ALRC 31 at para 37. In 1837 a Select Committee of the House of Commons resolved that Aboriginal people should be subject to British law, although some discretions should be exercised which would allow the reduction of penalties: Great Britain, *Report of the House of Commons Select Committee on Aborigines (British Settlements)* (Parliamentary Paper 425, 1837). In 1840, the British Government sent a dispatch to all Governors in Australia and New Zealand expressing the view that English law should entirely supersede Aboriginal customary laws: Australia, *Historical Records of Australia, Series One, Governor’s Dispatches to and from England* (Library Committee of the Commonwealth Parliament, Sydney, 1924) vol 21, 35. However, contrary to this directive, Aboriginal customary laws were not abolished.

35. J W Bleakley, *The Aborigines and Half Castes of Central Australia and North Australia: Report to the Parliament of Australia* (Parliamentary Paper 21, Government Printer, Melbourne, 1928); Western Australia, *Report of the Royal Commissioner Appointed to Investigate, Report and Advise Upon Matters in Relation to the Condition and Treatment of Aborigines* (HD Mosely, Royal Commissioner, Parliamentary Paper 2, Government Printer,

It is interesting to note that legislation in the late 1930s and in 1940 established Native Courts in a number of States to deal with matters between Aboriginal people or between the administration and Aboriginal people.³⁶ However, the movement to establish separate Aboriginal courts subsequently faltered.

3.28 What ultimately emerges from the ALRC's historical account is that government, the courts and individual writers, since at least 1836 and perhaps earlier, have frequently raised the question of whether Aboriginal customary law should be formally recognised by the Australian legal system. Yet the issue remains largely unresolved. Throughout Australia there is only very limited legislative recognition of Aboriginal customary laws. Similarly, there has been only limited development of the common law to recognise customary law.³⁷ The ALRC's recommendation for a general legislative endorsement of the practice of taking Aboriginal customary laws into account³⁸ has not been implemented, despite a call by RCIADIC for its implementation.³⁹

DEFINING THE ISSUES

3.29 Should Aboriginal customary law be recognised by the general criminal jurisdiction in New South Wales? On what basis can the general criminal law take account of Aboriginal law? If recognition is appropriate, should this be formally prescribed by legislation? Should legislative recognition be in terms of a general statement of principle or should specific statutory guidelines be provided? Would it be preferable to leave recognition of Aboriginal customary law solely to judicial discretion?

3.30 Aboriginal customary law can become relevant within general criminal

Perth, 1935).

36. *Native Administration Ordinance 1940* (NT); *Native Administration Act 1936* (WA); *Aboriginal Preservation and Protection Act 1939* (Qld).

37. Hennessy (1994).

38. ALRC 31 at para 517.

39. Recommendation 219. However, the Northern Territory has prepared a Draft Constitution providing for recognition of Aboriginal customary law as a "source of law in the Northern Territory": Northern Territory, Legislative Assembly Sessional Committee on Constitutional Development, *Final Draft Northern Territory Constitution* (December 1996) at para 2.1.1.

proceedings in a number of ways:

- Evidence may be submitted in mitigation of sentence that the offender has already received, or will receive, traditional punishment. A court could even consider suspension of a sentence to enable the Aboriginal offender to undergo traditional punishment.⁴⁰
- Where an offence has been committed in pursuance of, or as required by, Aboriginal customary laws, these circumstances may be raised in mitigation of the offence.⁴¹ For example, where a person has carried out a traditional punishment, such as a payback spearing, he himself may be charged with assault. These circumstances may also be raised as a defence to the charge, although this aspect is not relevant to this reference.
- Evidence that an offence was provoked by the victim's breach of a customary law will usually have implications for mitigation of sentence.
- Although it may not strictly be a matter of Aboriginal customary law, evidence of traditional customs or beliefs may help to explain the defendant's conduct and act in mitigation.
- Evidence of Aboriginal customary law may affect the exercise of the prosecutorial discretion, vested in both police and the Crown, as to whether an accused person is charged with an offence at all, or as to the nature of the offence with which he or she is charged.⁴²
- An Aboriginal offender may be subject to customary law obligations which have some relevance to determining what is an appropriate sentence. An example can be found in the convicted person's duty in

40. See generally the cases in ALRC 31 at Chapter 21, and J Crawford and P Hennessy, *Cases on Traditional Punishments and Sentencing* (ALRC Research Paper 6A, 1982).

41. *R v Jagamara* (NT Supreme Court, Gallop J, 18 November 1980, unreported); *Shannon v The Queen* (1991) 56 A Crim R 56; *R v Goldsmith* (SA CCA, SCCRM 379 of 1995, 27 October 1995, unreported).

42. In *R v Burton* (SA Supreme Court, No 81 of 1994, Duggan J, 18 July 1994, unreported), the Director of Public Prosecutions took into account both the customary aspects surrounding the commission of the offence, and the fact that the accused received traditional punishment from his community, in deciding to charge the accused with manslaughter rather than murder.

relation to forthcoming tribal ceremonies.⁴³

- Less directly, a consideration of Aboriginal customary law may arise if the offender's Aboriginal community seek to inform the court of its perceptions of the seriousness of the crime and its attitude towards the offender.⁴⁴ If there is to be recognition of Aboriginal customary law, the further issue arises as to whether the community's views should be relevant to the court's sentencing. This issue, as well as the ways in which the Aboriginal community can be constructively involved in the sentencing process, is discussed in Chapter 4.

RECOGNITION OF ABORIGINAL CUSTOMARY LAW BY THE GENERAL CRIMINAL LAW – AN EVALUATION

Arguments and Recommendations of the ALRC

3.31 Some of the key arguments in support of recognition of Aboriginal customary law, particularly relevant to sentencing, identified by the ALRC Report can be summarised as follows:⁴⁵

- “The reality of the customary laws in influencing the lives of traditionally oriented Aboriginal people itself calls for recognition. Non-recognition contributes to the undermining of traditional law.”
- “Non-recognition can lead to injustice.” It may be unfair, for example, for an Aboriginal person to be punished under the general law for

43. For example *R v Jagamara* (NT Supreme Court, Gallop J, 18 November 1980, unreported); see ALRC 31, vol 1 at para 514.

44. Yolngu leaders in Yirrkala and Millingimbi, in North-East Arnhem Land, Northern Territory, submit that actions and words which are highly offensive in Yolngu society and likely to incur harsh penalties according to customary law are not always given appropriate consideration in Australian courts. They describe their frustration at being no longer able to impose severe traditional sanctions for serious offences while at the same time these offences were, in their eyes, trivialised by the courts. They want to be allowed to explain these issues to the courts so that sanctions they regard as appropriate will be applied: S Thomas, N Williams and K Coulehan, “Across Two Laws – Cross-Cultural Awareness in the Northern Territory” (1996) 31(11) *Australian Lawyer* 4 at 5.

45. ALRC 31, Summary Report at para 26.

taking action required by his or her customary laws, or to be punished under both the general law and customary law for the one offence.

- “Aboriginal people themselves support some form of recognition of their laws, and a better relationship between Aboriginal law and the general law.”
- “In some communities, Aboriginal customary law may assist ... in maintaining law and order, while non-Aboriginal law and order mechanisms may be seen as neither particularly effective nor relevant.”
- “Recognition may provide a way to compensate Aboriginal people for past wrongs, including the injustice of initial non-recognition.”
- “Legislative recognition would reinforce decisions by individual judges and magistrates according recognition in individual cases ... It would thus promote consistency and clarity in the law and its application to Aboriginal people.”
- Australia’s international standing and reputation would benefit from its giving recognition to the laws and traditions of its Indigenous peoples.

3.32 On the other hand the ALRC Report identifies a number of arguments against recognition. These, and the Commission’s response, can be summarised as follows:

- *A court cannot and should not recognise those aspects of Aboriginal customary laws about which it cannot be reliably informed.* This aspect is discussed below, under the heading “Evidence and Procedure”. As with many evidentiary matters which the courts must deal with every day, in diverse cases, decisions are made to admit documents and testimony into evidence which may be objectionable, or, on the surface, not entirely reliable. The judge or magistrate then decides what weight he or she will give to this evidence. Court proceedings would be fettered if judicial officers took the attitude that they should only take heed of those relevant matters about which there is certain information and instruction.
- *Recognition could entail the loss of Aboriginal control over their law and traditions.* This argument, however, is one against codification of Aboriginal customary law, rather than recognising its relevance within the general criminal jurisdiction.
- *Aboriginal women may benefit from the abandonment of certain*

Aboriginal traditions, in particular those that discriminate against women. However, the ALRC noted that the predominant view expressed to it, in particular by Aboriginal women, supported appropriate forms of recognition of Aboriginal customary law.

- *It is now too late to recognise Aboriginal customary laws as they have ceased to exist in any meaningful form.* This argument has been considered above and the Commission does not accept that this is the case. The ALRC observed that others have argued as strongly that Aboriginal laws still have meaning and strength for many Aboriginal people, despite external pressures and influences. The fact that Aboriginal customary law may be dynamic does not preclude recognition. Rather, this is a feature which needs to be accommodated in the form of recognition.
- *Recognition should be geographically restricted to those Aborigines living in a strictly traditional manner.* This argument has been dealt with above in paragraphs 3.4-3.9 and 3.24.
- *Difficulties of definition preclude recognition.* The Commission's opinion is that it is not necessary to formulate a definition of Aboriginal customary law in order that it should be recognised within the sentencing process. (See paragraphs 3.14-3.25.)
- *Recognition should not occur because some aspects of Aboriginal customary law involve unacceptable punishments which cannot be tolerated by the general legal system.* The cases referred to below make clear that, in recognising the operation of Aboriginal customary law, the courts are not condoning what would be offensive conduct under general criminal law; they are acknowledging reality and ensuring that the offender is treated fairly by the general law.
- *There should be "one law for all": to recognise Aboriginal customary law would violate this principle, would create an undesirable form of legal pluralism, and would be divisive and an affront to public opinion.* The ALRC acknowledged that this argument raised fundamental issues and required separate consideration. It devoted an entire chapter of the Report⁴⁶ to this argument, analysing every component with depth and integrity. There is nothing to gain from reiterating the debate in this Report. The ALRC concluded that special measures for the recognition of Aboriginal customary law would not be racially discriminatory and

46. ALRC 31 at Chapter 9.

would not involve a denial of equality before the law or equal protection, provided the measures are responsive to the needs of Aboriginal people, are generally accepted by them and do not deprive them of basic human rights or access to the general legal system. The ALRC rejected outright the argument that recognition may be divisive and an affront to public opinion:

The [ALRC] has no doubts that Aborigines are in a special position. The effects on them of European settlement have been drastic. Their traditional ways of life have in many respects been destroyed or have undergone tremendous changes. Criminal statistics demonstrate the difficulties many Aborigines continue to face with the legal system. Special measures to deal with this situation are not merely justified but necessary.

3.33 The Commission agrees with the ALRC's analysis and conclusions. It must be borne in mind that what is being considered in this report is not whether there should be separate laws for Aboriginal people but whether the application of Aboriginal customary law should be taken into account under the general law.

- One of the more difficult arguments in the context of discrimination, raised in submissions to the ALRC, is that *recognition of Aboriginal customary law would unacceptably discriminate against some immigrant communities, to the extent that the cultural traditions, customary laws and practices of those communities are not recognised*.⁴⁷ However, this argument can readily be rejected. The simple rejoinder is that Aboriginal people are the original inhabitants of Australia, having their own laws and customs which have regulated their society for thousands of years. Although British law was imposed upon them on the establishment of the British colony, their laws and customs did not thereby disappear. Rather, they have continued to evolve alongside the general legal system. People migrating to Australia since 1788 have done so on the understanding and acceptance that they would be subject to Australian law, administration and jurisdiction. Furthermore, if more is needed, the impact of non-recognition of Aboriginal customary law is demonstrably greater than is the case with immigrant minorities.⁴⁸

3.34 The Commission joins with the ALRC in failing to be persuaded by

47. ALRC 31 at para 163.

48. ALRC 31 at para 163.

these arguments against recognition of Aboriginal customary law. Further, the Commission agrees with the ALRC's conclusion that:

... the need for consistency with fundamental values of non-discrimination, equality and other basic human rights does not preclude the recognition of Aboriginal customary laws. On the contrary, these values themselves support appropriate forms of recognition of the cultural identity of Aboriginal people.⁴⁹

Further arguments in favour of recognition

3.35 Sarre⁵⁰ has also identified arguments supporting recognition of Aboriginal customary law, some of which, although phrased slightly differently, are in accordance with the ALRC's arguments. These are that recognition would:

- honour Australia's international obligations under the UN conventions concerning Indigenous peoples;
- give effect to the recommendations of the RCIADIC;
- help to reduce the incidence of Aboriginal people coming into contact with the criminal justice system and eliminate the disproportionate imprisonment of Aboriginal people; and
- bring about safer and less violent communities given the evidence that many communities bound by customary laws have very low levels of violence and criminality generally.

3.36 Sarre concludes that "where possible, customary 'law' and practice should be recognised where it does not offend the general law and where justice is best served thereby".⁵¹

3.37 One argument advanced in favour of recognition during the Commission's consultations suggested that, before Aboriginal societies can have equal standing with non-Aboriginal societies, there must be recognition of Aboriginal customs and traditions.⁵² Furthermore, recognition of customary laws may bring about a renaissance of those laws: recognition has

49. ALRC 31, Summary Report at para 37.

50. R Sarre, "Aboriginal Customary Law" (1995) 7 *Legaldate* 3 at 4.

51. Sarre at 5.

52. W Matthews, *Consultation* (20 October 1997).

the potential to motivate Aboriginal people to pool their knowledge and recollections, creating the foundations for a rebirth of dormant customs and traditions. This process could well have the effect of increasing the value of Aboriginal ways and of empowering Aboriginal people, raising self-esteem and self-respect. In turn, this assists equality between Aboriginal and non-Aboriginal people. By the same token, the process of consolidating knowledge of the operation of customary law, and reactivating customs and traditions, provides an opportunity for Aboriginal culture to evolve in contemporary society.

3.38 During the consultation process for the preparation of one of its reports, the Council for Aboriginal Reconciliation found that there was:

wide support for the role which customary law ... could play in assisting social cohesion and purposefulness in those communities where links with their knowledge of customary law were fragile or broken but able to be forged.⁵³

3.39 A renaissance of Aboriginal customary law in New South Wales may also have direct benefits in relation to crime. As previously noted, shaming is typical customary punishment. It has been argued that “[s]ocieties with low crime rates are those that shame potently and judiciously”.⁵⁴ In referring to Aboriginal solutions to the problem of alcohol abuse, Bird observes that “more traditional groups, sensing that the solution may lie in political autonomy, press for the recognition of their customary law”.⁵⁵

Further argument against recognition

3.40 The Commission, in its consultations, heard submissions that there are no longer any Aboriginal people in New South Wales who could truly be called elders and who, as such, were the keepers of the law, having authority

53. Australia, Council for Aboriginal Reconciliation, “Going Forward: Social Justice for the First Australians” *Submission to the Commonwealth Government* (1995) at 82.

54. J Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, Melbourne, 1989) at 1. See also P de Graaff, “The Poverty of Punishment” (1993) 5(1) *Current Issues in Criminal Justice* 13.

55. G Bird, *The “Civilising Mission”: Race and the Construction of Crime* (Monash University, Melbourne, 1987) at 41.

over the community. Older people in the community are often referred to as elders but this, it is argued, is a misnomer. Many such people have not been through rigorous training in order to attain official “elder” status; they do not have the respect and due recognition which a true elder has, particularly from the younger members of the community. Accordingly, there is no-one to exercise jurisdiction over community members and therefore recognition of Aboriginal customary law is irrelevant.

3.41 While the Commission acknowledges the validity of this argument, it refers largely to situations of more formal conflict resolution and determination of punishment. It does not take into account some of the circumstance in which Aboriginal customary law may arise, alluded to above under the heading “Defining the Issues”. There may be occasions where the operation of Aboriginal customary law does not depend on the authority of elders, or where the elders play no role.

Report of RCIADIC

3.42 The RCIADIC made a specific recommendation in relation to the ALRC Report.⁵⁶ Its finding was that:

[t]he Australian Law Reform Commission’s Report on the Recognition of Aboriginal Customary Law was a significant, well-researched study. The Royal Commission received requests from Aboriginal people through the Aboriginal Issues Units regarding the progress in implementation of the recommendations made by the Australian Law Reform Commission and in some cases from communities which had made proposals to the Law Reform Commission. This Commission urges government to report as to the progress in dealing with this Law Reform Report.

3.43 It also recommended:

That in the case of discrete or remote communities sentencing authorities consult with Aboriginal communities 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 and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in

56. Recommendation 219, vol 4 at para 29.2.54.

appropriate circumstances relate to sentences in individual cases.⁵⁷

Chapter 4 of this Report examines community involvement in the sentencing process.

Submissions and judicial response

3.44 A magistrate with extensive experience sentencing Aboriginal offenders, and who has taken into account evidence of the operation of Aboriginal customary law in his court, has not felt constrained from doing so by the lack of formal recognition of customary law. He regards such evidence as falling within matters which the existing law requires courts to take into account.⁵⁸

3.45 Another magistrate presiding over an area with a high Aboriginal population points out that the cases referred to in the ALRC Report were all decided in South Australia, the Northern Territory and Western Australia where there are far more Aboriginal people living in a traditional way than in New South Wales.⁵⁹ He, himself, has not seen any examples of Aboriginal people in New South Wales living in “what I understand to be the traditional way”.⁶⁰

[W]hen considering the place of customary law in sentencing in my view the position has to be that the large proportion of the Aborigines do not know and do not appear to respect their customary law.⁶¹

3.46 Only once has it been submitted to him directly that he should apply, or take into account, Aboriginal customary law on sentence.⁶² In that case, he

57. Recommendation 104, vol 3 at para 22.4.51.

58. G Hiskey SM, *Submission*. Magistrate Hiskey was the North-West Circuit Magistrate in South Australia, taking in the Pitjantjatjara Lands, from 1987 until 1992.

59. B Lulham SM, *Submission*. Magistrate Lulham was the Magistrate for the Moree Circuit from 1993 until 1996. He is presently the Magistrate for the Broken Hill Circuit.

60. B Lulham SM, *Submission* at 3.

61. B Lulham SM, *Submission* at 4.

62. B Lulham SM, *Submission* at 5. R A Brown LCM is now the Magistrate for the Moree Circuit He is of the view that “the existence of Aboriginal customary law may be arguable in tribal populations”, but he is not aware of its ever being relied upon in his circuit (of Moree) to settle disputes between Aboriginal people, or for any other purpose: *Submission* at 1.

had no difficulty in sentencing on the basis of existing law:

The assaults by the victim on the Defendant's daughter were obviously matters to be taken into account as likely and, properly so, to cause much anguish to the Defendant. Certainly, an understanding of the Aboriginal law as to payback was of assistance and was generally taken into account but I was able to deal with the matter under existing principles as to sentencing.⁶³

3.47 He also anticipates difficulties in determining what is in fact Aboriginal customary law:

I have already referred to what I consider to be the general lack of knowledge of such law and it would be an extraordinarily difficult task for such law to be documented to enable the Courts to ascertain the particular Aboriginal customary law. It appears that the customs and traditions and laws changed from Tribe to Tribe and the ascertainment of the law would be extremely difficult.

3.48 The Office of the Director of Public Prosecutions ("the DPP") expresses the tentative view that provisions in the Sentencing Act requiring Aboriginal customary law to be taken into account in the sentencing process are not required in New South Wales.⁶⁴ The DPP goes on to say that:

if customary law is not to be recognised or given effect to in a formal way, it should not be left out of consideration when devising broader sentencing options. Those broader sentencing options are likely to be more effective and given greater community support by Aboriginal people if it is properly recognised that they are tied to notions of customary law. In turn the Aboriginal community could have a sense of ownership or investment in the process.⁶⁵

3.49 The DPP has drawn attention to options available to Indigenous offenders in New Zealand and Canada, based on traditional notions of culturally appropriate sentencing methods, which it advocates examining. For example, Canadian courts may take into account recommendations of a "healing circle" comprising elders of the relevant native community, and other community representatives. There are similar family conferencing schemes in New Zealand. The DPP argues that:

63. B Lulham SM, *Submission* at 5.

64. N R Cowdery QC, DPP, *Submission* at 4.

65. N R Cowdery QC, DPP, *Submission* at 5.

customary law in this sense needs to be carefully defined as it does not necessarily only mean “the odd spearing” in central Australia. Listening to elders in relation to sentencing is an aspect of customary law, as are payback and shaming. Failure to recognise this would be a significant omission in analysis.⁶⁶

Community involvement in the sentencing process is considered in Chapter 4 of this Report.

3.50 The DPP offers the following “significant benefits of customary law”:

- the sentenced person cannot claim to be the victim of “white man’s justice”;
- communities can take control of their interests and the law is likely to be better respected and the penalty more acutely felt as condemnation for transgressing against one’s own community; and
- a community approach with community-based punishments may be more easily accessed by victims as the victim avoids the stigma of going against his or her own people.⁶⁷

3.51 One of the submissions received by the Commission accepted that Aboriginal customary law “has a part to play within our diverse culture” and that “smaller towns with a majority of Aboriginal residents could have an established community supporting and participating in cultural law”. However, the rider expressed in this submission was that urban Aboriginal people cannot be considered as suitable for the application of customary law:

The only time that I consider customary law as appropriate is where both victim and offender are long term residents of a recognised Aboriginal community that has an established cultural authority. This does not necessarily mean that both victim and offender must be residing in the same Aboriginal community, but it does mean that offenders who commit serious offences within the wider community must be dealt with according to the laws of that wider community.⁶⁸

3.52 This submission went on to argue that, within the parameters set out in the above quotation, all minor offences (being those deemed not to require full-time incarceration) would be suitable for resolution by customary law,

66. N R Cowdery QC, DPP, *Submission* at 5.

67. N R Cowdery QC, DPP, *Submission* at 5.

68. Confidential, *Submission*.

but that an offender should have the right to refuse the application of customary law. The danger of “double jeopardy”, where offenders may be punished by customary law after being punished by State laws, was pointed out. The solution proposed was that, once it has been decided that an offender is to be punished by customary law, the State judiciary must not interfere “nor begin to consider whether a penalty imposed by the elders (or whoever) is appropriate in its perceived suitability”. That is, this submission argued for a complete acceptance of customary law, or not at all. The problem with this approach is that, in reality, it is an argument in support of self-determination for Aboriginal people. As was discussed above, this Report cannot analyse the feasibility, nor the desirability, of legislation giving Aboriginal people sovereignty over criminal matters, nor make recommendations with respect to self-determination. The law as it presently stands is unambiguous: the State criminal jurisdiction extends to the Aboriginal population, and is exclusive of any Aboriginal criminal jurisdiction.

Survey of New South Wales District Court Judges and Local Court Magistrates

3.53 The Commission prepared a questionnaire for District Court Judges and Local Court Magistrates to survey the views and experiences of those judicial officers in sentencing Aboriginal offenders. Responses were anonymous and largely confined to selecting a “yes” or “no” answer, with a limited amount of comment. The results of that survey in relation to Aboriginal customary law are as follows.

3.54 Of the 27 judges who responded, 8 believe that Aboriginal customary law should be recognised in the sentencing process in New South Wales, 15 do not believe it should be recognised, 3 were unable to comment and 1 did not answer this question.⁶⁹

Of the 60 magistrates who responded, 27 believe Aboriginal customary law should be recognised in the sentencing process in New South Wales, 14 of whom thought recognition should be in legislation. Twenty-one do not believe it should be recognised,

69. Numbers of judges in favour of recognition of Aboriginal customary law: three out of four responding judges sitting exclusively in country areas; one out of three responding judges sitting exclusively in metropolitan areas; eight out of 20 responding judges sitting in both country and metropolitan areas (although three of the judges who completed the questionnaire were unable to comment, one did not respond to this particular question and one commented that if customary law was applicable in New South Wales, he or she would support its recognition).

10 were unable to comment and 2 did not answer this question.⁷⁰

3.55 The only certain conclusion which can be drawn from these surveys is an obvious one: that it is a very complex issue on which it is always going to be difficult to obtain consensus. It is interesting to note that Aboriginal customary law has been raised on a number of occasions in New South Wales courts.⁷¹

Conclusion

3.56 Taking the submissions and judicial views into account, the Commission finds the arguments in support of recognition of Aboriginal customary law persuasive, and that they outweigh the arguments against recognition. The Commission agrees with the conclusions of the ALRC that it is proper for sentencing courts to have regard to Aboriginal customary law in sentencing proceedings.⁷² This view is endorsed by the RCIADIC and the Australian Council for Aboriginal Reconciliation.⁷³

70. Numbers of magistrates in favour of recognition of Aboriginal customary law: 10 out of 20 responding magistrates sitting exclusively in country areas (5 of whom supported legislative recognition); 4 out of 10 responding magistrates sitting exclusively in metropolitan areas (3 of whom supported legislative recognition); 13 out of 30 responding magistrates sitting in both country and metropolitan areas (9 of whom supported legislative recognition).

71. Customary law had been raised in the court of 1 judge at the time of trial and in the courts of 4 judges at the time of sentencing; and in the courts of 7 magistrates at the time of trial and in the courts of 19 magistrates at the time of sentencing.

72. ALRC 31 at para 516.

73. During the consultation process for the preparation of one of its reports, the Council for Aboriginal Reconciliation found widespread support “for the concept of according appropriate recognition and status for customary law within the present legal framework of the Commonwealth, the States and the Territories”: Australia, Council for Aboriginal Reconciliation, “Going Forward: Social Justice for the First Australians” at 82. The Council recommended that the Commonwealth draft legislation implementing recognition of customary law, for consideration by Aboriginal people and the wider Australian community: see Recommendations 59 and 60. The Australian Reconciliation Convention of 1997 “supports the recognition, including Constitutional recognition, and application of Aboriginal and Torres Strait Islander customary law and traditions within Australian written statutes and common law, and in court procedures”: Australia, Council for Aboriginal

3.57 The New South Wales Parliamentary Standing Committee on Social Issues called for submissions on means of promoting the interests of Aboriginal people in New South Wales, including comment on legislative initiatives, or other formal means of recognising the rights of Aboriginal people.⁷⁴ Implicit in the Committee's focus was support for recognition of Aboriginal customary law.⁷⁵

3.58 Submissions to the ALRC widely supported recognition of Aboriginal customary law in sentencing. Further, the ALRC noted that recognition "is generally accepted by judges and writers"⁷⁶ and that "[t]he converse view that Aboriginal customary laws should be rejected as a relevant factor in sentencing – was supported by no-one".⁷⁷ The ALRC also observed that:

[t]he courts have consistently rejected arguments that Aboriginal customary laws, because they are not formally recognised by the general law and may in some respects contravene it, cannot be taken into account in sentencing.⁷⁸

3.59 Proceeding, then, on the basis that courts should recognise Aboriginal customary law in sentencing, the issue which now needs to be considered is on what basis this can be achieved in New South Wales, and whether or not there is a satisfactory existing basis.

RECOGNITION OF CUSTOMARY LAW ON THE BASIS OF MABO

3.60 Since the ALRC's Report, the High Court handed down its decision of

Reconciliation, *Interim Report: Seminar Outcomes* presented at Australian Reconciliation Convention (May 1997, Melbourne).

74. NSW, Legislative Council Standing Committee on Social Issues, *Aboriginal Representation in Parliament* (Issues Paper No 3, April 1997).

75. The Standing Committee noted that "amendment of the NSW and Australian Constitution to recognise Aboriginal custom and law" was an option to enhance representation for Aboriginal people: NSW, Legislative Council Standing Committee on Social Issues, *Enhancing Aboriginal Political Representation* (Report No 18, November 1998) at para 8.8.

76. ALRC 31 at para 516.

77. ALRC 31 at para 516.

78. ALRC 31 at para 504.

*Mabo v Queensland (No 2)*⁷⁹ (“*Mabo (No 2)*”), a turning point in the recognition of Aboriginal law. This case has subsequently been examined for the possibility of extending its application beyond native title to criminal law. *Mabo (No 2)* held that the notion of Australia being *terra nullius* at the time of British settlement was a legal nonsense; that while English common law was introduced with settlement, it was possible that certain prior existing native laws survived; and that native land title continued after settlement. It was then argued that two features of *Mabo (No 2)* paved the way for recognition of native criminal jurisdiction:

The first is the High Court’s acknowledgment that the Aboriginal communities had and continue to possess sophisticated native laws ... Secondly, the High Court was prepared to recognise the co-existence of native laws with the general laws of the nation ... Accordingly, legislation which

79. (1992) 175 CLR 1.

recognises a form of native criminal jurisdiction co-existing with the general criminal jurisdiction would be in step with this *Mabo* ruling.⁸⁰

3.61 However, in *Walker v New South Wales*⁸¹ the High Court has clearly rejected the application of *Mabo (No 2)* to criminal law. Counsel for the plaintiff in *Walker* argued that the question which arose for consideration was whether customary Aboriginal criminal law is something which has been recognised by the common law and which continues to this day, in the same way that *Mabo (No 2)* decided that the customary law of the Meriam people relating to land tenure continues to exist. Chief Justice Mason held that customary Aboriginal criminal law is not recognised by the common law in New South Wales, and there is no rule of construction that precludes the application of criminal statutes to people of Aboriginal descent. His Honour further held that:

[e]ven if it be assumed that customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application. In *Mabo (No 2)*, the court held that there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown. There is no analogy with the criminal law.⁸²

3.62 The rejection by the High Court of the application of *Mabo (No 2)* to criminal law does not preclude a New South Wales court from taking into account Aboriginal customary law in the exercise of its criminal jurisdiction. Rather, it precludes the existence of competing Aboriginal criminal jurisdictions.

3.63 The following discussion examines whether courts have an existing power to recognise Aboriginal customary law within the general criminal law.

80. S Yeo, "Native Criminal Jurisdiction After *Mabo*" (1994) 6 *Current Issues in Criminal Justice* 1 at 23.

81. (1994) 182 CLR 45. *Walker v New South Wales* was referred to in *Wik Peoples v Queensland* (1996) 187 CLR 1 and considered in *R v Miyatatawuy* (1996) 87 A Crim R 574 and *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 157 ALR 193. It was followed in *DPP Reference (No 1 of 1999)* (1999) 128 NTR 1. It was distinguished in *R v Warren* (1996) 88 A Crim R 78.

82. (1994) 182 CLR 45 at 50.

RECOGNITION OF CUSTOMARY LAW ON THE BASIS OF THE OFFENDER'S CULTURAL BACKGROUND

3.64 While most Australian jurisdictions give legislative guidance as to the factors which should be taken into account on sentence,⁸³ only the *Crimes Act 1914* (Cth)⁸⁴ and the *Crimes Act 1900* (ACT)⁸⁵ and some juvenile justice legislation⁸⁶ specifically refer to the cultural background of the offender as a relevant factor. New South Wales sentencing legislation contains no qualitative principles to guide sentencing. In New South Wales, it is largely the common law which has developed principles and factors to be taken into account by the sentencing court. It is, therefore, the common law which must be examined for a basis on which to recognise Aboriginal customary law.

3.65 One of the leading cases in the area of sentencing principles, *R v Neal*,⁸⁷ held that while 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 racial group, the sentencing court is bound to take into account facts which exist only by reason of his membership of such a group.⁸⁸ Similar views have been expressed, and developed, in a number of other cases, notably, *R v Fernando*.⁸⁹ Principles applying to the sentencing of Aboriginal offenders are discussed in detail in Chapter 2.

3.66 The courts have frequently exercised judicial discretion to make allowances in sentencing on the basis that the concurrent operation of Aboriginal customary law is relevant. The ALRC Report reviews in detail some of the leading criminal cases, in the decade 1976-1986, in which

83. *Crimes Act 1914* (Cth) s 16A; *Criminal Law (Sentencing Act) 1988* (SA) s 10; *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2); *Crimes Act 1900* (ACT) s 429A; *Sentencing Act 1995* (NT) s 5(2). Compare *Sentencing Act 1995* (WA) s 6-8 which sets out sentencing principles without listing specific factors to be taken into account.

84. Section 16A.

85. Section 429A(1)(k).

86. *Young Offenders Act 1993* (SA) s 3(3)(e); *Young Offenders Act 1994* (WA) s 46(2)(c).

87. (1982) 149 CLR 305.

88. *R v Neal* (1982) 7 A Crim R 129 at 326 (Brennan J).

89. *R v Fernando* (1992) 76 A Crim R 58 at 62-63; *Jabaltjari v Hammersley* (1977) 15 ALR 94 at 98 (Muirhead J).

Aboriginal customary law was an issue,⁹⁰ including *R v Mamarika*,⁹¹ *R v Sydney Williams*,⁹² *R v Davey*,⁹³ *R v Jadurin*⁹⁴ and *R v Jungala*.⁹⁵ As well, the ALRC prepared a Research Paper summarising nearly 50 such cases, all but one decided in the period 1974-1982.⁹⁶ The decisions examined below are those which have been handed down since 1986.

Precedents for the exercise of judicial discretion

R v Wilson Jagamara Walker⁹⁷

3.67 The defendant was convicted of manslaughter and sentenced to three years imprisonment. The sentence was suspended on condition that he enter into a bond to be of good behaviour for two years and return to live in a

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90. ALRC 31, Chapter 21 and J Crawford and P Hennessy, *Cases on Traditional Punishments and Sentencing*.
 91. (NT, Supreme Court, No 293 of 1981, Muirhead J, 22 December 1981, unreported). The defendant killed his brother and was speared by his other three brothers as “payback”. The defendant’s plea of manslaughter was accepted by the Crown on the grounds of provocation. The defendant’s three brothers were charged with causing grievous bodily harm. The issue arose before the court as to the extent to which traditional payback should be taken into account by the court in determining sentence. The defendant’s community had written to the court proposing that the defendant not be imprisoned but be banished from his community for three years. The court sentenced the defendant to seven years and six months imprisonment. On appeal, the Federal Court did not vary the length of the sentence but suspended it on condition that the defendant be of good behaviour for four years and not return to his community for at least three years. Two of the brothers charged with spearing the defendant were given suspended sentences, and the other was acquitted.
 92. (SA, Supreme Court, Wells J, 14 May 1976, unreported); reported on a different point in (1976) 14 SASR 1. The defendant was convicted of manslaughter of an Aboriginal woman and given a two year suspended sentence on condition that he submit himself to the Tribal elders to be ruled and governed by them for one year and to obey their lawful directions.
 93. (1980) 50 FLR 57.
 94. (1982) 7 A Crim R 182.
 95. (NT, Supreme Court, No 97 of 1977, Muirhead J, 8 February 1978, unreported). The defendant’s family had already paid a penalty for his offence.
 96. ALRC Research Paper 6A.
 97. [1994] NTSC 79.

particular Aboriginal community. In determining the appropriate sentence, the Chief Justice of the Northern Territory took into account that the defendant would face traditional punishment, probably by being speared in each leg. However, the Chief Justice also required that the Director of Correctional Services report back to the court within six months whether the payback had occurred, as well as details of what had taken place. Imposing this condition went further than merely taking into account the possibility of customary punishment.

3.68 The observation has been made that the ALRC's recommendations on recognising customary law would not have supported the approach taken in *Wilson Jagamara Walker*, in particular the requirement to report back:

The danger of such a condition is that it interferes with the operation of customary law and the need for Aboriginal people to maintain control over their law. It may have the effect of forcing a spearing to occur in a contrived way in order for a Report to be written for the Court. It should be sufficient for the Court to take into account that traditional punishment will or may occur but allow this to be worked through by Aboriginal communities rather than the Court seeking to intervene in this way. The resolution of the conflict between the families involved in the *Walker* case may require complex negotiation and exchanges of obligations – it must be done by the Aboriginal parties.⁹⁸

R v Minor⁹⁹

3.69 The defendant, who had pleaded guilty to two charges of manslaughter and other offences, had consented to receive a “payback” penalty (by spearing in the leg) from his community upon his release from gaol. The trial judge sentenced him to a total effective head sentence of ten years, with a direction that he be released on a three-year good behaviour bond after serving four years. By setting a fixed release date, his Honour was giving special recognition to the traditional punishment. In the appellate court, Chief Justice Asche observed, without criticism, that the trial judge:

was influenced by the consideration that the infliction of payback would be of benefit to a community which possessed a philosophy that, once inflicted, payback wiped out all feuds arising from the defendant's actions. Hence, his Honour's remark that the community “may put the whole episode behind them and get on with the more

98. Hennessy (1994) at 8.

99. (1992) 59 A Crim R 227.

positive aspects of their lives”. His Honour was careful to say that the circumstances were such that the court did not condone payback but recognised it as inevitable.¹⁰⁰

3.70 On appeal by the Crown from sentence, Justice Mildren noted that “there is ample authority” for taking the possibility of future payback punishment into account in sentencing.¹⁰¹ The court held that Aboriginal customary 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 the offender’s membership of an ethnic or other group. This did not sanction violence but simply acknowledged reality. The court also held that a sentencing judge is entitled to have regard not only to the interests of the wider community, but to the special interests of the offender’s community. In that regard, the case is authority for taking into account the community’s wishes in regard to the sentence, so long as those wishes do not prevail over what might otherwise be a proper sentence.

R v Miyatatawuy¹⁰²

3.71 In this case, the defendant had been punished under Aboriginal customary laws prior to coming before the court for sentencing. It was held that the resolution or settlement of matters within the relevant Aboriginal community and the integral rehabilitation of the offender are significant circumstances to be considered on sentence. The court found that, although the High Court has held that Aboriginal customary law was extinguished by the passage of criminal statutes of general application, the facts and circumstances arising from the defendant’s Aboriginality, namely the operation within her Aboriginal community of practices affecting her, remain relevant. The courts are entitled to pay regard to those matters as relevant circumstances in the sentencing process. The court observed that the wishes of the victim of the offence in relation to the sentencing of the offender are not usually relevant, and that the wishes of the relevant community, of which the victim was a leading member, may not be permitted to override the discharge of the judge’s duty. Nonetheless, they may be taken into account on mitigation.

100. (1992) 59 A Crim R 227 at 228.

101. (1992) 59 A Crim R 227 at 237.

102. (1996) 87 A Crim R 574. This case considers *Walker v New South Wales* (1994) 182 CLR 45 and applies *R v Neal* (1982) 7 A Crim R 129.

R v Shannon¹⁰³

3.72 This case illustrates how evidence of traditional customs and beliefs may be relevant to an explanation of the defendant's conduct, mitigating the seriousness of the offence. In that respect, it is not strictly a precedent for the recognition of Aboriginal customary law, in so far as that term is understood to mean something akin to "a system of rules of conduct which is felt as obligatory upon them by the members of a definable group of people".¹⁰⁴ The defendant lit a number of fires believing this would frighten evil spirits away, shortly after he had been threatened by his father with ill fortune or punishment at the hands of tribal kadaitcha men. The mention of kadaitcha tends to strike fear into the hearts of many Aboriginal people.¹⁰⁵ In fact, Justice Zelling observed that a threat of use of kadaitcha would produce an immediate superstitious panic in the mind of the person threatened. The defendant "was put literally in fear for his life". When police officers attempted to apprehend the defendant, he assaulted them. The appellate court (hearing an appeal on severity of sentence) accepted that the defendant's state of mind had been affected, to some extent, by the threat of the "kadaitcha" men and that this mitigated the seriousness of the offence. The trial judge had failed to make allowance for "the mitigating circumstances (particularly those arising from the culture of the appellant) which clearly existed".¹⁰⁶

Munungurr v The Queen¹⁰⁷

3.73 The trial judge admitted into evidence a letter signed by the Chairman and Town Clerk of the Yirrkala Dhanbul Community Association stating the effect of the defendant's imprisonment on the community and its desire that he be returned to the community to be dealt with in the traditional manner. However, he gave no weight to the letter in his sentencing decision. On

103. (1991) 57 SASR 15.

104. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 266.

105. Zelling AJ in *R v Shannon* (1991) 57 SASR 15 at 19 gives, in his Honour's words, an oversimplified version of Aboriginal beliefs on this topic. Originally, the wearer of kadaitcha shoes – shoes made of emu feathers glued together with human blood – had a special role to play in judicial proceedings for murder. Later, kadaitcha was used for various forms of magical revenge among the Aboriginal people, not connected with judicial process. Later still, kadaitcha magic was used for baneful purposes by members of secret societies.

106. *R v Shannon* (1991) 57 SASR 15 at 17 (Olsson J).

107. (1994) 4 NTLR 63.

appeal from severity of sentence, the court held that, despite the informality of the evidence, the trial judge should not have rejected matters contained in the letter put by way of mitigation. In particular, the trial judge failed to consider the nature of the reconciliation ceremony referred to in the letter; the effect of imprisonment on the offender's family and his people generally; the community's wish that he be dealt with in the traditional way; and what traditional punishment, if any, the community proposed. The court held that the views, wishes and needs of the offender's community are relevant considerations, but will not prevail over what is a proper sentence. The court allowed the appeal and ordered that the defendant be released on a bond after three months on the condition that he attend at a tribal reconciliation for the purposes of sealing the peace between the two clans involved, as was prescribed by the relevant Aboriginal custom.

***R v Bara Bara*¹⁰⁸**

3.74 This is a case where customary law was taken into account in a sentencing hearing, but not in relation to the bearing it would have on the appropriate sentence. The defendant applied for an order suppressing the name of the deceased on the basis that it was extremely offensive to most Northern Territory Aboriginal people, and contrary to most tribal customs, to speak of a dead man by his name. The court granted the application, holding that publication of the deceased's name would be "likely to offend against public decency" within the meaning of section 57(1)(a) of the *Evidence Act 1939* (NT).

***R v Burton*¹⁰⁹**

3.75 In this case, the defendant was stabbed in the course of a dispute. He in turn stabbed the deceased in accordance with what was said to be the Anungu way of not hitting and running but exchanging one stab for another. In fact, the deceased had presented his leg to Burton to be stabbed. Burton failed to execute the stabbing in a way to cause minimal injury and subsequently received traditional punishment for this transgression. When sentencing, Justice Duggan took into account that the defendant had already received the traditional punishment. As well, the Director of Public Prosecutions considered the punishment under customary law in deciding to charge Burton with manslaughter rather than

108. (1992) 87 NTR 1.

109. (SA, Supreme Court, No 81 of 1994, Duggan J, 18 July 1994, unreported). This case is discussed in B DeBelle, "Aboriginal Customary Law and the Common Law" in E Johnston, M Hinton and D Rigney (eds), *Indigenous Australians and the Law* (Cavendish Publishing, Sydney, 1997).

murder.

R v Rogers and Murray¹¹⁰

3.76 Although this case did not involve a consideration of Aboriginal customary law, it elucidates the court's general power to take into account mitigating factors arising from the offender's cultural background, which can then be applied to recognising Aboriginal customary law. Chief Justice Malcolm held:

Race itself is not a permissible ground of discrimination in the sentencing process. If there were a different approach to the sentencing of Aborigines based only upon their Aboriginal background this would be contrary to s 9 of the *Racial Discrimination Act 1975* (Cth) ... It follows from this that the sentencing principles to be applied in relation to a sexual offence committed by an Aborigine must be the same as those in any other case. It is apparent, however, that there may well be particular matters which the court must take into account, in applying those principles, which are mitigating factors applicable to the particular offender. These include social, economic and other disadvantages which may be associated with or related to a particular offender's membership of the Aboriginal race.¹¹¹

R v Juli¹¹²

3.77 In that case, Chief Justice Malcolm quoted with approval a passage from a decision of Justice Muirhead in *R v Iginiwuni*:¹¹³

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 ...¹¹⁴

3.78 Quite clearly, the above cases, together with those cases examined by the ALRC in its Report and Research Paper, demonstrate that there is ample existing authority at common law for courts to recognise Aboriginal

110. (1989) 44 A Crim R 301.

111. *R v Rogers and Murray* (1989) 44 A Crim R 301 at 307. See also *R v Gibuma* (1991) 54 A Crim R 347: "[I]t is neither colour nor race that commonly forms a determinant or a factor in matters of sentencing ... It is the background, education, cultural outlook, and so on, of the particular individual involved" at 349 (McPherson SPJ).

112. (1990) 50 A Crim R 31.

113. (NT, CCA, No 6 of 1975, Muirhead J, 12 March 1975, unreported).

114. *R v Juli* (1990) 50 A Crim R 31 at 37.

customary law in the sentencing process. The issue now arises as to whether it would be proper to extend the basis for recognition, beyond a common law discretion, to a legislative duty to take Aboriginal customary law into account, where relevant.

CONCLUSION

3.79 There is ample common law precedent for judicial discretion to recognise Aboriginal customary law. Why, therefore, should an obligation to recognise Aboriginal customary law in the sentencing process be enforced by statute?

3.80 The Commission finds that the arguments in support of recognition of Aboriginal customary law are powerful, and outweigh the arguments against statutory recognition. A basic tenet of the Australian criminal justice system is that justice must be done, and be seen to be done. Failing to recognise the role played by Aboriginal customary law in a particular case could well lead to injustice. This reason alone may well justify legislative endorsement of the common law discretion. However, the totality of reasons for recognising Aboriginal customary law are too important to allow recognition to remain dependent upon the approaches and attitudes of individual judges and magistrates. The results of the Commission's survey of judges and magistrates show that a number of those surveyed do not believe that Aboriginal customary law should be recognised in sentencing in New South Wales. A legislative requirement of recognition, where relevant, would ensure that, where appropriate, Aboriginal customary law is always considered; and would thus promote consistency and clarity in the law and its application to Aboriginal people.

3.81 A recommendation that recognition of Aboriginal customary law be contained in legislation is not inconsistent with the Commission's conclusion that general sentencing principles should not be so contained. The two cases can be distinguished.

3.82 On the one hand, appellate courts have established qualitative principles by which the type and length of sentence are governed: imprisonment must be a sentence of last resort;¹¹⁵ punishment must not

115. Although, this principle has also received statutory recognition in New South Wales: *Justices Act 1902* (NSW) s 80AB; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).

exceed the gravity of the offence;¹¹⁶ there must be parity between co-offenders¹¹⁷ and between offenders generally;¹¹⁸ the total sentence imposed upon an offender must reflect the totality of the offending;¹¹⁹ the statutory maximum is to be reserved for the worst category of offence to which that maximum applies;¹²⁰ no-one should be punished for an offence of which he or she has not been convicted.¹²¹ These principles provide the framework for sentencing. The court's objective is to adhere to these general sentencing principles.

3.83 On the other hand, the cases have established that courts have the discretion to take into account Aboriginal customary law as a mitigating factor. This is not a principle forming part of the sentencing framework. It is a matter purely of discretion. Furthermore, there is no obligation on the court to take Aboriginal customary law into account, even where it may be a relevant circumstance. This is an unsatisfactory position.

3.84 The ALRC Report questions whether any legislative provision which requires a court to take Aboriginal customary laws into account in sentencing could be regarded as fettering essential judicial discretions. It might be thought, for example, to create difficulties if, in a particular case, the court decided that this was not appropriate. However, the ALRC Report rightly points out that:

such a provision would only require that a judge consider the relevance of Aboriginal customary laws in cases where, on the evidence, these have been an element in the offence. It would not require a judge automatically to give a lesser sentence, but it would be a direction from the legislature that Aboriginal customary laws are an element to be taken into account in sentencing.¹²²

3.85 The ALRC Report concluded that at least a general legislative endorsement of the practice of taking Aboriginal customary law into account is appropriate. It is considered that New South Wales should now put the recommendation of the ALRC Report into effect and give legislative support

116. *Veen v The Queen (Veen No 1)* (1979) 143 CLR 458; *Veen v The Queen (Veen No 2)* (1988) 164 CLR 465.

117. *Lowe v The Queen* (1984) 154 CLR 606.

118. *Bugmy v The Queen* (1990) 169 CLR 525.

119. *Mill v The Queen* (1988) 166 CLR 59; *R v Close* (1992) 31 NSWLR 743.

120. *R v Oliver* (1980) 7 A Crim R 174.

121. *De Simoni v The Queen* (1981) 147 CLR 389.

122. ALRC 31 at para 517.

for recognition of Aboriginal customary law.

3.86 Legislating for recognition of Aboriginal customary law has potential symbolic significance for New South Wales' credibility in the reconciliation process; for redress of the woeful consequences of Aboriginal contact with the criminal justice system, and the incidence of incarceration and deaths in custody; and for according respect to Aboriginal people, and real value to Aboriginal culture.

3.87 Recognition of Aboriginal customary law, while not amounting to Aboriginal sovereignty over criminal justice, would also be in line with the emerging international trend towards providing Indigenous peoples with the right to self-determination or self-management.

3.88 In considering whether there should be legislative endorsement of recognition, the issue arises as to whether this should be general or specific. The ALRC Report extracts from judicial precedents a number of general propositions as to how, and to what extent, Aboriginal customary law should be taken into account.¹²³ These propositions have as their foundation the axiom that a distinction must be made between taking the operation of customary laws into account on sentencing and seeking to incorporate aspects of customary law in a sentencing order. The latter is not considered appropriate and courts should continue to maintain the distinction. However, while the Commission accepts the wisdom of the propositions in the ALRC Report, it is not considered necessary to enunciate them in legislation. To do so would, in the Commission's view, inappropriately fetter judicial sentencing discretion. A general legislative requirement to recognise Aboriginal customary law, where relevant, achieves the objective.

3.89 The Commission has been guided by the terms of the ALRC Report¹²⁴ in making the following recommendation.

Recommendation 1

Where a person, who is, or was at a relevant time, a member of an Aboriginal community, is convicted of an offence, in determining the sentence, the court shall have regard to any evidence concerning the

123. ALRC 31 at para 505-515.

124. ALRC 31 at para 517.

customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which the victim was a member at a relevant time.

EVIDENCE AND PROCEDURE

3.90 While there are difficulties in introducing evidence of Aboriginal customary laws into general sentencing proceedings, they can be overcome and do not justify a complete exclusion of such evidence from a consideration of appropriate criminal sanctions. Courts deal with difficult and uncertain evidentiary issues every day. Rather than exclude certain evidence, decisions are frequently made to admit material or testimony into evidence and then judge what weight ought to be given to it. Specifically in relation to information about the relevance of Aboriginal customary laws, individual judges and magistrates, seeing the importance of having regard to such evidence in the circumstances, have been creative in finding ways to admit it. For example, in *Milirrpum v Nabalco Pty Ltd*¹²⁵ the court admitted evidence of customary laws as reputation evidence.

3.91 In *R v William Davey*, Justice Muirhead observed:

The Court has for many years now considered it should, if practicable, inform itself of the attitude of the Aboriginal communities involved, not only on questions of payback and community attitudes to the crime, but at times to better inform itself as to the significance of words, gestures or situations which are otherwise incomprehensible. The information may be made available to the court in a somewhat informal and hearsay style. This is unavoidable as it will often depend on a consultation with Aboriginal communities in remote areas.¹²⁶

3.92 A number of other sentencing judges have stressed the importance of being fully and reliably informed of relevant customary matters. In *R v Shannon*, Justice Zelling observed:

[i]t 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

125. (1971) 17 FLR 141.

126. (1980) 2 A Crim R 254.

publications on the topic: see, eg the [ALRC Report].¹²⁷

3.93 In *R v Minor*, Chief Justice Asche said:

[i]t is important also to note that [the trial judge] had here the advantage of hearing expert and convincing evidence from a person fully conversant with the language and customs of the community concerned. Statements sometimes emanate from the bar table to the effect that “there will be payback”. Such statements are of little assistance if they are not accompanied by the sort of evidence which was before the learned trial judge. Payback is not a vendetta. There must be clear evidence of the difference.¹²⁸

3.94 The Full Bench of the Federal Court stated in *Mamarika v R*:

But, if 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 this 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.¹²⁹

3.95 The ALRC Report expressed concern that the rules of evidence, strictly applied, could preclude much evidence from Aboriginal witnesses about their customary laws. It emphasised the need for flexibility in the law’s approach to receiving evidence of Aboriginal customary laws.¹³⁰ This view has been echoed by academics and the judiciary.¹³¹ For example, in *R v Shannon*, after pointing out the court’s need for help in informing itself properly of Aboriginal customary matters, Justice Zelling went on to say:

127. (1991) 56 A Crim R 57 at 61.

128. (1992) 59 A Crim R 227 at 228.

129. (1982) 42 ALR 94 at 97.

130. ALRC 31 at para 638-641.

131. See also G Eames, “Aboriginal Homicide: Customary Law Defences or Customary Lawyers’ Defences?” in H Strang and S A Gerull (eds), *Homicide: Patterns, Prevention and Control* (AIC Conference Proceedings No 17, Canberra, 1993) 149 at 162: If the courts are to have greater regard to the realities of Aboriginal society and to the opinions of Aboriginal people as to the appropriate disposition of homicide cases, then the first requirement will be that the law is made sufficiently flexible so as to be capable of receiving direct evidence on relevant matters.

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 ...¹³²

3.96 The ALRC Report, written prior to the enactment of the *Evidence Act 1995* (Cth), identified a particular problem relating to the fact that evidence of Aboriginal customary law is normally categorised as opinion evidence. Under the common law, opinion evidence could only be given by a suitably qualified expert, testifying as to matters within his or her range of expertise. It was uncertain whether a person with general expertise, but little local expertise, would qualify as an expert, although the degree of local expertise could be treated as a matter relevant to weight rather than admissibility.¹³³

3.97 The admissibility of expert evidence depends on proper disclosure and evidence of the factual basis of the opinion (the “basis rule”).¹³⁴ The ALRC Report concluded that the “basis rule” gives rise to potential difficulties in the proof of Aboriginal customary laws and that this rule should not be used to exclude evidence of Aboriginal customary laws, but should be applied only in relation to the weight given to the evidence:

A rule which required anthropologists to prove the basis of any opinion would create practical difficulties in many cases. In addition, opinions may be based on material that cannot or will not be formally admitted, eg because of questions of secrecy.¹³⁵

3.98 The *Evidence Act 1995* (NSW) (“Evidence Act (NSW)”), which is largely identical to the Commonwealth *Evidence Act*, continues to disallow evidence of an opinion to prove the existence of a fact, about the existence of which the opinion was expressed (the opinion rule).¹³⁶ However, “if a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge”.¹³⁷ It is possible that a member of the offender’s community with specialised

132. (1991) 56 A Crim R 57 at 61.

133. ALRC 31 at para 628-632.

134. S Odgers, *Uniform Evidence Law* (4th edition, LBC Information Services, 2000) at para 79.6.

135. ALRC 31 at para 637.

136. *Evidence Act 1995* (NSW) s 76.

137. *Evidence Act 1995* (NSW) s 78.

knowledge of that community's Aboriginal customary laws, based on his or her experience, could give evidence of those customary laws pursuant to this exception to the opinion rule.¹³⁸

3.99 Although hearsay evidence is normally inadmissible,¹³⁹ if the factual basis of the expert opinion is hearsay, this evidence would be admissible under an exception to the hearsay rule, because it would not be adduced to prove the existence of the facts asserted by the representations, but would be adduced to explain the assumptions on which an expert opinion is based.¹⁴⁰ Furthermore, the effect of s 60 of the Evidence Act (NSW), is that once the hearsay evidence is admitted to explain the assumptions on which an expert opinion is based, provided it is first-hand hearsay,¹⁴¹ it may then also be used to prove the existence of the asserted facts.¹⁴²

3.100 A further exception to the hearsay rule is contained in s 74 of the Evidence Act (NSW) which provides that the rule "does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right". If it can be successfully argued that customary law embodies general rights, then it is possible that some evidence relating to customary law could be admitted under this section.

3.101 To the extent that evidence of an opinion concerning Aboriginal customary laws may be about a fact in issue or an ultimate issue, or a matter of common knowledge, this evidence, which may have been inadmissible under the common law, would be admissible pursuant to s 80 of the Evidence Act (NSW).

138. The term "specialised knowledge" is not defined in the *Evidence Act 1995* (NSW). "It is likely that Australian courts will interpret s 79 in such a way as to require expert testimony to meet a standard of evidentiary reliability and relevance to be admissible": S Odgers, *Uniform Evidence Law* at para 79.3.

139. *Evidence Act 1995* (NSW) s 59: "Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation".

140. *Evidence Act 1995* (NSW) s 60: "The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation": see S Odgers, *Uniform Evidence Law* at para 79.6.

141. This limitation was imposed by the judgment of the High Court in *Lee v The Queen* (1998) 195 CLR 594: see S Odgers, *Uniform Evidence Law* at footnote 286.

142. S Odgers, *Uniform Evidence Law* at para 79.6.

3.102 To overcome evidentiary obstacles and uncertainties, the ALRC Report recommended specifically providing in legislation that evidence of Aboriginal customary laws is not inadmissible by reason that it is hearsay or opinion evidence or that it relates to a fact in issue.¹⁴³ However, it is probable that this evidence would now be admissible under the Evidence Act (NSW). The Commission sees no need for legislative changes in this regard.

3.103 The ALRC Report also raised special difficulties surrounding the taking of Aboriginal evidence, separate from those arising from legal rules of evidence.¹⁴⁴ Chapter 7 of this Report examines the difficulties Aboriginal people experience as witnesses, including language barriers and unfamiliarity with the non-Aboriginal legal system and court proceedings. Difficulties relating specifically to the giving of evidence about Aboriginal customary laws arise from:

- whether a witness has authority to speak for the community, in the particular circumstances and on the matter in question, a notion of considerable importance in Aboriginal tradition;¹⁴⁵
- the fact that a witness may only have authority to speak on a given matter in conjunction with others who collectively have such authority;¹⁴⁶
- the fact that disclosure of some Aboriginal customary laws may be forbidden;¹⁴⁷
- unrestricted publication of material contained in an anthropologist's report may breach customary laws and may also breach undertakings between the anthropologist and the Aboriginal community concerned;¹⁴⁸ and
- a witness's evidence may disclose a past violation by that witness of a customary law, exposing him or her to shame or retaliation.¹⁴⁹

3.104 The first issue, that of a witness having authority to speak, calls for

143. ALRC 31 at para 637 and 642.

144. ALRC 31 at Chapter 25.

145. ALRC 31 at para 644-645.

146. ALRC 31 at para 646-648.

147. ALRC 31 at para 649-656.

148. ALRC 31 at para 657-661.

149. ALRC 31 at para 662-665.

an awareness and sensitivity on the part of lawyers and judicial officers in identifying appropriate witnesses. This is necessary not only to accord the proper respect for Aboriginal custom, but to ensure that the most accurate and authoritative evidence is obtained.

3.105 Where an Aboriginal person only has authority in the presence of others, the ALRC Report recommends that legislation dealing with proof of Aboriginal customary laws should empower courts to take group evidence. The ALRC Report acknowledges that the courts may already have this power, as an aspect of their inherent power to regulate their own procedure, and that there are precedents for its having been invoked.¹⁵⁰ However, the ALRC Report takes the view that legislative endorsement would encourage taking group evidence and would clarify whether such evidence can be permitted. The Commission is not convinced of the necessity for a legislative provision that courts may take group evidence. The Commission does, however, urge that courts use their inherent powers to adopt this course where necessary, to ensure that relevant information is before the court.

3.106 In Aboriginal culture, it is imperative that certain customary laws remain secret to certain individuals, or certain groups, or to one gender or the other; disclosure of secret information causes distress to Aboriginal communities and may attract penalties. Some who oppose recognising Aboriginal customary law have argued that recognition entails too great a problem in maintaining the obligatory secrecy.

3.107 Magistrate Hiskey has experienced difficulty arising from the secrecy attaching to certain customary laws. The defendant might have used words or phrases which ought not, under Aboriginal custom, be uttered in particular circumstances.

What might appear to the court as an ordinary charge of using offensive language, may, to the Aboriginal community, be a grave breach of custom. A dilemma arises because traditional beliefs make repetition of such language inappropriate, but the gravity of the allegation must somehow be

150. See *Police v Isobel Phillips* (NT, Court of Summary Jurisdiction, No 1529-1530 of 1982, Murphy SM, 19 September 1983, unreported); *Spika Trading Pty Ltd v Royal Insurance Australia Ltd* (1985) 3 ANZ Ins Cas 60-663.

communicated to the court.¹⁵¹

3.108 The ALRC Report demonstrates that courts have inherent powers to receive secret information on a restricted basis, either in secret session, in the presence of members of only one sex, or to the judicial officer alone, or in camera and to make orders prohibiting publication of the information. Such measures have been successfully used in land claim hearings.¹⁵² A decision of the Full Court of the Federal Court ruled that it was within the court's power to apply "gender restrictions" in court proceedings when Aboriginal people are required to give evidence about their rituals and customs.¹⁵³ While the ALRC Report recommends legislative confirmation that the courts' discretion extends to evidence relating to Aboriginal customary laws, the Commission does not see the need for this. The necessary powers clearly exist and are being exercised without difficulty. They should continue to be exercised freely, as appropriate.

3.109 The ALRC Report examined the problem which may arise if communications between Aboriginal people and anthropologists, linguists and others working in Aboriginal communities are confidential and yet it is necessary, for example, to place the confidential information before the court in mitigation of sentence. If the offender wishes to produce confidential information in evidence it may be difficult for the Aboriginal community to oppose this on the basis that it is covered by a category of privilege. The ALRC Report does not recommend that a special category of privilege be created to cover confidential material within Aboriginal customary law. Rather, it recommends that the court exercise its general discretion to weigh the importance of the evidence and the nature of the proceedings against the damage to the Aboriginal community.¹⁵⁴

3.110 It is unclear whether the common law privilege against self-incrimination would extend to evidence which incriminated the witness under Aboriginal customary law. On this issue, the ALRC Report recommended that, while a complete privilege is not desirable, the courts should have the power to excuse a witness from answering a question which would tend to

151. G Hiskey, "Justice in the North-West Lands: On Circuit in the Pitjantjatjara Lands" (1992) 14(9) *Law Society Bulletin* 18 at 20.

152. ALRC 31 at para 649-656.

153. *Western Australia v Ward* (1997) 145 ALR 512.

154. ALRC 31 at para 657-661.

incriminate the witness under his or her customary laws.¹⁵⁵

3.111 Even allowing for flexibility in the laws of evidence and in the courts' approach to taking evidence, Magistrate Lulham draws attention to some practical difficulties in obtaining authoritative evidence of Aboriginal customary laws. If, in order for the court to be informed of all the customary matters relevant to the particular case, it is necessary to call Aboriginal elders as witnesses, there may be obstacles to this course. Magistrate Lulham believes that most Aboriginal elders would be quite elderly and that many would be suffering from ill health. He is of the view that it would be unfair to involve them in "difficult areas of administration of justice".¹⁵⁶ Moreover, he has found "a general reluctance amongst Aboriginal persons to become involved in the administration of justice". He "understand[s] from other Magistrates that they have encountered the same situation".¹⁵⁷

VIOLENCE AGAINST WOMEN

3.112 Any proposal to recognise Aboriginal customary law in sentencing must carry with it a caution to distinguish legitimate and authentic customary law from false assumptions and misconceptions. Specifically, there is a danger that the judiciary, and others involved in the sentencing process, will accept the claim or myth that sexual and domestic violence against women is sanctioned by Aboriginal culture, or, at least, not regarded as seriously as it is in non-Aboriginal culture. This premise must be categorically repudiated.

3.113 In a number of cases, Aboriginal custom at least, if not customary law, has been relied on to legitimise domestic and sexual violence against Aboriginal women, or to minimise the seriousness of the offence or the suffering of the victims.¹⁵⁸ Atkinson refers to the trauma Aboriginal women

155. ALRC 31 at para 662-665.

156. B Lulham SM, *Submission* at 7.

157. B Lulham SM, *Submission* at 8.

158. In *R v Tjungarrayi* (NT, Supreme Court, No 37 of 1991, Kearney J, 20 December 1991, unreported), a submission by counsel for the defendant asserted that rape was regarded differently, namely, less seriously, by the Aboriginal community. Kearney J commented on this submission as follows: "That may be so, and in my experience as a judge for the last nine years, I'm inclined to think that it might be so. But it might only be so because of the dominance of Aboriginal men as spokesmen for Aboriginal communities, and a different story might be depicted if Aboriginal women spoke more for their communities". In *R v Jampijinpa Pollard* (NT, Supreme Court, No 28 of

experience in bringing an action for rape and relates that:

[i]f our women persist, and get to court, they have to listen to white male lawyers present arguments that suggest a “rough up” is part of Aboriginal love making ... or, that rape is not as hurtful nor considered as serious by Aboriginal women as it is for white women. All too often white male racist and sexist attitudes are contained in the arguments presented, and accepted in court.¹⁵⁹

3.114 Fortunately, most judges have dismissed this distortion of Aboriginal culture:

Ill treatment of women and assaults upon women will not be tolerated by the law and I know of no Aboriginal custom which would refute that as a philosophy.¹⁶⁰

Being crimes of violence, the sentence should reflect the seriousness of the offence; there should be no mitigation based purely on claims of cultural acceptance of such treatment of Aboriginal women.

3.115 The Ministry for the Status and Advancement of Women (“MSAW”) conducted a review of Aboriginal women’s access to, and interaction with, legal services, a project arising out of consultations with Aboriginal women undertaken as part of the New South Wales Domestic Violence Strategic Plan.¹⁶¹ Aboriginal women reported in those consultations that “they felt they were often confronted with hostile or ill-informed attitudes of members of the bench who were overseeing trials involving allegations of violence against Aboriginal women”.¹⁶² MSAW recommended that the Office of the Director of Public Prosecutions develop a network of female experts in the field of

1989, Rice J, 1 June 1989, unreported) counsel for the defendant submitted at the sentence hearing in mitigation as follows: “It is not fruitless to reflect upon Aboriginal custom where the infliction of physical violence on spouses, perhaps especially female spouses is indeed far more common and certainly to a certain extent, part of the culture” at 22.

159. J Atkinson, “Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward” (1990) 2(46) *Aboriginal Law Bulletin* 6 at 6.

160. *R v Long* (NT, Supreme Court, No 6 of 1989, Asche CJ, 8 February 1989, unreported) at 19. See also *R v Tilmouth* (NT, Supreme Court, No 45 of 1989, Kearney J, 18 July 1990, unreported).

161. NSW, Ministry for the Status and Advancement of Women, *Report – Aboriginal Women and the Law (Dubay Jahli)* (Report to New South Wales Parliament, 1994) (“*Dubay Jahli Report*”).

162. *Dubay Jahli Report* at 17.

Aboriginal culture who can be called to dispute claims that physical or sexual violence is “normal” or “ordinary part” of Aboriginal culture.¹⁶³ It also recommended that the DPP conduct Aboriginal Cultural workshops, facilitated by Aboriginal women, to encourage better understanding of Aboriginal culture by the judiciary.¹⁶⁴

163. *Dubay Jahli Report* Recommendation 7.1 at 17.

164. *Dubay Jahli Report* Recommendation 7.2 at 17. Education issues are discussed in Chapter 7.

4 ● The Aboriginal community's role in sentencing

- Introduction
- Rationale for community involvement
- Types of community involvement
- The Commission's recommendation

INTRODUCTION

4.1 Facilitating participation by people in the design and delivery of services and institutions that affect them is a fundamental principle of democracy and equality before the law. This principle applies generally to all people in all areas of life, and should underpin all areas of law and policy, not just sentencing.

The Commission's focus in this Report, however, is on Aboriginal people and the sentencing process. So far as the criminal justice system is concerned, the community as a whole has a vested interest in ensuring the system is relevant and effective. Given the alarming number of Aboriginal people coming before the courts, it is clear that the justice system is not as responsive to Indigenous members of the community as it should be. The current overwhelming view, held in Australia and overseas, is that Aboriginal people should play a greater role than at present in developing justice initiatives aimed at reducing the rate at which they appear before the courts. In particular, developments concerning conferencing schemes, from pre-trial to sentencing, and sentencing circles, focus on creating an environment where the Aboriginal community can participate fully in how Aboriginal offenders are dealt with by the courts.

4.2 This chapter discusses conferencing and other measures, both current and proposed, designed to facilitate greater involvement by Aboriginal people in the criminal justice system, and makes recommendations regarding more flexible sentencing practices. Other chapters discuss the involvement of Aboriginal people in other areas of the sentencing process.¹

RATIONALE FOR COMMUNITY INVOLVEMENT

4.3 In the interests of fairness, the criminal justice system must be as truly representative as possible. At every critical point in the exercise and administration of justice, the rights, responsibilities and interests of the victim, the offender and the community, must be considered. Increasing levels of over-representation before the courts and in prison, and higher than average recidivism rates among Aboriginal offenders, indicate that the justice system is inadequately serving the interests of Aboriginal people.

1. For example, the role of Aboriginal customary law in sentencing (Chapter 3), developing appropriate sentencing options (Chapter 5) and informing the court on Aboriginal language and culture (Chapter 7).

4.4 Many Aboriginal people perceive the justice system to be alienating, discriminatory and irrelevant. As the Commission notes throughout this Report, the behaviour of many Aboriginal offenders, and effective methods of dealing with it, is intrinsically connected to the general life of the community in which they live. Community factors, such as lack of opportunities for education, employment and constructive leisure activities have a direct impact on levels of criminal activity. The only practical way to achieve cultural relevance in the criminal justice system is to involve Aboriginal people in the design and delivery of sentencing options. Participation by Aboriginal communities in sentencing strategies may also be an effective means of empowering communities where the traditional Indigenous authority structures and social cohesion may have broken down, and may ultimately reduce offending. It must be acknowledged that this objective is difficult to achieve and will become more difficult with changing social and economic conditions. However, without a substantial increase in the involvement of Aboriginal communities in the process of dealing with offenders, no improvement is likely.

Broad acceptance of the concept

4.5 The Commission notes that there has been increasingly widespread support for the principle of involving Aboriginal communities in the criminal justice process. Examples of this are set out below.

The Royal Commission into Aboriginal Deaths in Custody

4.6 The Royal Commission into Aboriginal Deaths in Custody (the "RCIADIC") recommended and encouraged self-determination and community involvement so that services appropriate to the needs of Aboriginal people were delivered.² It concluded that Aboriginal people should be involved in the review, planning and implementation of non-custodial options, employed in program delivery,³ and in developing community policing.⁴ The RCIADIC also recommended that sentencing

2. Australia, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (Five Volumes) (E Johnston, Royal Commissioner, AGPS, Canberra, 1991-92) (the "RCIADIC Report"): see particularly Recommendation 188 (self-determination to apply to the design and implementation of policies and programs); and Recommendation 192 (programs to be delivered either by Aboriginal organisations or following consultation with them).

3. RCIADIC Report, Recommendations 111, 113, 116 and 114.

4. RCIADIC Report, Recommendation 214.

authorities consult with discrete or remote Aboriginal communities and organisations on the general range of sentences considered appropriate for offences committed by members of the community within the community.⁵

4.7 In its review of the Government's implementation of the RCIADIC Report, the Aboriginal Justice Advisory Council ("AJAC") noted that few of the recommendations regarding Aboriginal involvement in service delivery and planning have been implemented.⁶

Other inquiries

4.8 Community involvement is a common thread running through several other reports. The Report by the Human Rights and Equal Opportunity Commission ("HREOC") on the Separation of Aboriginal and Torres Strait Islander Children from Their Families recommended that Indigenous organisations and communities play a major role in the sentencing of Indigenous offenders.⁷ It argued for respect for self-determination in juvenile justice and welfare matters.

4.9 The importance of focusing on the community to understand the context of, and find solutions for, offending behaviour, was also considered in Reports commissioned by Corrective Services Queensland into delivery of correctional services to Indigenous people in North Queensland.⁸ Arguing that Aboriginal social structures hold the key to social control, and understanding their functioning is essential in attempting to change disruptive and destructive behaviour patterns, the Reports proposed the community justice model,⁹ which has been successfully implemented in many communities.

5. RCIADIC Report, Recommendation 104.

6. NSW, AJAC, *Review of the NSW Government Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (September 2000) at 18-22.

7. Australia, HREOC, *Bringing Them Home*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (April 1997).

8. S Blackman and B A Clarke, *Aboriginal and Islander Perceptions of the Delivery of Correctional Services to Indigenous People in North Queensland* (Yalga-Binbi Institute for Community Development, Thuringowa Central, 1991); G Bimrose and J Adams, *Review of Community Justice Groups: Kowanyama, Palm Island, Pormpuraaw* (Yalga-Binbi Institute for Community Development, Thuringowa Central, 1995).

9. See para 4.16.

Government policy

4.10 Governments across Australia have accepted community involvement as a key element in policy formulation and implementation. The Ministerial Summit on Indigenous Deaths in Custody in July 1997, resolved that Ministers, “in partnership with Indigenous peoples” would develop plans for funding and service delivery of Indigenous programs and services to deal with the issues aired at the Summit.¹⁰ In New South Wales, *The Government Statement of Commitment to Aboriginal People* endorsed “initiatives based on a true partnership with Aboriginal people”, and encouraged Aboriginal involvement in justice system policy and program formulation and program delivery.¹¹ The Social Justice Commissioner has noted, however, that despite the acceptance by governments of the importance of the principle of Aboriginal involvement, it is largely viewed as “aspirational” rather than “essential”.¹²

International experience

4.11 In Canada, numerous inquiries have advocated an expanded role for the Indigenous community.¹³ Increasingly, Canadian courts are recognising the distinctive approach of Indigenous people in dealing with offenders, some having held sessions on Indigenous reserves.¹⁴ In particular, the use of sentencing circles has proved very effective.¹⁵ Other initiatives include the appointment of Indigenous justices of the peace, victim-offender reconciliation or mediation programs, elders’ courts, a youth court, community justice committees and sentencing advisory committees.¹⁶ In New Zealand, family conferencing has its roots in traditional Maori methods.¹⁷ Notwithstanding the caution which must be exercised in wholesale adoption

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10. The Outcomes Statement was signed by representatives of all Australian Governments, with the sole exception of the Northern Territory (4 July, 1997).
 11. NSW Government, *Statement of Commitment to Aboriginal People* (November 1997) at 4-5, 27 and 41.
 12. Australia, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Annual Report 1999* (Dr W Jonas, Sydney, 2000) (“Social Justice Commissioner Report (1999)”) «www.hreoc.gov.au/sj_report99».
 13. See para 1.31.
 14. The John Howard Society of Alberta, “Toward a Separate Justice System for Aboriginal Peoples” (1992) «<http://www.acjnet.org/docs/separjhs.html>».
 15. See below para 4.30-4.31.
 16. The John Howard Society of Alberta, “Toward a Separate Justice System for Aboriginal Peoples” (1992) «<http://www.acjnet.org/docs/separjhs.html>».
 17. See below para 4.29.

of models based on different Indigenous cultures, there is a developing body of comparative studies on which policy and program development in Australia can draw.¹⁸

Views of the judiciary

4.12 The potential for Aboriginal communities to be involved in sentencing was explored in the Commission's survey of judges and magistrates in New South Wales. A majority of Local Court magistrates supported the concept, although District Court judges were divided on the issue. Those in favour strongly endorsed a role for Aboriginal communities in providing background information on the circumstances of the offender and offence, advising the court on matters of customary law, having an input into the conditions attached to probation and parole, and conferencing. Some thought that there was scope for the Aboriginal community to advise on appropriate sentences. Some caution was expressed as to the appropriateness of such involvement and its potential for divisiveness. Concern was also expressed regarding the difficulty in ascertaining community views, given the diverse nature of Aboriginal culture, and the potential for injustice if offenders were denied rights as a consequence of community involvement in the sentencing process.¹⁹

4.13 Elsewhere, there is a growing recognition among judges and magistrates of the value of consulting with Aboriginal people regarding sentencing. Examples of informal consultation have occurred in courts in the Northern Territory, Western Australia and Victoria. The President of the Queensland Children's Court has recommended that Aboriginal elders and respected persons be empowered to participate actively in the judicial process, and that statutory recognition be afforded to them to supervise community-based orders and administer cautions.²⁰

TYPES OF COMMUNITY INVOLVEMENT

4.14 There is potential for significant participation by Aboriginal communities in all areas of criminal justice. Across Australia, examples of

18. See eg, K M Hazlehurst (ed), *Perceptions of Justice: Issues in Indigenous and Community Empowerment* (Avebury, Aldershot, 1995).

19. See, eg, B Lulham SM, *Submission* at 4; G Hiskey, *Submission* at 21.

20. Queensland, Children's Court, *Annual Report 1996-1997* at 24.

Aboriginal community-based initiatives are already operating.²¹ In this section, the Commission does not attempt to discuss all of those initiatives, but highlights some as examples of programs which have the potential to work successfully in New South Wales. It looks at community-based initiatives generally, and conferencing and Circle Sentencing in particular. Many of the programs focus on diversion from arrest and detention, community policing, and prevention and rehabilitation strategies. Others concentrate on input into the actual sentencing process. While the Commission's focus is on the imposition of sentences and how they are served, it is difficult, and somewhat artificial, to make a distinction between sentencing and other initiatives in this context.

General community-based initiatives

4.15 Across Australia, various programs facilitating Aboriginal input into the criminal justice system are operating. In Victoria, community-based initiatives have existed for some time. Community justice panels, comprising volunteers selected by Aboriginal communities, work with criminal justice agencies.

The Koori Justice Program, operated in Victoria by local Aboriginal co-operatives which employ a Koori Justice worker, enables supervision and support for young Aboriginal people in contact with the criminal justice system. Communities are funded to manage young offenders within their own community, providing realistic and culturally appropriate alternatives to incarceration, as well as diversionary programs.²² Panel members may also be called upon to provide input into decisions about appropriate sentences.

4.16 In Queensland, the Local Justice Initiatives Program involves a number of community justice groups, which comprise Aboriginal people elected by communities with a community-based development officer in support.²³ Originally piloted in the remote communities of Palm Island and

21. See below para 4.15-4.16. See also, for example, W Tyler, "Community-based Strategies in Aboriginal Criminal Justice: The Northern Territory Experience" (1995) 28 *Australian and New Zealand Journal of Criminology* 127; Australia Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fourth Report* (M Dodson, AGPS, Canberra, 1996) ("Social Justice Commissioner Report (1996)") at 19-66.

22. Social Justice Commissioner Report (1996) at 52-53.

23. Social Justice Commissioner Report (1996) at 53-61.

Kowanyama, but now extending throughout Queensland, the Program aims broadly to address the causes underlying Aboriginal involvement in criminal activity by facilitating consultation between local Aboriginal communities and justice agencies, including the judiciary, the police and local councils.²⁴ The groups have also advised courts about cultural matters during sentencing.²⁵ The advantage of such a Program is that strategies to reduce contact between Aboriginal people and the criminal justice system are developed by Aboriginal people within specific communities, thereby having more relevance and a greater chance of success. AJAC considers that a similar Local Justice Initiative Program should be established in New South Wales as it would “significantly improve the Aboriginal community’s capacity to deal with problems locally”.²⁶ As the needs of communities in New South Wales would be different from those in Queensland, and may only be peripherally relevant to sentencing, it is difficult for the Commission to make a formal recommendation on this point. However, the Commission encourages the Government to consult with AJAC regarding the development of Local Justice Initiatives in New South Wales.

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24. For a detailed description of the Local Justice Initiative Program: see Queensland, Department of Aboriginal and Torres Strait Islander Policy and Development, *Local Justice Initiatives Program, Program Description and Funding Guidelines* (May 1996); Queensland, Department of Aboriginal and Torres Strait Islander Policy and Development, *Local Justice Initiatives Program, Interim Assessment of Community Justice Groups, Report* (May 1998). See also P Chantrill, *The Kowanyama Justice Group: A Study of the Achievements and Constraints on Local Justice Administration in a Remote Aboriginal Community* paper presented at the Australian Institute of Criminology Occasional Seminar Series (Canberra, 11 September 1997) <www.aic.gov.au/conferences/occasional/chantrill.htm>.
 25. The role of Queensland community justice groups in advising courts on sentencing could be entrenched if legislation currently before the Queensland Parliament is passed. Presently, sentencing legislation provides that the court may hear submissions on sentence from community justice groups, but only at the request of either party or the court. The *Penalties and Sentences and Other Acts Amendment Bill 2000* (Qld) provides for adult and juvenile sentencing legislation to be amended to enable community justice groups to make submissions to the court of their own volition, on matters such as cultural and historical issues and available sentencing options in the offender’s community, when Aboriginal offenders are being sentenced: see Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 1 June 2000 at 1539.
 26. AJAC, Letter to the Executive Director of the NSWLRC (16 August 2000).

4.17 In Chapter 2, the Commission discussed specific factors that courts may take into account when sentencing some Aboriginal offenders. Information about such matters may be raised by counsel, or the court may request a pre-sentence report. Aboriginal communities may be consulted in gathering information to present before the court, but there is no formal requirement or mechanism for doing so. In Pitjantjatjara Lands in South Australia, magistrates may hear representations on matters of customary law in relation to penalty from a lawyer representing the Pitjantjatjara Council on behalf of the community.²⁷ Several courts, including local courts in New South Wales, have Aboriginal Court Liaison Officers whose functions include liaising between the judiciary and Aboriginal communities in order to increase awareness among judges of Aboriginal community views.²⁸ In New Zealand, an offender appearing for sentence may request the court to allow witnesses to speak about the offender's ethnic or cultural background and the way it may relate to the commission of the offence.²⁹

AJAC and community involvement

4.18 Established in New South Wales in 1993 following a recommendation of the RCIADIC, AJAC is a central body which provides advice to the State Government, through the Attorney General, on the impact of the law on Aboriginal people,³⁰ and develops initiatives aimed at making the justice system more responsive to the needs of Indigenous Australians.³¹ AJAC also monitors the Government's implementation of the RCIADIC Report.³² In addition to the central agency, there are six regional councils in New South Wales comprising members from Aboriginal communities across the State. It is therefore well-placed to bring an Indigenous community perspective to Government decision-making.

27. G Hiskey, "Justice in the North-West Lands: On Circuit in the Pitjantjatjara Lands" (1992) 14(9) *Law Society Bulletin* 18.

28. See para 7.13-7.15 for a discussion on the role of ACLOs.

29. *Criminal Justice Act 1985* (NZ) s 16.

30. For example, AJAC has recently conducted reviews of the effect on Aboriginal people of offensive language and conduct laws, and the impact on young Aboriginal people in Moree and Ballina of the *Children (Protection and Parental Responsibility) Act 1997* (NSW).

31. For example, AJAC recently released a Discussion Paper proposing the introduction of Circle Sentencing in New South Wales as an option for the Government to consider: see para 4.32-4.34.

32. See para 1.12.

Conferencing

Conferencing generally

4.19 “Conferencing” describes participation by community members in the way the criminal justice system deals with offenders.³³ Participation can involve any number of community members ranging from a handful of selected individuals to a large number of experts, community elders, and families and friends of both offenders and victims. At different points the emphasis may vary, focusing on the community’s interest in restitution, reparation and restoration, as well as the role and importance of both the offender and the victim. Ideally, conferencing should reconcile the aim of re-connecting offenders with their offences and their community, with the goal of increasing the participation of victims in the criminal justice system. There are two general variants of conferencing schemes, namely family group conferences and those involving mediation between offenders and victims. The two groups are not mutually exclusive and many variations occur.

4.20 Conferencing may occur at one of three stages in the criminal justice system:

- before trial, often as part of a police cautioning power, as a diversion scheme or alternative to prosecution;
- as part of the sentencing process, as an assistance to the court in determining an appropriate sentence; and
- after sentencing, on occasions when victims and offenders desire reconciliation, compensation or some form of future contact.

4.21 Conferencing has emerged in recent years as a popular option in achieving restorative rather than retributive justice.³⁴ As such, it aims to look beyond apportionment of blame to repairing the damage caused to

33. For a comprehensive discussion of examples of conferencing and their advantages and disadvantages, see New South Wales Law Reform Commission, *Sentencing* (Discussion Paper 33, 1996) (“NSWLRC DP 33”) at para 9.65-9.95, and New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996) (“NSWLRC Report 79”) at para 12.1-12.18. See also C Alder and J Wundersitz (eds), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (AIC, Canberra, 1994); and J Hudson et al (eds), *Family Group Conferences: Perspectives on Policy and Practice* (Federation Press, Sydney, 1996).

34. See J Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, Melbourne, 1989).

communities through crime. Because of this emphasis, some crimes are more amenable than others to being dealt with by way of conferencing. For example, conferencing is generally more effective in cases of stealing, damage to property or assault, where an opportunity exists for reparations to be made and the offender is confronted on a personal level with the effect the crime has had on the victim and the community. Conferencing is less effective for more violent crimes such as murder, sexual assault, domestic violence and drug trafficking, where the chance of redressing the wrong and restoring relationships is more remote.³⁵

Youth conferencing in New South Wales

4.22 In New South Wales, youth justice conferences are conducted under the *Young Offenders Act 1997* (NSW), which establishes the legislative base for an integrated and accountable system of administering justice for young people.³⁶ The Act applies to young people aged between 10 and 18 who commit a summary offence or an indictable offence which may be punished summarily.³⁷

It provides for a hierarchy of intervention for young offenders, from police warnings and cautions, conferencing and court appearances. The decision to hold a youth justice conference may be made by the police, the Director of Public Prosecutions or by the court at any time during proceedings, including sentencing.³⁸ Factors affecting the decision will include the seriousness of the offence, the degree of violence involved, the harm caused to the victim and the attitude of the offender.³⁹ A conference may be held only where the offender has admitted guilt (after receiving adequate, independent legal advice), and agrees to attend a conference.⁴⁰ The victim may choose whether or not to participate, or may elect to send a representative.⁴¹ Where the victim decides against participation, a conference may still be held.

35. For example, under the *Young Offenders Act 1997* (NSW), a court must deal with these matters rather than a youth justice conference: s 8.

36. Similar schemes for juvenile offenders operate in other Australian jurisdictions, eg, the *Young Offenders Act 1993* (SA) Pt 2 Div 3; *Young Offenders Act 1994* (WA) Pt 5 Div 2 and 3; and the *Juvenile Justice Act 1992* (Qld) Pt 1C and s 18F(5). This list is not exhaustive.

37. Under Part 9 of the *Criminal Procedures Act 1986* (NSW); see *Young Offenders Act 1997* (NSW) s 8. Such offences may include assault, theft or other property offences.

38. *Young Offenders Act 1997* (NSW) s 38 and s 40.

39. *Young Offenders Act 1997* (NSW) s 37(3) and s 40(5).

40. *Young Offenders Act 1997* (NSW) s 36 and s 40(1).

41. *Young Offenders Act 1997* (NSW) s 45(2)(b) and s 47(1)(i) and(j).

4.23 Apart from the offender and the conference convenor, participants in a youth justice conference may include the victim (or a representative), a support person for both the victim and the offender, police representatives, a legal advisor for the offender, a probation officer, an interpreter and an advocate to advise on cultural matters (such as an Aboriginal elder).⁴² A mutual resolution is agreed, and a plan of action settled upon, which may include an apology, compensation, reparation, or any other undertaking.⁴³ Youth conferencing aims to divert young offenders from the courts and from prisons, instil in them a sense of responsibility for the consequences of their actions and involve them, the victims and the community in repairing some of the damage caused by criminal acts.⁴⁴

Youth conferencing and Aboriginal offenders

4.24 Juvenile conferencing schemes have, to varying degrees, acknowledged the needs of Aboriginal juveniles, who are vastly over-represented in the juvenile justice system. They have adopted strategies such as using Aboriginal conference administrators and convenors, ensuring procedures recognise behaviours, relationships, values and norms characteristic of Aboriginal offenders and their families.⁴⁵

4.25 However, many commentators have argued that such attempts to make conferencing culturally appropriate are superficial, and that the benefits of diversionary conferencing have not been enjoyed by Aboriginal juveniles. Evaluation has consistently indicated the disparity of rates of access of Aboriginal youth to conferencing as a diversionary strategy.⁴⁶ Criticisms include inadequate consultation with Aboriginal communities in the design

42. *Young Offenders Act 1997* (NSW) s 47 and s 48.

43. *Young Offenders Act 1997* (NSW) s 52.

44. *Young Offenders Act 1997* (NSW) s 34.

45. See, eg R Welch and K Symonds, "Family Conferencing for Young Aboriginal Offenders" paper presented at AIC conference, Juvenile Crime and Juvenile Justice, Towards 2000 and Beyond (Adelaide, 26-27 June 1997); L Kelly and E Oxley, "A Dingo in Sheep's Clothing? The Rhetoric of Youth Justice Conferencing" (1999) 4(18) *Indigenous Law Bulletin* 4.

46. Social Justice Commissioner Report (1999) at Chapter 5; C Cunneen, "Community Conferencing and the Fiction of Indigenous Control" (1997) 30 *The Australian and New Zealand Journal of Criminology* 292; H Blagg, "A Just Measure of Shame?: Aboriginal Youth and Conferencing in Australia" (1997) 37 *British Journal of Criminology* 481; L Kelly and E Oxley, "A Dingo in Sheep's Clothing? The Rhetoric of Youth Justice Conferencing" (1999) 4(18) *Indigenous Law Bulletin* 4.

and administration of schemes; insufficient allocation of resources or flexibility in design to permit meaningful participation; the extent of police involvement and the reluctance of police to refer young Aboriginal offenders to conferencing; limitations on access for more serious offenders; and lack of access to legal advice and the severity of the penalties involved.⁴⁷

4.26 A recent report on the operation of the *Young Offenders Act 1997* (NSW) gives some weight to these criticisms.⁴⁸ That review was partly a response to a concern by the Youth Justice Advisory Council that young Aboriginal people were not being diverted from the court system at the same rate as other offenders.⁴⁹ The report revealed that the diversion rate of all offenders under the Act (that is, the number of young people dealt with by way of caution and conferencing rather than court proceedings) was 37.22%.⁵⁰ A higher diversion rate was expected based on experience in New Zealand⁵¹ and South Australia. The diversion rate was lower still (24.38%) for Aboriginal offenders.⁵² A total of 1, 267 conferences were held during the 1998-99 financial year. Of these, 14% were recorded as relating to young Indigenous people.⁵³ Nine barriers to compliance with the existing provisions of the legislation were identified, the major ones being that police were not adequately resourced or informed about the legislation, and were not using

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47. See Social Justice Commission Report (1999) at Chapter 5; C Cunneen, "Community Conferencing and the Fiction of Indigenous Control" (1997) 30 *The Australian and New Zealand Journal of Criminology* 292; H Blagg, "A Just Measure of Shame?: Aboriginal Youth and Conferencing in Australia" (1997) 37 *British Journal of Criminology* 481; L Kelly and E Oxley, "A Dingo in Sheep's Clothing? The Rhetoric of Youth Justice Conferencing" (1999) 4(18) *Indigenous Law Bulletin* 4.
 48. N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997* (NSW), (Report to the Youth Justice Advisory Committee, October 1999) (the "Hennessy Report").
 49. Hennessy Report at 7 and 19.
 50. Hennessy Report at 19-20.
 51. See para 4.29.
 52. Hennessy Report at 19-20. Aboriginal offenders comprised 12.85% of all young people dealt with under the *Young Offenders Act 1997* (NSW): Hennessy Report at 7 and 19.
 53. Although, as information regarding cultural background was inconsistently recorded, this number could be higher: Hennessy Report at 23. The Report also noted that, of the 710 people who successfully completed an outcome plan following conferencing, 13% were recorded as being Aboriginal: Hennessy Report at 23.

their discretion to refer matters away from the courts.⁵⁴ The report makes a number of recommendations concerning improvements to police practice, including greater accountability regarding the numbers of Aboriginal youth referred away from the court system.⁵⁵

4.27 However, while the numbers of young people being referred to conferencing may be lower than expected, those that have been referred have recorded a high degree of satisfaction with the process. The New South Wales Bureau of Crime Statistics and Research (“BOCSAR”) conducted a survey of victims, offenders and offenders’ support persons involved in youth conferences held under the *Young Offenders Act 1997* (NSW) and the Reintegrative Shaming Experiment in the Australian Capital Territory, between March and August 1999.⁵⁶ Of the New South Wales survey sample, 4.7% of victims, 24% of offenders, and 18.5% of offenders’ support persons identified as being Indigenous.⁵⁷ The vast majority of all those surveyed were happy with the procedures before and during the conference, believed that it was either “somewhat fair” or “very fair” to the offender and the victim, felt that they were treated with respect and listened to during the conference, and were satisfied with the outcome plan.⁵⁸

4.28 Many of the factors identified as limiting the effectiveness of youth conferencing, particularly with regard to Aboriginal offenders, relate to pre-trial diversion and other matters not related to sentencing. While the Commission is limited in this Report to considerations of sentencing, the success of conferencing as an effective sentencing tool depends on a continuum of factors working together. The Commission is of the view that much can be learnt from criticisms of youth conferencing in developing a successful regime potentially applicable to all Aboriginal offenders, not just juveniles. It would appear that the key element, apart from improving the level of resources and education about conferencing, is facilitating meaningful input from Indigenous communities in the development and operation of conferencing schemes. The Commission makes recommendations regarding conferencing for Aboriginal offenders at

54. Hennessy Report at 33-63.

55. Hennessy Report, List of Recommendations at 2-5.

56. L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (BOCSAR, Sydney, April 2000) (“BOCSAR Youth Justice Conferencing Evaluation”).

57. BOCSAR Youth Justice Conferencing Evaluation at 27.

58. BOCSAR Youth Justice Conferencing Evaluation at vii.

paragraphs 4.35-4.41.

The following paragraphs illustrate examples of Indigenous conferencing schemes in New Zealand and Canada which have met with some success.

New Zealand model

4.29 Much of the impetus for conferencing stems from the New Zealand model of family group conferencing operating under the *Children, Young Persons and their Families Act 1989* (NZ). Though applicable to all juveniles, the model was designed to reduce over-representation of Maori youth in custody. Like the youth conferencing scheme in New South Wales, the New Zealand model can operate either as a diversionary or a pre-sentence scheme. It is largely driven by Maori people, was developed following extensive consultation with Maori communities, and reflects Maori traditional systems of justice. Participation of the whanau (extended Maori family) is integral to family group conferencing, exercising their traditional role in conflict resolution and reaching reconciliation between victim and offender.⁵⁹ The family group is widely defined, and includes an adult with whom a young offender has a “significant psychological attachment”. The model is generally regarded as successful in diverting young people from the court system.⁶⁰

59. G Maxwell and A Morris “The New Zealand Model of Family Group Conferences” in Alder and Wundersitz (eds), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism*; Social Justice Commissioner Report (1996) at 42-45.

60. The Hennessy Report states that, in 1996, 85% of juvenile matters under the *Children, Young Persons and their Families Act 1989* (NZ) were dealt with by way of warnings or cautions, 13% by family group conferences, and only 1.8% finalised by a court: at 7.

Circle Sentencing in Canada

4.30 The “Circle Sentencing” scheme was devised by judges of the Territorial Court of Yukon in Canada, and first conducted in 1992.⁶¹ It is a community conferencing scheme, again based on the principle of restorative justice, which operates as a pre-sentence option for adult offenders. Sentencing circles operate on the understanding that crime affects whole communities, not just victims and offenders. Originally, Circle Sentencing was oriented towards Canada’s Indigenous people, but has since been adopted by both Indigenous and non-Indigenous people, in traditional and urban settings. Circle courts (as they are sometimes known) constitute an informal process by which community members contribute to sentencing decisions involving other community members. Participants may include a judge, counsel, court recorders, the offenders and community members (elders and others); and usually include community workers, police officers, the victim and family (including extended) members.

4.31 Matters are referred to a sentencing circle at the request of an offender or the offender’s legal representative. An offender’s eligibility for inclusion is assessed by criteria variously established in several reported cases and judicial pronouncements.⁶² Unlike other conferencing schemes, Circle Sentencing is not confined to less serious offences. An offender must normally plead guilty and accept responsibility for the offence to be able to take part in a sentencing circle. Procedures vary, but the purpose of discussion is to bring to the circle the best available information from which an appropriate sentence can emerge, to be determined by the judge. Usually a sentencing plan is devised by participants, and community resources used to carry it out. Goals include reduced recidivism and reliance on incarceration, victim empowerment and satisfaction, victim-offender reconciliation, and community healing and regeneration. Though sanctions focus on community-

61. For an examination of Circle Sentencing, see: R Ross *Duelling paradigms? Western Criminal Justice Versus Aboriginal Community Healing* (Conference Paper, Canadian Appellate Court Seminar, National Judicial Institute, 1994); J Nightingale “Community-based Sentencing of Aboriginal Offenders” (1997) 9(7) *Judicial Officers Bulletin* 49; C LaPrairie, “Altering Course: New Directions in Criminal Justice, Sentencing Circles and Family Group Conferences” (1995) *Australian and New Zealand Journal of Criminology* 78; J V Roberts and C LaPrairie, “Sentencing Circles: Some Unanswered Questions” (1996) 39 *Criminal Law Quarterly* 69.

62. For example *R v Moses* [1992] 3 CNLR 116 (Y TTerr Ct); *R v Webb* [1993] 1 CNLR 148 (Y TTerr Ct); *R v Cheekinew* (1993) 80 CCC (3d) 143; *R v Morin* (1994) 1 CNLR 150 (Sask QB); and *R v Joseyou nen* [1995] 6 WWR 438.

based options, commentators have noted that taking responsibility for the offending behaviour, facing community and victim, and performing sometimes intrusive and stringent conditions can be more effective than imprisonment.⁶³

Circle courts generally supported

4.32 Sentencing circles have received enthusiastic support from within the Canadian judiciary and Indigenous communities and beyond. AJAC attributes this success to the capacity of circle courts to merge the values of Indigenous people with the structures of the western justice system.⁶⁴ AJAC has argued that involving the victim, offender and the community greatly improves the potential for developing workable solutions to crime and addressing the underlying causes of criminal behaviour. Issues of concern have also been raised in Canada and abroad. They include the need for guidelines for the establishment of circles to ensure consistency and procedural safeguards, the criteria by which to select appropriate cases, the role of and impact on victims, the degree to which sentencing circles truly reflect Indigenous traditions and values, the cost involved,⁶⁵ and the ability of communities to implement the sentencing plans devised.⁶⁶

Proposed trial in New South Wales

4.33 In response to a proposal by AJAC to trial Circle Sentencing in New South Wales, a Working Party was established recently, which developed a model for a three-year trial to be established in three Aboriginal communities.⁶⁷ Determining which communities should be selected would depend on the level of support from the local Aboriginal population, magistrate, Aboriginal Legal Services, and whether the requisite community infrastructure was in place. While the Working Party was of the view that procedural details should be left for local communities, particularly Aboriginal communities, to determine themselves, the Working Party

63. D Kwotchka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 *Saskatchewan Law Review* 153 at 165.

64. NSW, AJAC, *Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process* (Discussion Paper, 1999) ("AJAC Circle Sentencing Paper").

65. AJAC Circle Sentencing Paper at Chapter 8.

66. See C La Prairie, "Altering Course: New Directions in Criminal Justice, Sentencing Circles and Family Group Conferences" (1995) *Australian and New Zealand Journal of Criminology* 78 at 87-90.

67. For a detailed description of the model, see AJAC Circle Sentencing Paper at Chapter 10.

proposed the following guidelines:

- a Community Justice Committee, comprising respected members of the Aboriginal community, would be established in each of the trial locations to oversee the Circle Sentencing process;⁶⁸
- a defendant may apply to a court for entry to a sentencing circle after a plea or a determination of guilt has been made;
- a defendant's suitability for entry would be assessed by two tests: one imposed by the court and one imposed by the local community, both of which must be satisfied;
- if the defendant meets the criteria for the court-applied test,⁶⁹ the application would be forwarded to the local Community Justice Committee to determine the defendant's acceptability;
- in determining a defendant's eligibility, the Community Justice Committee would consider matters such as the type of offence, the attitude and community support of the offender, and the views of and impact on the victim and the community as a whole;
- if the Community Justice Committee rejects the application, the matter would be sentenced in a regular court;
- if the application is accepted, a sentencing circle would be formed, comprising a magistrate, the offender, the victim, family and/or support people for the victim and the offender, legal representatives, community elders and any other relevant people;⁷⁰
- during the Circle Sentencing process, the nature, context and impact of the offence would be explained and discussed, a plan developed on how the wrong may be redressed, and a sentence passed; and
- the defendant's support group would assist the offender to complete the sentence, report progress to the Community Justice Committee, who would in turn report to the court.

68. The Community Justice Committee would be assisted by a local Aboriginal Court Liaison Officer. Having such a Liaison Officer would be a prerequisite for inclusion in the trial.

69. To be eligible for Circle Sentencing under the proposal, a defendant's crime must be one that may be finalised in the Local Court, carry a term of imprisonment as a likely outcome, and not be a sexual offence.

70. Clearly, participants in the circle would differ depending on the nature of each case.

4.34 The Working Party also proposed that the Circle Sentencing trials be evaluated by assessing the overall level of Aboriginal community satisfaction, the progress of individual offenders, and the impact of the level of Aboriginal crime in the pilot areas. The Government has not indicated to date whether, or in what form, it intends to implement the proposals.

THE COMMISSION'S RECOMMENDATION

4.35 As the Commission noted earlier, various attempts to introduce conferencing schemes in New South Wales have met with considerable criticism. Objections to the schemes, however, have largely centred on the way in which they have been conducted, in particular the level of police involvement and certain issues of procedural fairness. Even critics of the schemes agree with the basic concept of conferencing and circle sentencing, considering them to be an effective and culturally sensitive way of involving and empowering the Aboriginal community in the justice system.⁷¹

4.36 The success of youth conferencing in New Zealand and Circle Sentencing in Canada demonstrates the potential for such schemes to work here. Throughout this Report, the Commission notes the inappropriateness of importing schemes from overseas and applying them in New South Wales without regard to the needs and wishes of the local community. Consequently, the Commission does not recommend the adoption of the New Zealand and Canadian schemes unamended. In comparing the success of these schemes with the criticisms of other initiatives, the Commission observes several key elements for successful conferencing and Circle Sentencing of Aboriginal offenders.⁷² They are:

- the need for “grass roots” involvement of Aboriginal communities in program design and delivery, rather than a “top down” approach;
- a genuine commitment on the part of government and justice officials to negotiate with Aboriginal communities;

71. See, eg, Social Justice Commissioner Report (1996) at 199 and Social Justice Commissioner Report (1999) at Chapter 5.

72. The Commission refers here to the success of conferencing in the sentencing context only, and does not discuss pre-trial diversion by police or pre-sentencing diversion by courts.

- education for judges and magistrates on the availability and operation of conferencing and Circle Sentencing schemes; and
- a broad and flexible legislative base for the schemes to ensure a degree of consistency and procedural fairness.

With these factors in mind, the Commission makes the following recommendation.

Extending conferencing to adult offenders

4.37 In its Report on Sentencing, the Commission made the following recommendations regarding conferencing for all offenders:

- where participation of a victim is a component of a conference, the victim must freely consent to taking part in the proceedings, although refusal to take part need not prevent the proceedings taking place;
- an offender must freely consent to taking part in any conference;
- an offender must have the opportunity to seek and receive proper legal advice before consenting to take part in a conference;
- an offender must admit guilt before being able to take part in a conference; and
- there should be a prohibition on the publication of proceedings of any conference, and any disclosures made during such proceedings should be inadmissible in any judicial or quasi-judicial proceedings other than the sentencing hearing to which it relates.⁷³

4.38 These principles lie at the heart of the *Young Offenders Act 1997* (NSW). The Commission is of the view that the principles remain valid for adult offenders as well, particularly Aboriginal offenders, given the unique opportunity presented by conferencing to merge the western justice system with Aboriginal culture. The principles should form the basis of any trial of adult conferencing which may be undertaken. The Commission does not consider that any specific principles need be formulated for Aboriginal offenders. Conferences could, of course, be tailored on a case-by-case basis to suit the needs of Aboriginal offenders and communities.

73. NSWLRC Report 79, Recommendations 73-78.

Support for Circle Sentencing trial

4.39 Unlike adult conferencing, Circle Sentencing is targeted specifically towards Aboriginal communities, and may operate on a less formal basis. The Commission supports the recommendations made by AJAC to conduct trials of Circle Sentencing in communities which welcome and support the concept and have the infrastructure to enable the trials to have a greater chance of success. It is also essential for the success of the trials that they be designed and developed by Aboriginal community members.

4.40 The Commission understands that at least one sentencing circle has already been successfully conducted in a Local Court in western New South Wales.⁷⁴ That matter involved an Aboriginal juvenile repeat offender, for whom youth conferencing had proved unsuccessful.⁷⁵ The Magistrate conducted an informal session at a local community hall. The session was attended by the offender, the offender's parents and older members of the extended family, the prosecutor and other legal and administrative staff. All participants had the opportunity to speak, with the discussion flowing around their views on crime, the commitment of the group to the offender remaining in the community, how re-offending could be prevented and how the offender could be supported by the community. The actual sentencing remained at the Magistrate's discretion. All adult participants considered the exercise to be worthwhile. The Magistrate considered the positive aspects to be the involvement and commitment of the young person, the family and the community, and the acceptance of responsibility by them for parts of the process, and the flexibility to consider issues beyond the case at hand that place the crime in context.⁷⁶

74. Information on this matter was provided to the Commission by the Magistrate concerned. Due to the offender being a juvenile, any further information is confidential.

75. As this matter involved a juvenile, and did not involve the victim, it did not fit the generally accepted model of a sentencing circle, but drew on the principles set out in the AJAC Circle Sentencing Discussion Paper, as amended to suit a juvenile offender.

76. For example, the link between juvenile crime and the availability of alcohol to juveniles, and the lack of facilities for young people in rural areas which can lead to chronic boredom.

A legislative base

4.41 Should the trials of adult conferencing and Circle Sentencing prove successful, and the Government proposes to include them as an option in the justice system on a continuing basis, they should be underpinned by legislation in order to ensure a degree of consistency and some procedural safeguards. As the Commission recommended in its Sentencing Report,⁷⁷ that legislative base should not be at all prescriptive, but should be broad and flexible enough to enable the court⁷⁸ to have a discretion to refer matters to conferencing or to Circle Sentencing, whichever may be more appropriate in the circumstances. Legislation should also contain the principles referred to in paragraph 4.37 above. The Commission considers it to be crucial, however, that trials of conferencing and/or Circle Sentencing proceed before a legislative structure is developed. This would help to guard against the imposition of a “top down” approach, and ensure that the legislation follows the model that works best. It is also vital that Aboriginal communities have input into the design of any legislation. Accordingly, the Commission does not make a recommendation at this point concerning such legislation.

Recommendation 2

Pilot schemes for Circle Sentencing and adult conferencing should be instituted in consultation and collaboration with Aboriginal communities.

77. NSWLRC Report 79, Recommendation 73.

78. It may, of course, be desirable to have pre-trial and pre-sentence referral to conferencing, but this is beyond the Commission’s Terms of Reference.

5. Sentencing options

- General approach to sentencing
- Full-time custody
- Alternatives to full-time custody
- Non-custodial options

5.1 This chapter evaluates the adequacy and effectiveness of sentencing options currently available, and canvasses possible avenues for development. Issues which relate specifically to Aboriginal women are discussed in Chapter 6.

GENERAL APPROACH TO SENTENCING

5.2 Individual sentencing options are discussed below, with reference to their particular roles and characteristics. However, before proceeding to this discussion, the Commission notes the following general considerations as relevant to an evaluation of individual sentencing options:

- An understanding of the special needs of Aboriginal offenders, and an awareness of what is culturally appropriate in an individual case, are essential prerequisites for more effective programs, services and options directed to achieving rehabilitation.
- Aboriginal people do not comprise one, undifferentiated category. For programs and services to be effective, there must be an understanding of Aboriginal diversity and an appropriate range of non-custodial sentencing options should be made available.¹
- It is important that those preparing pre-sentence reports, and members of the judiciary deciding upon an appropriate sentence, be fully conversant with all the available options.²
- There is a need to address language and communication issues which may impact on the ability of Aboriginal offenders and their families to understand the sentencing process, the outcome of the hearing and any obligations to comply with conditions attached to a sentence.³
- The Aboriginal community should be involved in the sentencing process and in the design and delivery of sentencing options.⁴
- As alcohol and drugs are implicated, either directly or indirectly, in so

1. Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (Five Volumes) (E Johnston, Royal Commissioner, 1991-1992) (the "RCIADIC Report") Recommendation 109, vol 3 at 96.

2. See Chapter 7 for a full discussion of this point. The RCIADIC recommended that the judiciary be advised on the scope and effectiveness of non-custodial options: RCIADIC Report, Recommendation 101, vol 3 at 80.

3. See Chapter 7.

4. See Chapter 4.

much of Aboriginal crime, both custodial and non-custodial sentences need to include, as a priority for the majority of Aboriginal offenders, programs addressing alcohol and substance abuse, staffed by suitably trained workers, particularly Aboriginal workers.⁵

- In order to overcome the practical difficulties of delivering sentencing options to Aboriginal offenders in remote rural regions, creative alternatives to conventional options, which nonetheless achieve the same sentencing objectives, must be available.
- Statistical and other information must be recorded to enable an understanding of Aboriginal rates of recidivism and the effectiveness of sentencing options and parole, and for devising strategies for the rehabilitation of offenders.⁶

5.3 The Department of Corrective Services (“Corrective Services”) reports that it is not yet possible for it to evaluate sentencing orders or parole orders in terms of recidivism due to limitations in its computerised information management system. The Probation and Parole Service (“Probation and Parole”) is introducing a new information management system (known as “PIMS”) which will be able to provide a wider range of statistics. The hardware and software is currently still being developed. As statistics in relation to recidivism need to be collected for a number of years in order to evaluate the success of a particular program, reliable information on this issue is unlikely to be available in the near future.⁷ The Commission urges that the implementation of PIMS be expedited, in order to allow for more effective evaluation and direction of sentencing reforms.

FULL-TIME CUSTODY

5.4 Chapter 2 stresses, and expounds, the fundamental principle at

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5. RCIADIC Report, Recommendation 287: “These programmes should operate in a manner such that they result in greater empowerment of Aboriginal people, not higher levels of dependence on external funding bodies”.
 6. RCIADIC Report, Recommendation 115.
 7. NSW, Department of Aboriginal Affairs, *Report on the New South Wales Government’s Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody 1996-97* (“Department of Aboriginal Affairs Report”) at 238. Corrective Services is also working with the National Corrections Advisory Group to define standard indicators for recidivism.

common law, given statutory recognition in New South Wales in the *Justices Act 1902* (NSW),⁸ that imprisonment is the sanction of last resort.⁹ Chapter 2 also discusses whether the judiciary is at all times complying with this principle. It analyses whether imprisonment in fact has a deterrent or rehabilitative effect on Aboriginal offenders. Examination of those issues is not repeated here. Rather, this chapter concentrates on the prison experience for Aboriginal inmates where a custodial sentence is truly the only proper or available sentence for the crime committed.

5.5 The Royal Commission into Aboriginal Deaths in Custody (the “RCIADIC”) made 19 recommendations relating to the prison experience.¹⁰ In 1996, in response to these recommendations, Corrective Services formulated an action plan for the management of Aboriginal offenders (“the Action Plan”).¹¹ The Action Plan sets out the Department’s goals, objectives and achievements, as well as strategies for consolidation, for the period 1996-1998.

The Action Plan was produced following consultation with key stakeholders, in particular, Aboriginal organisations and individuals, concerned in policies and programs affecting Aboriginal offenders. Corrective Services is preparing to report on the outcome of this plan in 2000.

5.6 The Action Plan addresses the following broad areas:

- involvement of Aboriginal people in the planning and implementation of Corrective Services policy, services and programs;
- the reduction of the rate of imprisonment of Aboriginal people, and, where possible, the diversion of Aboriginal offenders away from the criminal justice system;
- an increase in the representation of Aboriginal staff in Corrective Services;
- raising awareness among all staff concerning Aboriginal cultural matters which are necessary to effective interaction with Aboriginal people, and to eliminate discriminatory and racist behaviours;
- meeting the special needs of Aboriginal offenders with respect to

8. Section 80AB.

9. RCIADIC Report, Recommendation 92.

10. RCIADIC Report, Recommendations 168-186.

11. NSW, Department of Corrective Services, *Action Plan for the Management of Indigenous Offenders 1996-98* (November 1996).

health and safety, the Aboriginal experience in prison, welfare, education and vocational training, psychology services, drug and alcohol programs, HIV and health promotion, pre-release programs, inmate employment, and probation and parole services; and

- meeting the special needs of female Aboriginal offenders.

5.7 Within each of the above broad areas there are detailed and comprehensive strategies, many of which are already in place.¹² Of particular importance, Corrective Services established the Indigenous Services Unit (“ISU”) to deal with Aboriginal inmates. It is also considering the feasibility of establishing small regional ISUs, tailored for the community in question.

5.8 Corrective Services’ Alcohol and Other Drug Services Unit also developed a strategic plan in 1996 with improvements to be implemented over several years, with the aid of increased funding to that Unit. A dedicated Indigenous Drug and Alcohol Team, comprising a co-ordinator and five Aboriginal drug and alcohol workers, has been established within Corrective Services, and Aboriginal staff and inmates have designed special resources for use in drug and alcohol programs.

5.9 Providing Corrective Services remains as committed to these strategies as the Action Plan suggests, and subject to comments and discussion below, it appears that it has covered all reasonable and effective avenues relating to full-time custody which strive to minimise risks to the safety and well-being of Aboriginal inmates, increase the likelihood of rehabilitation, and reduce recidivism. The report of the progress which has been made under the Action Plan will need to be studied carefully to confirm that the planned reforms have been implemented and to evaluate, from a number of perspectives, how successful the strategies, including those already in place, have been. This needs to be done in conjunction with better statistical recording and analysis.

5.10 Priority also needs to be given to programs and services for offenders receiving short custodial sentences and who have a high rate of recidivism for

12. The most recent Annual Report of Corrective Services details a number of initiatives which have been put in place in the 1998-1999 year in response to the *Action Plan for the Management of Indigenous Offenders*, including the opening of the Girrawaa Creative Work Centre at Bathurst, the Second Chance Program at Brewarrina, the Ivanhoe Project and the Broken Hill Cultural Link Program: NSW, Department of Corrective Services, *Annual Report 1998-1999* at 15.

these comparatively minor offences. Aboriginal offenders are proportionately sentenced more frequently to short terms of imprisonment than non-Aboriginal offenders.¹³ Although there are no statistics which give a breakdown of the proportion of repeat offenders among Aboriginal inmates serving sentences less than six months, anecdotal material suggests that the numbers are high. Steps should be taken to reduce the incidence of short prison sentences.¹⁴ Where a short prison sentence is unavoidable, the focus should be on addressing the causes of recidivism and achieving rehabilitation. This group of offenders tends to be neglected in the criminal justice system. Their incarceration is often too short for them to benefit from mainstream programs, which seek to address the underlying causes of recidivism.

A segregated custodial facility?

5.11 From time to time it is suggested that a corrective establishment exclusively for Aboriginal offenders be built. However, in so far as this refers to an institution accommodating all categories of offenders, serving sentences of all lengths, the prevailing wisdom is that a segregated facility is neither feasible nor advisable. Nor is it supported by ISU, employees of whom expressed the view to the Commission that “what is important is not to have black jails but to have programs in jails as culturally appropriate as possible”.

5.12 The numbers, and geographical spread, of Aboriginal offenders cannot justify the costs of building new facilities in various regions of the State. Neither would it be desirable to bring all Aboriginal prisoners to one central

13. In 1997-1998 in Local Courts, 16.5% of Aboriginal and Torres Strait Islander people convicted of an offence were given a sentence of imprisonment, with the average length of sentence being 5.5 months. In comparison, 7% of all persons overall convicted of an offence were sentenced to imprisonment, the average term being 4.4 months: NSW, Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1998* (1999) (“BOCSAR Statistical Report 1998”) at Table 1.10 and 1.12 and Table 1.9 and 1.11. There are no comparable figures given for sentences in the Higher Courts in this publication. As at 30 June 1994, 25% of women and 20% of men serving aggregate sentences of three to six months were Aboriginal and Torres Strait Islander: NSW, Department of Corrective Services, *New South Wales Inmate Census 1994: Summary of Characteristics* (Internal Publication, September 1994). The most recent Corrective Services census does not give a similar analysis of inmate population.

14. This is discussed in Chapter 2 at para 2.7-2.8.

institution. The ideal is for Aboriginal inmates to be accommodated close to their own communities, where they can receive visits from family and friends and where they may also already know other inmates. These factors may help an offender cope with the prison experience. As identified by the Action Plan, within predominantly non-Aboriginal institutions, there should be policies, services and programs which are directly targeted at Aboriginal inmates.

5.13 While we cannot recommend a segregated conventional custodial facility, Aboriginal offenders with a low security classification and offenders receiving non-custodial sentences may benefit greatly from involvement in residential programs designed and managed by and for Aboriginal people. Two of these kinds of options, both of them initiatives which the Commission applauds, are explored below.

Ivanhoe Warakirri Centre

5.14 Although the building of the Ivanhoe Warakirri Centre¹⁵ may seem at odds with our comments above, the purpose the Centre serves differs from a mainstream correctional centre in several respects. To be eligible for admission, an inmate must have a C2 classification, not be a violent offender, and be serving the last 18 months of a sentence. It is more akin to a transitional centre, where offenders are working up to release into the community. Although the inmate population will be predominantly Aboriginal, and Aboriginal cultural awareness will be an important component of in-house programs, it is not exclusively an Aboriginal facility. It is a Work Centre employing inmates in ground- and building- maintenance and in community projects. Inmates will also be taken out on mobile camps within a 400 kilometre radius to carry out community projects.¹⁶ The centre's aim is for inmates to acquire vocational training, numeracy and literacy skills

15. This centre is a rural property, completed in September 1999 and situated at Ivanhoe, approximately 300 kilometres from Broken Hill. It can accommodate 50 male inmates. "Warakirri" means "to stand and grow" in the local Aboriginal language: NSW, Department of Corrective Services, *Annual Report 1998-1999* at 15.

16. There are presently two mobile camps, one which works on various community projects and the other which works in Mutawintji National Park. This park has been handed back to the traditional Aboriginal owners. Hence, employing Aboriginal inmates to work in the park is an important means of raising their cultural awareness and strengthening cultural ties.

and community understanding.¹⁷

Yetta Dhinnakkal

5.15 Although Yetta Dhinnakkal is exclusively for Aboriginal inmates, once again it is only for low-security Aboriginal offenders and is a correctional farm, without security walls or fences. It has been created on a station 75 kilometres south of Brewarrina, in north western New South Wales, can accommodate 50 inmates and is managed by members of the local Aboriginal community and staffed by both Aboriginal and non-Aboriginal wardens. Aboriginal elders from the local community will have contact with the inmates and programs will focus on Aboriginal cultural awareness and acquiring vocational skills.

Release from custody on parole

5.16 The RCIADIC found that:

the Aboriginal use of parole in New South Wales is extremely limited. Since the introduction of the *Sentencing Act 1989* – the so called “truth in sentencing” legislation – the number of offenders who served parole has dropped from 56% of the prison population to 31.8% ...

In response to this finding, the RCIADIC recommended that Corrective Services authorities ensure that Aboriginal offenders are not denied opportunities for probation and parole by virtue of the lack of trained support staff or infrastructure to ensure monitoring of such orders.¹⁸

5.17 Promoting access to parole for Aboriginal offenders may involve other issues besides those related to support staff and infrastructure. An Aboriginal worker with Probation and Parole expressed the view to the Commission that the number of Aboriginal offenders being granted parole had fallen either because these offenders were not asking for parole, based on an expectation that it would not be granted, or they were not offered it because of prior breaches.¹⁹ Probation and Parole has recently implemented a policy of investigating the reasons behind previous breaches of orders.²⁰ Understanding why an offender has breached parole, and the circumstances surrounding the

17. NSW, Department of Corrective Services, *Annual Report 1998-1999* at 15.

18. RCIADIC Report, Recommendation 119, vol 3 at 117.

19. NSW, Probation and Parole Service, *Consultation* (26 February 1998).

20. NSW, Probation and Parole Service, *Aboriginal Offender Management Strategies Information Package* (1999) at 16-17.

breach, may result in an assessment that the offender remains a suitable person to be on parole and is deserving of another chance. For example, the offender's behaviour may have been determined by Aboriginal cultural obligations, such as the imperative to attend a funeral, observing a grieving period after the death of family members, or other important family obligations.

5.18 There is also evidence to suggest that Aboriginal offenders do not always understand the conditions applying to parole and the consequences of a breach.²¹ In Queensland, a lack of knowledge of parole processes and difficulties understanding correspondence from the Parole Board were identified as deterrents to applying for parole and obstacles to successful completion. This issue, and its applicability to New South Wales, is discussed in Chapter 7.

5.19 Alternatively, there may have been financial and practical obstacles to reporting, such as lack of transportation, particularly for rural offenders. Recognition that an offender does not have the resources, whether physical, emotional or mental, to find a way around obstacles, may be far more productive than the automatic response of placing the offender back into custody.²²

5.20 Providing appropriate support to an offender who has a real commitment to serving parole, and ensuring an understanding of parole obligations, may result in his or her successful reintegration within the community. This illustrates the benefits of a flexible approach to sentencing Aboriginal offenders, which takes into account cultural factors adversely affecting the offender. The Commission endorses Probation and Parole's strategy of investigating the reasons behind previous breaches of orders.

5.21 Perhaps the likelihood of breaches occurring can be minimised from the outset if especial consideration is given to the offender's ability to comply

21. Parliament of Western Australia, *Report of the Joint Select Committee on Parole* (August 1991) (the "Halden Report") at 109.

22. Probation and Parole has identified that another factor which may give rise to breaching orders involves an Aboriginal offender's anxiety and inability to remain in a non-Aboriginal setting: New South Wales, Probation and Parole Service, *Aboriginal Offender Management Strategies Information Package* at 17.

with conditions, in particular: abstinence from alcohol;²³ not being in premises where alcohol is consumed; not associating with individuals who are in fact part of the offender's extended family; and reporting to the parole officer. This Report has warned elsewhere against setting up an offender (or a community) for failure. Understanding the operative cultural determinants, providing appropriate support and programs, and not setting unrealistic conditions, may forestall breaches of parole.

5.22 Practical measures to improve success rates for completion of parole, recommended in a report of the Western Australian Joint Select Committee on Parole (the "Halden Report"), have relevance for New South Wales. The Halden Report recommended that the implications and operation of parole, and the consequences of not complying, be explained not only to the person sentenced, but also to the community in which he or she is to be detained. In remote areas where communication with Probation and Parole officers is difficult to maintain on a regular basis, supervision of parolees for reporting purposes could be by a nominee of a community.²⁴ Special provision should also be made to accommodate the cultural importance of attendance at funerals.

5.23 Aboriginal prisoners interviewed by Cunneen and McDonald in relation to their experiences and perceptions of parole felt that there was a lack of support on their release from prison, particularly taking into account the double discrimination they face: discrimination on the basis of being both black and ex-prisoners.²⁵ Insufficient external support services also impact on

23. In South Australia, a condition on a bond requiring abstinence from drinking alcohol for three years was declared invalid on the basis that it was an unreasonable and unrealistic condition: *Baddock v Steel* (1973) 5 SASR 71. It has been recognised elsewhere that caution is necessary when imposing a condition on a bond to refrain from consuming intoxicating liquor. Such a condition may be far too onerous and unreasonable for some alcoholic offenders. Yet if offered the alternative of prison, offenders are likely to agree to terms which they may be unable to live up to, so they are set up to fail: I Potas, "Alcohol and Sentencing of Violent Offenders" in *Alcohol Misuse and Violence – Legal Approaches to Alcohol-related Violence: The Reports* (Report 6B, National Symposium on Alcohol Misuse and Violence, 1994) 225 at 256.

24. Halden Report at 112.

25. C Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody: An Evaluation of the Implementation of the recommendations of the Royal Commission in Aboriginal Deaths in Custody* (Office of Public Affairs, ATSIC, Canberra, 1997) ("Cunneen and

the offender's ability to abide by conditions. Family and Prisoners Support Incorporated in Queensland has argued that there is a greater need for a staged return for Aboriginal people after imprisonment, particularly those returning to communities.²⁶

5.24 A further concern expressed to Cunneen and McDonald was that eligibility for parole was often measured through the inmates' participation in prison programs, yet those programs were seen as "superficial, lacking in Aboriginal control and unable to communicate with Aboriginal people effectively". The observation was also made that "there are generally no Aboriginal people on parole boards and there is a lack of experience in assessing Aboriginal people who come up for parole".²⁷

McDonald") at 145.

26. Cunneen and McDonald at 146.

27. Cunneen and McDonald at 145.

5.25 Other obstacles faced by Aboriginal offenders in being granted parole are mirrored in the experiences of Canadian Indigenous offenders:

There was a feeling among some inmates and correctional personnel that because of the lack of community support in urban areas for Native offenders it was difficult to develop a convincing parole application. Other factors which contributed to the problem included: lack of adequate skills and assistance in drawing up an application, a past record of alcohol abuse, lack of clearly stated goals, a rural background and lack of treatment facilities.²⁸

Post-release support

5.26 The Department of Corrective Services established and funds Aboriginal Pre- and Post- Release Programs throughout the State, which provide post-release services specifically for Aboriginal offenders, as well as educational and advisory links to Aboriginal communities. These programs include educational curricula, vocational training, drug and alcohol counselling and/or individual counselling by way of referral to appropriate individuals or agencies.

5.27 This initiative is well-intentioned, appropriate and necessary, but criticisms have been made of the way it is working in practice. The Aboriginal Justice Advisory Council ("AJAC") has expressed the opinion that there is a lack of consistency with the services offered by the various regional programs.²⁹ More importantly, AJAC believes that there needs to be greater community involvement in the development and administration of the programs in order for them to be truly effective.

5.28 Within the prison, the offender is provided with services preparing him or her for release but reportedly there is a falling-off in the level of support and services following release. Harnessing community resources may advance the effective re-integration of the offender into the community, especially in the three to six month period following release when the offender is particularly vulnerable to re-offending. The offender's community can provide informal support and help in adjusting to life outside an

28. D McCaskill "Parole and After Care" in R A Silverman and M O Nielsen (eds), *Aboriginal Peoples and Canadian Criminal Justice* (Harcourt Brace, 1993) at 213.

29. AJAC, *Consultation* (11 January 1999).

institution and becoming familiar with changes which have occurred during his or her incarceration. By establishing formal links with community organisations and individuals, Corrective Services can ensure that this vital community support is not left to chance.

5.29 AJAC also makes the point that there needs to be a greater connection between the pre-release services offered in the prison in which the offender has been accommodated and the community to which he or she will return. The particular circumstances of the offender, the features and dynamics of the community, the offender's place in that community, his or her domestic situation, community peer groups, and operative peer pressures, need to be addressed specifically. Post-release services and support should then be given in the context of these factors.

ALTERNATIVES TO FULL-TIME CUSTODY

Home Detention

5.30 The *Home Detention Act 1996* (NSW) ("Home Detention Act") makes provision for offenders who are sentenced to terms of imprisonment of 18 months or less, and who meet other preconditions, to serve their sentences by way of home detention.³⁰ An offender subject to a home detention sentence is required to remain within his or her residence unless undertaking approved activities. Compliance with conditions is monitored electronically, as well as by visits from supervising officers, and by drug and alcohol testing. Participants may be required to perform community service, enter treatment programs, and seek and maintain employment. Breaches of conditions attract further penalties, and may result in full-time imprisonment in a correctional facility.

5.31 The Commission's Report 79, *Sentencing*, analyses the advantages and disadvantages of Home Detention generally.³¹ This Report is concerned only with the suitability of this option for Aboriginal offenders.

5.32 The RCIADIC recommended that where not presently available, home detention should be provided as a sentencing option available to courts, as

30. *Home Detention Act 1996* (NSW) s 5.

31. New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996) ("NSWLRC Report 79") at para 7.2-7.31.

well as a means of early release of prisoners.³² Cunneen and McDonald feel that this recommendation “could have been somewhat stronger in referring not only to having available this option but also urging that it be used in practice and be evaluated to ensure that Aboriginal people receive the full benefits of the option”.³³

5.33 In the 1998-1999 financial year, 350 offenders were admitted to the home detention program and 258 offenders completed home detention in New South Wales, of whom 17 identified as Aboriginal.³⁴ From the commencement of the Home Detention Act on 21 February 1997, until 27 August 1998, 20 Aboriginal offenders participated in home detention.³⁵ As at July 1999, there were 140 detainees (115 male and 25 female) of whom six identified as Aboriginal (five males and one female). Corrective Services has told the Commission that it had hoped that Aboriginal offenders would be diverted from prison into home detention at a greater rate. It considers that home detention is an option which is particularly appropriate for Aboriginal offenders and is therefore looking at ways to increase its use for Aboriginal people. Corrective Services suggests that a number of factors are contributing to the low Aboriginal participation rate:

- lack of availability of the program in those areas where Aboriginal populations are substantial;
- the restricted number of offences eligible for Home Detention court ordered assessment; and
- cultural and “kinship” issues may be in conflict with the logistics of Home Detention supervision.³⁶

5.34 The first factor appears to be a significant one. The Home Detention Program presently operates in an area extending from Newcastle to Wollongong and west to the Blue Mountains. Approximately 70 per cent of all offenders meet the eligibility criteria for home detention. However, only about 50 per cent of Aboriginal offenders are resident within the Home Detention Program geographical area. This creates a skew in numbers of

32. RCIADIC Report, Recommendation 118, vol 3 at 114.

33. Cunneen and McDonald at 143.

34. NSW, Department of Corrective Services, *Annual Report 1998-1999* at 13.

35. K Heggie, *Review of the New South Wales Home Detention Scheme* (Department of Corrective Services, Research Publication No 41, 1999) at 14.

36. Heggie at 15.

Aboriginal offenders eligible for home detention.³⁷

5.35 Corrective Services is presently investigating an extension to the geographical range of the Home Detention Program. Some of the key factors to evaluate are clearly related to low population density of eligible offenders in rural areas, and balancing costs and program effectiveness. The way in which Corrective Services operates the Home Detention Program is to maintain a high degree of personal contact between Probation and Parole officers and the offender, not simply to monitor electronically prisoners isolated in their homes. Each officer has a caseload, on average, of ten offenders, with whom the officer becomes intensely involved, gaining insight into the dynamics of the offender's environment. Probation and Parole officers on the Home Detention Program bring enormous flexibility to their jobs, making themselves available seven days a week, 24 hours a day. It is not unusual for a home detainee to see an officer three days in a row, or to be visited early in the morning or late in the evening. In rural areas, the number of eligible detainees to constitute a reasonable caseload may be spread over an enormous geographical area. Accordingly, distances and travel times present practical obstacles to maintaining the desired level, and flexibility, of contact and involvement.

5.36 Corrective Services acknowledges that, in rural areas, a different organisational structure will be necessary. It envisages the negotiation of partnership agreements with other government or community agencies. It may also be feasible for officers involved in probation and parole cases to absorb any home detainees in their area. The disadvantage with this is that, to some extent at least, the roles require different skills and approaches. While the primary aim of home detention is to divert offenders from gaol, with all the benefits which flow from this, including keeping families intact and reducing the costs of incarceration, a secondary aim is to rehabilitate offenders. Officers trained to work with home detainees are skilled in identifying issues contributing to offending behaviour, finding resources and referrals to deal with these, and in supporting offenders. This is done in the home environment, involving interaction with the offender's family. On the other hand, the officer responsible for offenders on probation or parole, although bringing similar skills to bear, works from an office base, during office hours, seeing individual offenders less frequently and less intensely. The need, in one role, to be available at a fixed place during

37. NSW, Department of Corrective Services, Home Detention Unit, *Consultation* (28 May 1998).

business hours would be difficult to reconcile with the need, in the other role, to be mobile, flexible and frequently available.

5.37 The way around the practical obstacles does not lie in recruiting community sponsors, as is done, for example, in Corrective Services' Mothers and Children's Program. The important and effective feature of the Home Detention Program is the proactive contact between offender and skilled officer. If the emphasis was merely on surveillance of home detainees, this could largely be done electronically.

5.38 The Commission is of the opinion that the practical obstacles are not insurmountable and accord with the view held by Corrective Services, namely that the benefits of home detention for Aboriginal offenders warrant pursuing development of the program to other areas, such as the mid- and upper-North Coast. These areas are now being targeted by Corrective Services. Further training of Probation and Parole Officers, or of other department or agency personnel, may be necessary to increase the range of their skills, but this is not an unrealistic objective. Another approach may be to recruit more part-time officers to be responsible for only one or two home detainees residing within a manageable geographical area. Corrective Services is also considering the possibility of home detainees being supervised by a community organisation, such as a drug and alcohol treatment service. The pool of eligible Aboriginal offenders could not justify an Aboriginal Home Detention Program, nor an inflexible requirement that Aboriginal home detainees only be seen by Aboriginal workers.

5.39 A concern with home detention as it affects Aboriginal peoples is that they are more culturally vulnerable to suffer from isolation than are non-Aboriginal people. In consultations with Aboriginal people, it has been emphasised to the Commission that Aboriginal people primarily conduct their lives with extended family, in clan groups and with a great deal of community contact. To be confined to his or her home, without any contact with his or her community, can be almost intolerable for some Aboriginal people.

5.40 A study of home detention in Queensland identified a number of factors pertaining to Aboriginal culture which may act to the detriment of Aboriginal offenders serving sentences at home.³⁸

38. P Moyle, "Home Detention in Northern Queensland and Aboriginal Inmates: Equality or Discrimination?" (1993) *Socio-Legal Bulletin* 28.

One of these was the stress of isolation referred to above. Another was based on the argument that Aboriginal people suffer special disadvantages in relation to the definition of “home”, a concept which can differ from that of non-Aboriginal society. A further factor relates to the heavy alcohol consumption in some Aboriginal communities which can place enormous pressure on the home detainee, who is prohibited from drinking alcohol while on the program. The question arises, therefore, as to whether “home detention” can be redefined on a more culturally appropriate basis, so as to reduce the likelihood of breaches, while maintaining this option as suitable for Aboriginal offenders.

5.41 In the Northern Territory, for example, home detention is available in remote Aboriginal communities as “community detention”, being detention within the boundaries of a particular community.³⁹ Because New South Wales does not have the same incidence of discrete Aboriginal communities as does the Northern Territory, it is unlikely that there would be many cases where an offender could be sentenced to community detention. However, as has already been emphasised, sentencing Aboriginal offenders needs to be approached with flexibility. If community detention is feasible and appropriate in a particular case it should not be dismissed as an option. Alternatively, the shift in approach from detention strictly within the offender’s home need not be this radical. Detention within a rehabilitative or group residence are creative alternatives which may serve all the purposes of home detention but be more appropriate for Aboriginal offenders.

5.42 This approach has worked in Queensland where that State’s Corrective Services has interpreted “home” widely and placed offenders, as appropriate, in rehabilitation centres catering to Aboriginal offenders. There is also an instance where Aboriginal offenders given a home detention sentence have been placed on a cattle station, about 40 kilometres from the main Aboriginal community.⁴⁰ The intention is to expand this approach to appropriate regions, where offenders can be housed in facilities proximate to their communities.

5.43 Taking a flexible approach to what qualifies as “home” for home

39. Although some magistrates have expressed concern about community detention, Community Corrections are targeting non-violent offences as suitable for this option: Cunneen and McDonald at 144. According to some Aboriginal organisations, even where home detention had been redefined as community detention, obstacles to its use arose because of a shortage of surveillance officers: Cunneen and McDonald at 144.

40. This is at Arakun, north of Cairns: Moyle at 34.

detention has other advantages. For example, accommodating a small group of offenders in a community house overcomes some of the difficulties of operating the home detention program in large geographical areas with sparse populations.

In addition, it would be feasible to conduct in-house programs to meet the offenders' needs, programs which might otherwise be unavailable in remote areas. It would also be cost-effective to install a telephone in a group house, being a precondition for home detention eligibility: the lack of a telephone in many Aboriginal homes has been cited as a barrier to such eligibility.⁴¹ An offender found guilty of a domestic violence offence is unable to serve a home detention sentence if it would mean living with the victim.⁴² However, that offender could be eligible for home detention in another residence. Again, this is a situation where the availability of a community house could be of particular advantage to Aboriginal offenders. Corrective Services has indicated that it is open to exploring community based group housing, or other options, to address the problems associated with running home detention programs in rural areas. The Commission encourages this approach.

5.44 Secondly, although the families of all home detainees suffer restrictions and pressures themselves, Moyle argues that this is exacerbated for Aboriginal families, whose society is based on communal rather than individual responsibilities. This signals a need for Corrective Services officers to be aware of differing, culture-based, stresses and pressures on Aboriginal home detainees and their families.

5.45 Moyle also draws attention to the possibility that some Aboriginal people will have difficulty reading and understanding the forms which set out onerous and detailed home detention conditions, leaving offenders open to inadvertent breaches. This issue, which arises in relation to all sentencing documentation containing conditions, is discussed in Chapter 7.

5.46 In consultations with the Commission, Aboriginal community and organisation representatives have emphasised the differing cultural concepts of, and attitudes to, time. Moyle argues that such differences may disadvantage the Aboriginal offender as the system of passes for absences from the home "assumes a type of organisation based on Anglo-Saxon work

41. Although, when compared with the cost of keeping an offender in gaol, it may even be cost effective for Corrective Services to pay for telephone installation in an individual offender's home.

42. *Home Detention Act 1996* (NSW) s 6(g).

and society”.⁴³
 The Commission is of the opinion that this should not give rise to special concessions, in a formal sense, for Aboriginal home detainees. Rather, Corrective Services should ensure an understanding on its part of such differences and, on the part of the offender, of the importance of adhering to specified time limits. There may also be room to exercise some discretion in favour of the Aboriginal offender where minor infringements occur.

Periodic detention

5.47 Custodial sentences of terms not exceeding three years can be served by way of periodic detention.⁴⁴ Although it is still a sentence involving imprisonment, it enables offenders to maintain their ties with their communities, live with their families and continue in employment for the greater part of the week. In the 1998-1999 year, 1,335 offenders served their sentences by way of periodic detention, of whom 7.8% were Aboriginal (6.8% male and 1.0% female).⁴⁵

5.48 There are currently 10 periodic detention centres in New South Wales.⁴⁶ A further centre will be built at Parklea, to replace the centre at Wollongong which is closing to make way for the building of a female gaol on the site. There are no plans to build other centres in the foreseeable future.

5.49 An issue has been raised in relation to the accessibility of periodic detention for Aboriginal offenders in remote areas, and the transport difficulties and financial burden on offenders travelling long distances to get to a periodic detention centre.⁴⁷ In the Commission’s survey of judicial

43. Moyle at 33.

44. *Periodic Detention of Prisoners Act 1981* (NSW) s 5, as amended by *Periodic Detention of Prisoners Amendment Act 1998* (NSW) Schedule 1.

45. NSW, Department of Corrective Services, *New South Wales Inmate Census 1998: Summary of Characteristics* (Statistical Publication No 17, January 1999) Table 3.1 at 38.

46. As at February 2000. The centre at Broken Hill opened in February 2000 but no offenders have as yet been sentenced to attend. It will accommodate 18 males and two females. Construction has started on a periodic detention centre at Parklea that will hold up to 78 detainees: NSW, Department of Corrective Services, *Annual Report 1998-1999* at 15.

47. See NSWLRC Report 79 at para 6.4. In fact, s 5(1)(b)(ii) of the *Periodic Detention of Prisoners Act 1981* (NSW) provides that, before imposing a sentence of periodic detention, the court must be satisfied that “travel by the

officers, more than 70% of District Court judges and more than 53% of Local Court magistrates said that, when sentencing Aboriginal offenders, the lack of facilities prevented them from exercising the option of periodic detention.⁴⁸

5.50 In the north-west region of New South Wales,⁴⁹ covering approximately one quarter of the total land area of the State and taking in the major centres of Bourke, Brewarrina, Walgett, Coonamble and Dubbo, there are no correctional facilities at all. This is an area that has a significant Aboriginal population (14.6% of the area's total population) and significant Aboriginal contact with the criminal justice system. In fact, in 1998, Aboriginal and Torres Strait Islander people comprised 44.57% of all appearances in courts in that area.⁵⁰ A periodic detention centre has now been built at Broken Hill, accommodating 18 males and two females. Otherwise, the next closest periodic detention centre is in Tamworth, which has facilities for male offenders only. As was pointed out in one submission to the Commission:

The unavailability of periodic detention as a sentencing option places

-
- person to and from that prison ... could not reasonably be expected to have the effect of imposing undue inconvenience, strain or hardship on the person".
48. Magistrate Dive described to the Commission specific cases heard before him in Moree in which "the tyranny of distance" led to the defendant being assessed as ineligible for periodic detention. Magistrate Dive urges that there is a need for resources to be devoted to developing the availability of sentencing alternatives in the far west of the State. He also points out that "there may be no need for those alternatives to be modelled on white Anglo 'weekends outside normal working hours' ideas" as "in towns such as Brewarrina there is effectively no work to be had": *Submission*.
49. The local government areas which fall within the North-West region are: Bogan; Bourke; Brewarrina; Broken Hill; Cobar; Coolah; Coonamble; Dubbo; Gilgandra; Narromine; Walgett; Warren; and Wellington.
50. NSW, Bureau of Crime Statistics and Research, *New South Wales Local Court Statistics 1998* (provided to the New South Wales Law Reform Commission by special request). In fact, the percentage could be higher, as 26.15% of those in the group not identifying as Aboriginal and Torres Strait Islander are of unknown status. Appearances by Aboriginal and Torres Strait Islander people in Local Courts in the North-West region accounted for 17.2% of all appearances by persons identifying as Aboriginal or Torres Strait Islander in Local Courts in New South Wales and 1.58% of all appearances of all persons in Local Courts in NSW; 3.54% of all appearances in Local Courts in NSW were in the north-west region.

Aboriginal people in peril of receiving full time custodial sentences purely as a result of their geographical isolation. Such limitations impact particularly on Aboriginal people who form the most significant group of people coming before the court in these regional towns [of Broken Hill, Walgett, Wilcannia, Bourke, Brewarrina, Lightning Ridge and Coonamble].⁵¹

5.51 While the building of a periodic detention centre at Broken Hill is to be commended, the question remains whether this is a sufficient response to the needs of the north-west region. The Commission makes no recommendation in this regard but is concerned to draw attention to whether all options have been considered in relation to establishing, or using an existing institution or organisation as, a periodic detention centre, in other towns in this part of the State. In circumstances where there is an urgent need to keep Aboriginal offenders out of gaol, sentencing issues must be approached with flexibility, creativity and a degree of lateral thinking, as is emphasised throughout this Report. For example, it may be feasible to provide periodic detention in the north-west region, and in other regions,⁵² on the basis that the facility is not for that exclusive use. A periodic detention facility could be combined with existing or new facilities which meet other community and criminal justice needs, with costs spread over other government departments.⁵³

5.52 A submission to the Commission by a magistrate with extensive

51. NSW, Legal Aid Commission, *Submission* at 3.

52. There is also arguably a need for a periodic detention facility serving Forster, Kempsey, Port Macquarie and Taree Courts. (In 1998, 5,919 persons were charged in the Local Courts in the mid-north coast region: BOCSAR Statistical Report 1999, Table 1.16 at 35.) A corrections centre is currently being built at Kempsey which may be able to incorporate periodic detention, although this has not yet been determined. As well, there is arguably a need for a periodic detention facility serving Bega, Batemans Bay, Moruya and Narooma Courts. At present, periodic detainees are transported by train to Wollongong to serve their sentences. (In 1998, 3,793 persons were charged in the Local Courts in the south eastern region of New South Wales: BOCSAR Statistical Report 1999, Table 1.16 at 35.)

53. In relation to sentencing of offenders generally, in NSWLRC Report 79 the Commission stated that it considers that it is important that periodic detention should be more widely available and that it encourages its continuing expansion to ensure that it may be used effectively as a sentencing option for all offenders throughout New South Wales: para 6.4.

experience sentencing Aboriginal offenders expresses doubts that periodic detention will be appropriate for many Aboriginal offenders because of the prevalence of alcohol problems. In his view, the majority would be unable to manage their consumption of alcohol to enable them to attend a periodic detention centre on a regular basis.⁵⁴ While this is a valid observation, in the Commission's view this should not constitute reason for denying Aboriginal offenders access to the option of periodic detention. Rather, if alcohol abuse is a problem for a particular offender, it is highly desirable that the periodic detention incorporate counselling and other programs relevant to substance abuse.

5.53 The South Eastern Aboriginal Legal Service argues that amendments to the *Periodic Detention of Prisoners Act 1981* (NSW) have adverse implications for Aboriginal offenders. If an offender fails to report for periodic detention for three weekends, the case goes before the Parole Board which must order that the offender serve the remaining sentence, plus penalties, in full-time custody. Previously, the matter was heard by a court which had a discretion to take the circumstances surrounding the breach into account and give the offender a further opportunity to complete the periodic detention.⁵⁵ As recommended by the Law Society, if the support offered to periodic detainees by Probation and Parole is enhanced, this may reduce unauthorised absences.⁵⁶

NON-CUSTODIAL OPTIONS

5.54 In focusing on the over-representation of Aboriginal and Torres Strait Islander people in the prison population, the RCIADIC emphasised that initiatives at many levels, most importantly, measures to improve the social

54. B Lulham SM, *Submission* at 28.

55. South Eastern Aboriginal Legal Service, *Submission to the New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population* New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population *Inquiry into the Increase in Prisoner Population: Issues Relating to Women* (Interim Report, July 2000) at para 6.87.

56. Law Society of New South Wales, *Submission to the New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population* New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population *Inquiry into the Increase in Prisoner Population: Issues Relating to Women* at para 6.88.

and economic situation of Aboriginal people, were required to remedy their plight.⁵⁷ However, it went on to observe that, for those who were already caught up in the criminal justice system, what is of immediate concern is that policies and programs are applied which might direct them away from that system wherever possible; or, if not, might provide alternatives to imprisonment.

5.55 The RCIADIC expressed concern that, in New South Wales, non-custodial sentences appeared to be under-utilised as an alternative punishment for Aboriginal offenders.⁵⁸ It recommended that adequate resources be made available to provide support by way of personnel and infrastructure so as to ensure that non-custodial sentencing options which are made available by legislation are capable of implementation in practice.⁵⁹ It emphasised that it is particularly important that such support be provided in rural and remote areas of significant Aboriginal population.⁶⁰

5.56 The RCIADIC recommended that experiences in, and the results of, community corrections, rather than institutional custodial corrections, should be closely studied by Corrective Services. The RCIADIC also recommended that, in reviewing options for non-custodial sentences, governments should consult with Aboriginal communities and groups, especially with representatives of Aboriginal Legal Services and with Aboriginal employees with relevant experience in government departments,⁶¹ and that the greater involvement of communities and Aboriginal organisations in correctional processes be supported.⁶²

5.57 Community involvement should not stop at consultation: Aboriginal people should participate in the planning and implementation of community-based programs; be employed and trained to take responsibility for the implementation of non-custodial programs; and should assist in educating and informing the community as to the available range of options.⁶³

57. RCIADIC Report, vol 3 at 67-68.

58. RCIADIC Report, vol 3 at 95.

59. This has been urged by Magistrate Dive, who presided over Moree Local Court for some time and witnessed the inability of Juvenile Justice to be fully effective by reason of its caseworkers being overwhelmed by their workload: *Submission*.

60. RCIADIC Report, Recommendation 112, vol 3 at 96.

61. RCIADIC Report, Recommendation 111, vol 3 at 96.

62. RCIADIC Report, Recommendation 187, vol 3 at 358

63. RCIADIC Report, Recommendations 113 and 114, vol 3 at 97.

Involvement of Aboriginal people in sentencing specifically, and the criminal justice system generally, is examined in Chapter 4.

5.58 A report of the South Australian Department of State Aboriginal Affairs found that the majority of non-custodial sentencing options do not address recidivism:

The problem remains that Fines and [Community Service Orders], which have increasingly become the most dominant outcome of the judicial system and other agencies ... are alternatives which, for Aboriginal participants, do little more than recycle offenders.⁶⁴

5.59 This South Australian report also found that the current range of non-custodial options in that State “do not fulfil the holistic imperatives” which, ideally, should underpin options for Aboriginal offenders. The report notes that, as in New South Wales, the majority of offences are related to alcohol or drug abuse, signalling a need for an Aboriginal operated sobering-up/detoxification program/centre, emphasising a holistic approach to the long-term healing of problems and development of Aboriginal spiritual and cultural awareness.⁶⁵

Community Service Order

5.60 One view expressed to the Commission, which differs from that expressed by the South Australian Department of State Aboriginal Affairs, is that a Community Service Order (“CSO”) “is easily the most productive of the sentencing options in reducing the commission of further crime” and that this option “has a real impact on the social problems [being experienced by Aboriginal people] ... particularly frustration, lack of esteem and lack of employment opportunities and boredom”:

It has been indicated to me by some of the Aboriginal leaders in Wilcannia that defendants who are given a [CSO] equate such order with obtaining regular work. I am informed that such defendants often appear pleased and proud to have such work available to them and certainly in Wilcannia where most of the work is carried out with Aboriginal agencies there does not appear to be any stigma attached to

64. C Larkin, “Barriers to Alternatives to Custody” *Report to Department of State Aboriginal Affairs* (South Australia, Planning Advisory Services, March 1995) at 10.

65. Larkin at 19.

such work at all. There have been numerous examples in Wilcannia of people continuing to do the work when the hours have been completed ... and the number of defendants brought back before the Court for breach of a [CSO] is very low indeed. ... I believe strongly that one of the most effective ways of assisting Aboriginal communities would be to increase the availability of Parole and Probation Officers.⁶⁶

5.61 The RCIADIC recommended that persons responsible for devising work programs on CSOs in Aboriginal communities should consult closely with the community to ensure that work is directed which is seen to have value to the community.⁶⁷ Aside from the obvious benefits of this, the Halden Report makes the point that this may have the effect of encouraging the offender's identification with the community and the community's perception of reparation by the offender. The Halden Report recommends that if work is unavailable in the offender's own community, then work should be found in other Aboriginal communities, with due regard to tribal differences.⁶⁸ It was submitted to the Commission that work should be "sensitive and relevant to Aboriginal offenders".⁶⁹

It can be hoped that, if the work has value to the Aboriginal community, then it will also be culturally sensitive and relevant. This should, at least, be aimed for in directing the work to be performed.

5.62 Probation and Parole's (unwritten) policy is to place Aboriginal offenders with Aboriginal organisations, providing the offender so wishes. Corrective Services reports that Community Service Organisers ensure the policy is implemented where practical and in accordance with the offender's wishes. Corrective Services has also said, in response to Recommendation 94 of the RCIADIC, that it is seeking to develop closer links with Aboriginal communities for the creation of more culturally appropriate work placements. Unfortunately, as was noted above, no statistical information is presently kept by Probation and Parole in relation to Aboriginal community service placements. Determining the incidence of Aboriginal offenders placed with Aboriginal organisations, and the nature of the work performed, would entail a piecemeal survey of each individual Probation and Parole Office. Clearly,

66. B Lulham SM, *Submission* at 24.

67. RCIADIC Report, Recommendation 116, vol 3 at 109. This was also submitted to the Commission by J Nicholson SC, Deputy Senior Public Defender, *Submission* at 11.

68. Halden Report at 116.

69. M Sides QC (as he then was), *Submission* at 3.

the sooner PIMS is installed the better, in order to properly assess the effectiveness of various work placements for Aboriginal offenders on CSOs. Until there is comprehensive reporting of Aboriginal participation in the CSO program, it is futile to attempt to make recommendations in relation to this area.

5.63 Probation and Parole has conveyed to the Commission that some Aboriginal organisations have been reluctant to become, or continue to be, involved in CSOs because of difficulties organisations may have experienced with the process in the past. Enlisting a sufficient number of appropriate organisations to provide work could be delegated to an Aboriginal community leader in a particular region, who would undertake the convening and setting up of a program. When Probation and Parole officers are already stretched with their caseloads, it is not easy for them to devote the necessary time to this task. It has also been suggested to the Commission that an Aboriginal community leader could fulfil the very valuable role of giving support to an offender on a CSO.

5.64 In Western Australia, for example, the Ministry of Justice contracts with councils of Aboriginal communities to undertake supervision of Aboriginal people on CSOs, the Ministry training the councils' nominees to be supervisors.⁷⁰ This approach has the potential to lessen the likelihood of a breach and improve the organisation's and community's perception of the success of the program, encouraging continuing participation. However, the Western Australian experience has demonstrated that it is most successful in more remote areas. In less remote areas, a parallel strategy which the Commission endorses is mentoring.

5.65 The Young Offenders' Mentoring Program was an initiative established in 1996 by the Crime Prevention Division of the Attorney General's Department in conjunction with the Department of Juvenile Justice, specifically to rehabilitate Aboriginal juvenile offenders on remand or under community supervision. The aim of the program was to provide intensive assistance and support to these offenders, helping them to undertake vocational training and obtain employment, and encouraging them to adopt positive lifestyles and maintain links with their Aboriginal communities. After 12 months, the success of the program justified extending it to all juvenile offenders. A review of the program is currently being carried out by external

70. Cunneen and McDonald at 131.

consultants. In particular, the review will evaluate the advantages and disadvantages of paying mentors for their duties.

5.66 The Commission is of the view that the Young Offenders' Mentoring Program would translate well to the management of young adult offenders, having the potential to reduce breaches of orders and recidivism. A family member, or member of the offender's Aboriginal community, in particular an Aboriginal elder, to whose authority the offender would respond, could have day-to-day contact with, and responsibility for, supervision of the offender. It is envisaged that, as for juvenile offenders, a case management plan would be developed by Corrective Services in consultation with the offender, the offender's family and the chosen mentor. Mentors could undertake a variety of duties, such as assisting the offender to understand and comply with the obligations of the community service order, obtain employment, deal with substance abuse, engage in constructive recreational activities and, in the case of Aboriginal offenders, foster closer ties with his or her Aboriginal community.

Recommendation 3

The Department of Corrective Services should establish a mentoring program for young adult offenders based on the Young Offenders' Mentoring Program conducted for juvenile offenders by the Department of Juvenile Justice and the Crime Prevention Division of the Attorney General's Department.

5.67 Care needs to be taken in giving Aboriginal offenders CSOs which will be difficult for them to perform due to ill health, substance abuse or other reasons, thus making them vulnerable to breaching the order. In such cases, an Attendance Order, requiring attendance at rehabilitative courses, would make far more sense. Attendance Orders are discussed below.

5.68 In Western Australia, CSOs are more frequently breached by Aboriginal than by non-Aboriginal offenders. It has been suggested that:

[t]his could, at least in part, be because the nature of the order is inappropriate, the mode of supervision is ill-adapted to Aboriginal needs, or the response of the supervisors is unduly formalistic.⁷¹

5.69 In New South Wales, the rate of successful completion of orders for all offenders is 87%. Separate statistics for Aboriginal and non-Aboriginal offenders are not kept, and it is therefore not possible to say whether, as is the case in Western Australia, CSOs are more frequently breached by Aboriginal offenders. Nonetheless, whether or not this is so, the above quote at least suggests measures to forestall breaches of orders, namely: ensuring the nature of the order is appropriate; adapting supervision to Aboriginal needs; and ensuring the response of supervisors is not unduly formalistic.

5.70 In the Pitjantjatjara Lands in South Australia, a program for community service (the "Pitjantjatjara community service program") has been trialled successfully, having a 95% completion rate.⁷² To a large extent, the success of the program depends on there being discrete communities,

71. R W Harding, R G Broadhurst, A M Ferrante and N S N Loh, *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody* (Hawkins Press, 1995) at 129.

72. See Halden Report, Appendix A at 117.

with established community councils. It therefore may not translate well for much of New South Wales. Nonetheless, it is worth examining for its applicability to those communities in New South Wales which are discrete, and for the potential of adapting the principles to less structured communities.

5.71 The program has been established along the lines suggested by a consensus of people living within the area and each community's ideas incorporated into a program best suited for that particular community. The features of the program are:

- each community has appointed its own supervisor;
- the Community Council decides where offenders are to work;
- offenders are incorporated into existing work programs;
- female offenders work in areas separate from the men;
- community service programs operate for one week each month; and
- funerals and other culturally significant functions and meeting are acknowledged as valid reasons for absence.

Recommendation 4

A pilot program based on the Pitjantjatjara community service program in South Australia should be established in New South Wales in consultation and collaboration with the Aboriginal Justice Advisory Council.

5.72 In regard to this program, the South Australian Department of Correctional Services made an important observation, which the Commission makes, as a general caution, in this Report:

Experience has shown that if a project involving Aborigines is to be successful, then the Aborigines need to be involved in the planning, structuring, implementation and machinations of such programs.⁷³

73. South Australia, Department of Correctional Services, *Report on the Establishment of Community Service Programs in the Anangu Pitjantjatjara Lands*, quoted in the Halden Report at 118.

5.73 The RCIADIC recommended that alternatives to imprisonment be available for breach of a CSO.⁷⁴ The Commission has already recommended in Report 79 that a breach of a CSO should not constitute a separate offence. Where breach of a CSO has been established and the court chooses to revoke the CSO, the court should re-sentence the offender for the original offence, having regard to the work already performed under the CSO.⁷⁵

Attendance Centre Order

5.74 The RCIADIC recommended that sentencing and correctional authorities should accept that community service may be performed in many ways by an offender placed on a CSO and that attendance at a personal development course likely to reduce the risk of re-offending should qualify for community service.⁷⁶

5.75 Sentencing courts can make a community service order and/or an attendance centre order but are limited in their power to order attendance at courses and programs outside those run within Attendance Centres. The court may make a recommendation but this does not have the status of a court order. Corrective Services implements the second limb of the RCIADIC's recommendation to the extent that it allows offenders to pursue personal development courses at its Attendance Centres. However, the policy of Corrective Services to date has been that Attendance Centres serve as the sole avenue for developmental courses to be credited against CSO requirements.⁷⁷ Attendance Centres are situated at Albury, Annandale, Chatswood, Emu Plains, Gosford, Goulburn, Liverpool, Newcastle, Orange, Pendle Hill, Wagga Wagga and Wollongong.

5.76 Establishment of Attendance Centres in rural areas with significant Aboriginal populations is a conspicuous omission from the above list, and one which needs to be investigated. Clearly, many offenders in remote and rural areas would have difficulties travelling to the nearest centre. For Aboriginal offenders, Probation and Parole's policy regarding accrediting hours only for those courses undertaken at its Attendance Centres is relaxed

74. RCIADIC Report, Recommendation 117.

75. NSWLRC Report 79, Recommendation 22.

76. RCIADIC Report, Recommendation 94.

77. Programs offered include Personal Development, Drug and Alcohol Counselling, Money Management, Drink Driver Education, Self-Esteem/Assertiveness Training, Stress Management, Anger Management, Literacy and Personal Relationships Management. Some centres also offer Living Skills Management.

in special circumstances. Probation and Parole has said that it recognises that if an Aboriginal offender needs to participate in, for example, an Anger Management or Drug and Alcohol program, it would be proper for this to be done through a culturally appropriate agency.⁷⁸

5.77 Probation and Parole has also, in response to the RCIADIC, developed and implemented a number of programs designed to meet the localised needs of Aboriginal offenders, one of which is the Aboriginal Cultural Heritage Program at Albury. This is a nine-week program, delivered by Aboriginal elders, which has been held on two occasions to date. Another is the Casino Alcohol and Other Drug Intervention program. This is a 12 week program which provides intensive intervention sessions to Aboriginal people in their community setting. The program has been funded for another year and will offer individual counselling and group sessions. In Bourke, an Alcohol and Other Drug program is being developed in co-operation with the local community. As well, in 1997-1998, \$1 million was provided to Probation and Parole's

70 district offices, 45 of which are in country areas, for the provision of Offender Training And Development programs which will target Aboriginal offenders, while addressing local social issues.

5.78 The local Aboriginal community at Armidale has been funded to present an Aboriginal Cultural Development Program, similar to the Aboriginal Cultural Heritage Program at Albury. The program's focus is on Aboriginal culture and the raising of course participants' self esteem. It also examines contemporary issues, such as substance abuse and anger management.⁷⁹

78. AJAC seeks to have attendance centre programs expanded "after consultation and negotiation has taken place with local Aboriginal and Torres Strait Islander communities and organisations and such programs are acceptable to the relevant communities": AJAC, *Submission*.

79. M Dowd SM describes an initiative aimed at juvenile offenders, which could be adapted for adult offenders, equally beneficially:

In Wilcannia, for a period of about 12 months, the Department of Health appointed 2 young graduates as Drug and Alcohol Counsellors. One of them was involved almost full time with a group of about 10-12 young (12-16 yrs old) petrol sniffing Aborigines, who were coming into constant contact with the law. Over a period of time he exercised close supervision, and arranged weekend or week long camping trips, associated with Aboriginal Art and Craft activities and informal drug counselling. Once the court was aware he was prepared to undertake these activities,

5.79 This is commendable progress towards full implementation of both the letter and spirit of Recommendation 94 of the RCIADIC, but more is needed. There need to be more personal development courses and programs in more regional centres which qualify for a CSO/Attendance Centre order. As well, making exceptions for Aboriginal offenders to credit attendance at culturally appropriate courses occurs as a matter of Corrective Services practice only and does not form written or formal policy. Nor is it specifically ordered by the sentencing court. It is also ambiguous whether the implementation of the initiatives referred to above is directed specifically at, or at the least can accommodate, those who may otherwise be on a CSO or who must otherwise participate in an Attendance Centre program.

5.80 The Commission is of the view that this is an issue which should not be left to such ill-defined discretion. It is important, because of potential significant benefits, that Aboriginal offenders be allowed to credit towards their CSO attendance at courses, preferably within Aboriginal organisations, better suited to their needs and culture. Most Aboriginal programs are run on a holistic basis, not only because this is a culturally-based approach to life issues generally, but because the causes of Aboriginal offending are so multi-layered and integrated, this is a logical and necessary response. Participation in community-based personal development programs should be formally endorsed as an alternative to a CSO or an Attendance Centre order. However, there is no justification for limiting this option to Aboriginal offenders. It is an option which may be appropriate in many cases and should be available to all offenders.

Recommendation 5

The Department of Corrective Services should establish more Attendance Centres in rural areas.

Recommendation 6

Courts should have the power to order that participation in approved community-based, personal

it did give some worthwhile options, both pre-sentencing or as conditions of bonds or community service orders. *Submission.*

**development programs may be credited towards
Community Service Orders.**

Probation

5.81 It has been submitted to the Commission that, other than through CSOs, the most effective way for courts to impact at all on the underlying social causes of crime is for Aboriginal offenders, in suitable cases, to be placed under the supervision and guidance of the Probation and Parole Service:

I admire greatly the skill, competence and dedication of officers of the Parole and Probation generally, and particularly in the case of officers at Broken Hill. It is very rare indeed that a positive result is achieved from a sentencing exercise without the intervention of the Parole and Probation Service. The supervision provided by these officers mainly in relation to practical social problems such as budgeting, financial management, personal relationships, anger management and drug and alcohol rehabilitation through the use of Community Health Officers are the most positive factors in obtaining a beneficial result from a sentence. This is particularly so if it is combined with a community service order...⁸⁰

5.82 The RCIADIC recommended that corrective service authorities ensure that Aboriginal offenders are not denied opportunities for probation and parole by virtue of the lack of trained support staff or infrastructure to ensure monitoring of such orders.⁸¹ One of Probation and Parole's responses to this recommendation was to establish the Aboriginal Offender Management Program (the "AOM Program") to examine initiatives aimed at Probation and Parole's Aboriginal clients. Due to a number of difficulties, the AOM Program lapsed but is now in the process of being restructured and revitalised. The intention is for the Aboriginal Program Committee, which provides advice and perspective on the AOM Program, to review programs for Aboriginal offenders and make its own proposals. In relation to the AOM Program as originally convened, concern was expressed by Aboriginal people outside Corrective Services that there was insufficient Aboriginal consultation and involvement in the formulation and implementation of the AOM Program. It is envisaged that all members of the restructured Committee

80. B Lulham SM, *Submission* at 23.

81. RCIADIC Report, Recommendation 119, vol 3 at 117.

will be Aboriginal, which should allay these concerns. As well, efforts to increase the numbers of Aboriginal people employed by Probation and Parole, a goal which is being actively pursued, should also help to deliver culturally appropriate services.

5.83 ISU sees great benefit in establishing a farm for young, low risk offenders in Western New South Wales, not with a prison classification, but to accommodate offenders on probation. Probation into a live-in program could be particularly successful for Aboriginal offenders. Given the right infrastructure and supervision, the prospects of rehabilitation may be increased. Offenders could have access to drug and alcohol rehabilitation, counselling services, and education which addresses the offender's financial circumstances. This could include TAFE and vocational courses, teaching literacy and numeracy, and programs directed towards obtaining employment. A live-in program gives staff, together with the offender, a better opportunity to look at the patterns in, and direction of, the offender's life and ways of breaking destructive patterns.

5.84 The concept of live-in programs of course extends beyond ISU's objective of a farm for young offenders. In whatever geographical region there is an identified need, and wherever suitable accommodation can be found, the concept can be put into effect. The Legal Aid Commission of New South Wales points out that:

[t]here are already a number of organisations controlled by Aboriginal people which provide accommodation and rehabilitation schemes for offenders. These organisations could perhaps serve as models to be used as options to full time custody. Some of these organisations are: Orana Haven, Brewarrina; Gu-Dgodah, Rothbury; Doonooch, Nowra; Weigelli Centre Aboriginal Corporation, Cowra; Nardoolla, Moree. These organisations are set up to deal specifically with Aboriginal offenders. They are controlled by Aboriginal people and encourage activities which are relevant to the cultural needs of Aboriginal people. It is imperative that such organisations, if they are to exist as alternative sentencing options, be located locally.⁸²

5.85 For all offenders, Vinson and Baldry advocate the use of probation hostels, modelled on those that exist in England, which would involve a more intensive system of probation, and which, they argue, would therefore provide an alternative to full-time custody in more serious cases. Probation to a hostel would entail participation in rehabilitative programs and intense

82. NSW, Legal Aid Commission, *Submission*.

supervision, while avoiding many of the negative effects of prison. Hostels could also accommodate women with dependent children. Vinson and Baldry also advocate a defined intensive probation scheme, not necessarily within a residential program, as an alternative for offenders who might otherwise be imprisoned. Such a scheme would include components which go further than usual probation requirements, such as more frequent reporting and other restrictions on freedom of movement.⁸³

5.86 The use of live-in programs does not have to be confined to probation. Offenders could be paroled to live-in programs and post-release services could be offered. Similarly, it has been suggested that offenders could be released on probation to outstations established by the Aboriginal Lands Councils.⁸⁴ This may act more as a diversionary scheme than probation in the conventional sense. There would, of course, need to be programs and services available at these outstations to have real prospects of achieving rehabilitation.

5.87 In paragraphs 5.14 and 5.15, two initiatives are described which mirror the concept of utilising live-in programs for probation and parole, but in the context of custodial sentences. These correctional centres could serve as models for live-in programs for offenders on probation or parole. They also demonstrate that the concept of accommodating offenders in centres, such as farms or stations, run by Aboriginal people, with Aboriginal community involvement and a focus on addressing specific issues relating to Aboriginal offending, can be applied to a number of different situations. If the Ivanhoe Warakirri Centre and the Yetta Dhinnakkal correctional farm are successful, the Commission urges the Government to establish similar centres in other areas with significant Aboriginal populations.

83. T Vinson and E Baldry, *Submission to the New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population* New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population *Inquiry into the Increase in Prisoner Population: Issues Relating to Women* at para 6.68-6.69.

84. The use of extended periods of probation on, or even banishment to, outstations instead of custodial sentences has been proposed by Tharpuntoo ALS in Queensland. The difficulty which Queensland Community Corrections finds with this is that it does not have the resources to adequately supervise and enforce such orders: Cunneen and McDonald at 139.

Fines

5.88 The imposition of fines on Aboriginal offenders has been a factor in the over-representation of Aboriginal people in the prison population. This has largely been due to the socio-economic disadvantages of many Aboriginal people, resulting in a significant level of fine default with subsequent imprisonment. In January 1998, the *Fines Act 1996* (NSW) (“the Fines Act”), came into force, introducing a new system of fine enforcement. Whether this will result in a lower incidence of fine default, and of imprisonment for fine default, remains to be seen. The Commission’s Report 79, *Sentencing*,⁸⁵ sets out in detail the provisions of the Fines Act and analyses its effectiveness and fairness. In Report 79, while the Commission generally endorsed the Fines Act, it expressed concerns about several aspects.

5.89 In brief, the Fines Act retains imprisonment for fine default but only as a sanction of last resort. If a fine defaulter fails to comply with a CSO, a warrant of commitment can be issued for the imprisonment of the offender. Imprisonment can be served by way of periodic detention.⁸⁶ However, before a person reaches the stage of receiving a CSO, there are many steps taken to enforce the fine, including issue of various notices,⁸⁷ followed by driver’s licence or vehicle registration cancellation and other civil enforcement action.⁸⁸ It is only if civil enforcement action has not been possible, or has been unsuccessful, that a CSO is given.⁸⁹

5.90 In Report 79, the Commission expressed its concern that court-imposed fines have a potentially discriminatory effect on offenders of different financial standing who are required to pay the same amount of money following conviction for offences of similar gravity. This may result in a much more severe punishment for one offender than for another. Of particular relevance to Aboriginal offenders, it may also make imposition of a further penalty for fine default more likely for an offender who does not have the financial means to pay than for an offender who does. Further, although the Fines Act requires that an offender’s financial means be considered when imposing a fine,⁹⁰ it provides that a fine must be paid within 28 days of its

85. NSWLRC Report 79, Chapter 3.

86. *Fines Act 1996* (NSW) s 58(e).

87. *Fines Act 1996* (NSW) Part 3.

88. *Fines Act 1996* (NSW) Part 4.

89. *Fines Act 1996* (NSW) s 58(d).

90. *Fines Act 1996* (NSW) s 6.

imposition.⁹¹

The court cannot extend the 28 day time limit.⁹² An offender who seeks further time to pay must apply to the court's registrar.

5.91 The Commission concluded that it is unnecessarily arbitrary and bureaucratic to fix a general 28 day time limit for the payment of fines, and that this will lead to an increase in fine default. It is also improper to remove the discretion to order time to pay from the sentencing court and vest it instead in the court registrar, with no opportunity to appeal from the registrar's decision.⁹³ The Commission recommended in Report 79 that these provisions be removed from the Fines Act and that sentencing courts retain the discretion to order time to pay. The Commission also recommended that the inequities of court-imposed fines be reduced by making fine option orders available.⁹⁴ The Commission reaffirms those recommendations in this Report.

91. *Fines Act 1996* (NSW) s 7(1).

92. *Fines Act 1996* (NSW) s 7(3).

93. NSWLRC Report 79 at para 3.8.

94. NSWLRC Report 79, Recommendation 12.

6. Female offenders

- Introduction
- Need for separate consideration of women
- Statistics
- Context of offending
- Discrimination
- Role in the family and the community
- Women's experience of prison
- Sentencing options and initiatives
- The criminal justice system generally
- Conclusion

INTRODUCTION

6.1 This chapter looks at the sentencing of Aboriginal female offenders. The several reasons for singling out Aboriginal women are set out below; but it is possibly sufficient justification that Aboriginal women are over-represented in prisons to an even greater extent than Aboriginal men, that this over-representation is increasing, and yet Aboriginal women remain largely invisible in the picture of criminal justice. Research, policies, programs and correctional institutions focus almost entirely on the needs of the male offender. As Brooks points out:

[s]ince the Royal Commission into Aboriginal Deaths in Custody, much has been written about the impact of the Australian criminal justice system on Aboriginal and Torres Strait Islander men. By contrast, there is relatively sparse literature on Aboriginal and Torres Strait Islander women and the law.¹

6.2 The Royal Commission into Aboriginal Deaths in Custody (the “RCIADIC”), devoted comparatively little attention to female offenders. In fact, there were no recommendations dealing specifically with female offenders. The only recommendation directed towards women was in relation to women as victims.² This chapter highlights this neglect of Aboriginal women and the reasons why change is needed.

6.3 Although this chapter does not examine the position of Aboriginal women as victims, violence against Aboriginal women by Aboriginal men, particularly in a domestic context, is relevant in several respects to a review of sentencing law and practice. There appears to be a misapprehension that

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1. M Brooks, “The Incarceration of Aboriginal Women” in G Bird, G Martin and J Nielsen (eds), *Majah: Indigenous Peoples and the Law* (Federation Press, 1996) at 267.
 2. Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (Five Volumes) (E Johnston, Royal Commissioner, 1991-92) (the “RCIADIC Report”) vol 5 at 82, Recommendation 60: “That Police Services take all possible steps to eliminate violent or rough treatment or verbal abuse of Aboriginal persons including women ... by police officers ...”. Subsequent reports by bodies such as the National Committee to Defend Black Rights have been critical of the RCIADIC on this point: M Mackay and S Smallacombe, “Aboriginal Women as Offenders and Victims: The Case of Victoria” (1996) 3(80) *Aboriginal Law Bulletin* 17 at 17. See also M Paxman and H Corbett, “Listen to Us: Aboriginal Women and the White Law” in (1994) 5(3) *Criminology Australia* 2.

violence against women is accepted in, or even part of, Aboriginal culture, or at least not viewed as seriously as it is in non-Aboriginal culture. This is a fallacy which needs to be dismissed from any view of Aboriginal culture. This is discussed in more detail in Chapter 3, Aboriginal Customary Law. Domestic violence also impacts on offending patterns of Aboriginal women. There is evidence to show a direct correlation between violence and abuse experienced by Aboriginal women, and their patterns of criminal behaviour.

This is discussed under the heading “Context of Offending”.

NEED FOR SEPARATE CONSIDERATION OF WOMEN

6.4 In a report on sentencing Aboriginal offenders, separate consideration of Aboriginal female offenders is necessary for the following reasons:

- Aboriginal women have been neglected by the criminal justice system. (See further under the heading “Statistics”) Baldry warns that “[w]omen are a minority within the justice system and vigilance is needed to ensure their particular needs are not subsumed”.³
- Generally, the types of offences committed by Aboriginal women are different from those committed by Aboriginal men. The vast majority of female inmates do not pose a threat to society and are classified as minimum security.⁴
- Aboriginal women frequently have a pivotal role in the family and community. In particular, they are often bringing up children alone, or, at least, unsupported. Any consideration of sentencing of Aboriginal

3. E Baldry, “Convicted Women: Before and After Prison” (1997) 8(3) *Current Issues in Criminal Justice* 275 at 276. Dr Eileen Baldry has been both President and Vice-President of CRC (Civil Rehabilitation Committee, as it then was) Justice Support (1991-1996), has been a Prison Reform Council New South Wales member and is a Lecturer, School of Social Work, University of New South Wales.

4. “This [gender-specific classification] system recognises that most women inmates are not incarcerated for violent offences and generally do not require high levels of security. The system focuses, therefore, on program needs rather than on traditional security classifications. In the past, the same categories were used when classifying male and female inmates although offending patterns, security requirements and program needs were significantly different”: NSW, Department of Corrective Services, *Annual Report 1996-1997* at 11.

women must take into account the effect on their families and communities. (See “Role in the Family and the Community”)

- There are a number of factors pertaining exclusively to Aboriginal women, as compared with Aboriginal men, which are highly relevant to their offending behaviour and which should be taken into account in determining sentences. (See “Context of Offending”)
- Aboriginal women experience prison differently from Aboriginal men. The effect on women of incarceration needs to be borne in mind, both in considering whether to give a custodial sentence, and in recommending custodial programs and correctional centres. In particular, most mothers are acutely affected by their separation from their children. (See “Aboriginal Women’s Experience of Prison”)
- Aboriginal women experience discrimination for reasons of both race and gender. (See “Discrimination”)
- There is anecdotal evidence to suggest that Aboriginal women are taking responsibility for offences committed by their male partners and relatives, especially if the woman does not have a prior criminal record but the man has a lengthy record. The reported offences range from petty theft and driving offences to robbery.⁵

STATISTICS

Numbers in the criminal justice system

6.5 Despite the significant over-representation of Aboriginal people in the criminal justice system in New South Wales,⁶ only a small percentage is

5. NSW, Department of Corrective Services Indigenous Services Unit, *Consultation* (11 February 1998).

6. As at 30 June 1999, of the total prison population of 8,382 inmates in full-time custody in NSW, 1,257 were Aboriginal and Torres Strait Islanders, representing 15% of the total prison population: NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* (Statistical Publication No 19, 2000) at 3. However, Aboriginal and Torres Strait Islander people comprise only 1.6% of the total population of New South Wales.

female.⁷ Consequently, the special issues surrounding the sentencing of female offenders has largely been overlooked by researchers, relevant authorities and policy-makers. The Minister for Corrective Services, the Hon R J Debus, MP, has acknowledged this deficiency:

All too often, programs and policies are based only on the needs of the majority Anglo-Celtic male population, as though their experiences were generic to the inmate population as a whole.⁸

6.6 Also overlooked is the fact that the over-representation of Aboriginal women in prison is greater than that of Aboriginal men.⁹ While Aboriginal people generally are more likely to be imprisoned than non-Aboriginal people, Aboriginal women are the most vulnerable to imprisonment. This trend has been steadily increasing in recent years:

New South Wales was the major contributor to the national increase in Aboriginal women in prison. Between 1987 and 1991 the number of Aboriginal women in New South Wales prisons rose by no less than 168%. It is worth noting that while the number of Aboriginal women in prison rose by 63% nationally, the corresponding increase for Aboriginal men was 24%. Thus in recent years there has been a general increase in the imprisonment of indigenous people in Australia. However that increase has disproportionately impacted on indigenous women.¹⁰

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7. As at 30 June 1999, of the total prison population of 8,382 inmates in full-time custody in NSW, 552 were women. Twenty per cent of these female inmates were Aboriginal and Torres Strait Islanders: NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* (Statistical Publication No 19, 2000) at 4.
 8. B Debus, "Women's Imprisonment: The Politics of Difference" (1996) 8(2) *Current Issues in Criminal Justice* 201 at 202.
 9. Although Aboriginal women are less than two percent of the population, 25% of women imprisoned in 1999 were Aboriginal or Torres Strait Islander. The most recent report indicates that between 1992 and 1998 the number of Aboriginal women in New South Wales prisons rose by 193%: NSW, Department of Corrective Services, *Annual Report 1998-1999: Statistical Supplement Table 7*.
 10. C Cunneen and K Kerley, "Indigenous Women and Criminal Justice: Some Comments on the Australian Situation" in *Perceptions of Justice: Issues in Indigenous Community Empowerment* (1995) at 84-85. "Nationally, the number of Indigenous women prisoners has increased by 148% from 105 in 1988 to 261 in 1998; the rate of Indigenous women's imprisonment has

6.7 Appendix B contains statistics relating to offending by women generally and available statistics for offending by Aboriginal women. A comparison with statistical profiles of offending by men is also given.

Deficiencies in statistical information

6.8 Problems exist concerning data collection relating to Aboriginal offenders. The New South Wales Bureau of Crime Statistics and Research does not separately record the number of Aboriginal women convicted, nor give a profile of the types of offences committed by Aboriginal women. Neither do the courts record the number of Aboriginal women coming into the criminal justice system, nor the types of offences bringing them before the courts. The National Prison Census gives a breakdown of Aboriginal and non-Aboriginal inmates, and the offences for which they have been imprisoned, but not a corresponding breakdown of female and male Aboriginal inmates.

6.9 In 1985, a Report of the Task Force on Women in Prison to the Minister for Corrective Services¹¹ observed that there was no research information or clear policy available specifically on Aboriginal women and the criminal justice system, and recommended that funds be sought for a research project on Aboriginal women and imprisonment in Australia. To date, there has been no specific response to, or implementation of, this recommendation.

6.10 In Western Australia, the 1994 Chief Justice's Taskforce on Gender Bias noted a similar "dearth of readily available official information concerning Aboriginal women". It concluded that:

proper study does and will reveal the disadvantaged positions of Aboriginal women compared with both other Aboriginal and non-Aboriginal persons. But it is only with full and proper information that

increased from 162.8 per 100,000 population in 1988 to 223 per 100,000 population in 1998 – an increase of 36.9%: Australian Institute of Criminology *Submission to the New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population* New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population Inquiry into the Increase in Prisoner Population: Issues Relating to Women (Interim Report, July 2000) at para 3.12.

11. Parliament of NSW, *Report of the Task Force on Women in Prison to the Minister for Corrective Services* (March, 1985).

the full extent of the problems can be properly revealed.¹²

6.11 It is unlikely that the special needs of Aboriginal women offenders, not just those in full-time custody, can be properly met when data collection is so inadequate. In particular, the Probation and Parole Service has told the Commission that it is not receiving information regarding numbers of Aboriginal women offenders, and the nature of offences committed, at an early enough stage to place them into appropriate programs.¹³ In order to remedy this situation, and to assist the management of male and female Aboriginal offenders alike, the Commission makes the following recommendation.

Recommendation 7

The following statistical information about Aboriginal offenders, with breakdown into gender categories, should be compiled and published at regular intervals:

- **the numbers coming into the criminal justice system;**
 - **the numbers being convicted of a criminal offence;**
 - **a breakdown into types of offences for which a conviction is entered;**
 - **a breakdown into types and lengths of sentences given; and**
 - **the numbers in all correctional centres.**
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CONTEXT OF OFFENDING

6.12 In determining an appropriate sentence, the judicial officer takes into account the circumstances and context of the offence, including the nature of

12. Western Australia, Taskforce Sub-Committee on Aboriginal Women and the Law, *Report of Chief Justice's Taskforce on Gender Bias* (1994) at para 55.

13. NSW, Department of Probation and Parole, *Consultation* (26 February 1998).

the offence and of the offender.¹⁴ An offender's Aboriginality is not relevant per se but is relevant in so far as it explains, or throws light on, the circumstances of an offence:¹⁵

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist by reason of the offender's membership of an ethnic or other group.¹⁶

6.13 There are a number of factors pertaining to Aboriginal women which are highly relevant to their offending behaviour and which should be taken into account in determining sentences.

Historical context

6.14 Over the last two hundred years, Aboriginal women have suffered a loss of position and esteem in their culture which has had a deleterious effect on their sense of purpose and well-being and must, logically, impact on behaviour. It is necessary to understand the high status which women traditionally enjoyed in Aboriginal culture in order to comprehend the extent of their dislocation and disempowerment.

6.15 Women traditionally performed different, but equally important, roles from those performed by men. Contributions made by each gender to the functioning of the community were equally valued. As a result, the status of Aboriginal women was comparable with that of men:

They [had] their own ceremonies and sacred knowledge, as well as being custodians of family laws and secrets. They supplied most of the reliable food and had substantial control over its distribution. They were the providers of child and health care and under the kinship system, the woman's or mother's line was essential in determining

14. For a detailed discussion of sentencing principles see Chapter 2.

15. Toohey J, unpublished address given to the National Criminal Law Congress on Aboriginal Customary Law (24 June 1988); see also Chapter 2.

16. *Neal v The Queen* (1982) 149 CLR 305 at 326 (Brennan J).

marriage partners and the moiety (or tribal division) of the children.¹⁷

6.16 One of the most important roles in traditional Aboriginal society was performed by women: the control of fire, known to Aboriginal peoples as “the gift of the universe”.

6.17 Following the arrival of non-Aboriginal peoples in Australia, there was a shift in the balance of power within Aboriginal society, and an undermining of the status of Aboriginal women, which subsequent policies and practices of government perpetuated. Upton submits that:

[t]he differences that revealed Aboriginal women as having a distinct and separate social, religious and legal role in Aboriginal society, and hence a separate, independent and respected voice, were either ignored, trivialised or simply remained undiscovered [by the anglo-European colonisers].¹⁸

6.18 Thomas and Selfe explain the historical upheaval in the organisation of Aboriginal communities, and the consequences for women, in the following terms:

The white men arrived and so too did a white value system which saw a different type of person (that is, white and male), placed at the top of the ladder. Along with their racist, pre-conceived notions of Aboriginal people, they brought with them ... a belief that women did not have the same importance or significance to society as men. ... It has been easy for the new white population to assume that Aboriginal women were not equally important to Aboriginal men. ... Aboriginal women face both racism and sexism. ... [I]t must be remembered that Aboriginal women have additional barriers which non-Aboriginal women do not have to face, stemming from a drastic and rapid change in lifestyle, changed roles and responsibilities and a shift in power structures within communities.¹⁹

6.19 An Aboriginal woman speaks of her experience of the costs to

17. S Payne, “Aboriginal Women and the Law” in P W Eastal and S McKillop (eds), *Women and the Law* (AIC Conference Proceedings No 16, Canberra, 1993) at 65.

18. J C R Upton, “By Violence, By Silence, By Control: The Marginalization of Aboriginal Women Under White and ‘Black’ Law” (1992) 18 *Melbourne University Law Review* 867 at 867.

19. C Thomas and J Selfe, “Aboriginal Women and the Law” in S McKillop (ed), *Aboriginal Justice Issues* (AIC Conference Proceedings No 21, Canberra, 1993) at 168.

Aboriginal people of having a “male dominated view of Aboriginal society ... enforc[ed] upon Aborigines”:

Aboriginal men have been selected and groomed for special positions in the public service. Aboriginal men, in outback Australia, have been taught by non-Aboriginal men to consider themselves superior. ... Aboriginal women have also been similarly affected. They have been told so often that it is their men who own the land, know the only sacred sites and rituals and make the decisions. When their own life experiences disagree with the constructs being put upon them by non-Aborigines, they are confused.²⁰

6.20 It may be argued that the fact that drinking among Aboriginal women is very recent is, in part, evidence of the response of Aboriginal women to the gradual devaluing of their positions in, and contributions to, Aboriginal society. The high rate of convictions for “drunk and disorderly” offences is in turn evidence of the link between Aboriginal women’s loss of position and their contact with the criminal justice system.

6.21 A further historical factor relevant to offending by Aboriginal women is the “assimilation” policy which resulted in Aboriginal children being taken from their mothers.²¹ This has been described as “[o]ne of the most disempowering acts of all for women.”²² While this was a policy which has impacted on both sexes and “will continue to be a major factor in Aboriginal over-imprisonment for both sexes for a long time to come”,²³ the special effects for women need to be acknowledged. A large proportion of Aboriginal women were either removed as children from their parents by the State, and have survived childhood as

20. F Gale quoted in J Scutt, *Women and the Law: Commentary and Materials* (The Law Book Company Limited, 1990) at 22.

21. “During the 1950s and 1960s even greater numbers of Indigenous children were removed from their families to advance the cause of assimilation. Not only were they removed for alleged neglect, they were removed to attend school in distant places, to receive medical treatment and to be adopted out at birth.”: Australia, HREOC, *Bringing Them Home*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (April 1997) at 34.

22. S Payne, “Aboriginal Women and the Law” in P W Eastal and S McKillop (eds), *Women and the Law* at 66.

23. Payne at 66. The RCIADIC documents the connection between the removal of Aboriginal children from their families, and criminal behaviour.

wards of the State,²⁴ or have had their own children removed from them, or have experienced the stress of seeing members of their extended family so treated.²⁵ Women who were institutionalised as children had no opportunity to learn parenting skills and undoubtedly face greater difficulties and stresses in bringing up their own children.

Contemporary context

6.22 Many Aboriginal women frequently experience violence, physical and emotional abuse,²⁶ substance abuse²⁷ and economic hardship; the latter, often

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24. “[W]ardship [is] a major contributing factor to later involvement in the juvenile and criminal justice systems”: New South Wales, Legislative Council Standing Committee on Social Issues, *A Report into Children of Imprisoned Parents* (Report No 12, July 1997) para 3.3. See also E Sommerlad, *Aboriginal Juveniles in Custody* (Department of Aboriginal Affairs, Canberra, 1977) at 6: “It is not possible to state with certainty that the very high rates of Aboriginal juveniles in corrective institutions and of Aborigines in prison is a direct result of their having been placed in substitute care as children, but that there is a link between them has often been asserted and seems undeniable. In Victoria, analysis of the clients seeking assistance from the Aboriginal Legal Service for criminal charges has shown that 90% of this group has been in placement – whether fostered, institutionalised or adopted. In NSW, the comparable figure is 90-95% with most placements having been in white families.” See also New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population *Inquiry into the Increase in Prisoner Population: Issues Relating to Women* at para 3.58 and 3.66: “Thirty per cent of women [inmates] have reported to the Department of Corrective services that they were removed from their families as children.”
25. S Payne, “Aboriginal Women and the Law” in P W Eastaer and S McKillop (eds), *Women and the Law* at 65-66.
26. Fifty three per cent of the men whose deaths in custody were investigated by RCIADIC had been jailed as a result of their acts of violence against women, in particular, Aboriginal women.
27. “In Kevin’s sample ... of 130 women serving full time sentences in NSW between July and October 1993, 62 per cent reported being under the influence of a drug (including alcohol) at the time of arrest and 72 per cent reported a relationship between their drug use and current imprisonment. To this must be added the growing literature reporting the high incidence of women in prison who were sexually and/or physically abused as children ... and whose crimes are related to substance abuse”: Baldry “Convicted Women: Before and After Prison” at 278. See: M Kevin, *Women in Prison*

because Aboriginal women have low levels of education and difficulty finding, and sustaining, employment. Many Aboriginal women are bearing the considerable emotional and financial stresses of having the responsibility for raising children solely, or without adequate support.²⁸

6.23 Payne notes that, in the 1990 National Prison Census, the offences recorded as being most frequently committed by Aboriginal women involved non-payment of fines, drunkenness and social security fraud, which she describes as crimes which are “the result of extreme poverty”.²⁹ Research on women generally as Social Security offenders supports the argument that women’s offending often results from economic need.³⁰

6.24 In relation to Social Security offences, however, attention needs to be drawn to the possibility that some Aboriginal women are simply not understanding their rights and obligations regarding receipt of social security payments. For example, there have been incidences where the woman’s

with Drug Related Problems Part 1 (NSW, Department of Corrective Services, Sydney, 1995); NSW Parliament, *Report of the New South Wales Task Force on Women in Prison* (1985, Sydney); J Heney, “Report on Self-Injurious Behaviour in the Kinston Prison for Women” (1990) 2(3) *Forum*; R A Robinson, “Intermediate Sanctions and the Female Offender” in J Byrne and A Lurigio (eds), *Smart Sentencing: The Emergence of Intermediate Sanctions* (1992, Sage, Newbury Park); B Hampton, *Prisons and Women* (1993, UNSW Press, Sydney) at Chapter 6; B Denton, “Prisons, Drugs and Women: Voices from Below” *Report to NCADA* La Trobe University, Melbourne, 1994); B O’Connor, “Creating Choices or Just Softening the Blow? The Contradictions of Reform: Inmate Mothers and their Children” (1996) 8(2) *Current Issues in Criminal Justice* 144 at 146.

28. The Census produced by the Department of Corrective Services does not identify whether an inmate is a parent and the primary carer of children prior to incarceration. The anecdotal evidence to the Committee, however, indicates that approximately 60% of women in prison are parents. Approximately 30 to 40% of these are sole parents: NSW, Legislative Council Standing Committee on Social Issues, “A Report into Children of Imprisoned Parents” *Report 12* (July 1997) at 37.

29. S Payne, “Aboriginal Women and the Law” in P W Eastaer and S McKillop (eds), *Women and the Law* at 66.

30. Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (Report 69, 1994) at 142. See also New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population Inquiry into the Increase in Prisoner Population: Issues Relating to Women at para 2.19-2.20 and 3.60-3.63.

partner has died, a Social Security cheque has been issued shortly after his death and the woman thought she was entitled to keep it.³¹ Awareness of this issue, and the appropriate dissemination of information, could readily eliminate the risk of inadvertent transgressions. The Dubay Jahli report recommended:

[t]hat ATSIC liaise with the National Network of Welfare Rights Agencies to produce an information booklet and other educational materials informing Aboriginal women of their entitlements to Department of Social Security benefits and liabilities for overpayments and fraud.³²

6.25 The violent and/or abusive conditions under which many Aboriginal women live may impact directly on the likelihood of their offending. Cunneen and Kerley refer to evidence which suggests that “the victimization of Aboriginal women in the area of domestic violence may have some bearing on the number of Aboriginal women in prison”.³³ There has been considerable concern about the levels of family violence and sexual assault in Aboriginal communities in Australia³⁴ amidst growing evidence that a high proportion of Aboriginal women in prison has been subject to violence in various forms.³⁵

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31. Women consulted in the course of the preparation of a report into Aboriginal women and the law said that they needed information on rights and responsibilities in relation to receipt of Social Security benefits: NSW, Ministry for the Status and Advancement of Women, *Dubay Jahli: Aboriginal Women and the Law* (Report to NSW Parliament, 1994) at 5.
 32. NSW, Ministry for the Status and Advancement of Women, *Dubay Jahli: Aboriginal Women and the Law* at 6.
 33. Cunneen and Kerley, “Indigenous Women and Criminal Justice: Some Comments on the Australian Situation” at 81.
 34. Cunneen and Kerley, “Indigenous Women and Criminal Justice: Some Comments on the Australian Situation” at 81. See: J Atkinson, “Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward” (1990) 2(46) *Aboriginal Law Bulletin* 6; A Bolger *Aboriginal Women and Violence* (ANU Casaurina, North Australia Research Unit, 1991); S Payne, “Aboriginal Women and the Law” in P W Easta and S McKillop (eds), *Women and the Law*.
 35. Baldry refers to such evidence in relation to all women in prison, compared with women in the general population: E Baldry, “Convicted Women: Before and After Prison” at 278. See: C Alder, “Women and the Criminal Justice System” in D Chappell and P Wilson (eds), *The Australian Criminal Justice System – The Mid 1990s*

6.26 One study noted that “almost all the Aboriginal women in Mulawa Correctional Centre (“Mulawa”) had, at some stage in their lives, been sexually assaulted and/or physically abused”.³⁶ Another study found, through informal consultation, that almost 90% of Aboriginal women in prison had experienced forms of sexual abuse as children and as adults, by both white and black males.³⁷ The Indigenous Services Unit of Corrective Services conducted an informal survey of a small sample group (18) of Aboriginal female inmates which found that every woman in that group had suffered abuse of some description.³⁸

6.27 Cunneen states that Aboriginal women are more likely to be in prison for assault, than non-Aboriginal women (in 1992, 12.2% compared with 1.1%) and notes that it has been suggested that, because Aboriginal women are the victims of domestic violence, this factor may have some bearing on the number of Aboriginal women imprisoned for offences against the person.³⁹ He draws attention to Canadian literature which has linked high

(Butterworths, 1994) at 143, and studies cited therein; NSW Parliament, *Report of the New South Wales Task Force On Women in Prison* (Sydney, 1985) at 54; J Heney, “Report on the Self-Injurious Behaviour in the Kinston Prison for Women” (1990) 2(3) *Forum*; R A Robinson, “Intermediate Sanctions and the Female Offender” in J Byrne and A Lurgio (eds), *Smart Sentencing: The Emergence of Intermediate Sanctions* (Sage, Newbury Park, 1992); B Hampton, *Prisons and Women* (UNSW Press, Sydney, 1993) Chapter 6; B Denton, “Prisons, Drugs and Women: Voices from Below” *Report to NCADA* (La Trobe University, Melbourne, 1994) at 34-35; M Kevin, *Women in Prison with Drug Related Problems Part 1* (NSW, Department Of Corrective Services, Sydney, 1995). See also the submissions and research documenting “the high level of violence and childhood abuse experienced by women prisoners” cited in New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population Inquiry into the Increase in Prisoner Population: Issues Relating to Women at para 2.19-2.20, 3.64-3.65 and 3.67-3.68.

36. C Thomas, “Addressing the Concerns of Aboriginal Women” in *Local Domestic Violence Committees Conference, Papers and Proceedings* (NSW Domestic Violence Committee, Sydney: NSW Women’s Co-ordination Unit, 1991) at 87.
37. J Atkinson, “Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward” (1990) 2(46) *Aboriginal Law Bulletin* 6 at 6.
38. NSW, Department of Corrective Services Indigenous Services Unit, *Consultation* (11 February 1998).
39. C Cunneen, “Judicial Racism” (1992) 2(58) *Aboriginal Law Bulletin* 9 at 10.

levels of domestic violence to the disproportionate imprisonment of Canadian Indigenous women for crimes against the person.⁴⁰ Cunneen summarises the Canadian author's arguments as follows:

[T]here may be a strong relationship between the contemporary condition of indigenous men as a result of colonisation, male violence against indigenous women and subsequent criminal activity by indigenous women. She suggests three ways that indigenous women's conflict with the law could be related to family violence: firstly indigenous women might retaliate against violence by the use of violence; secondly, by escaping from violent or abusive situations there may be a resort to alcohol or drug abuse; and thirdly, the victimisation of women may itself cause abuse or neglect of others.⁴¹

6.28 Cunneen and Kerley add that, for Aboriginal women, "physical force may be the only resistance to domestic violence available given a range of pressures which militate against the involvement of the police".⁴²

6.29 The enormous pressures arising from the combined effects of poverty, violence, sole parenthood, alcohol and substance abuse, and gender and race discrimination give some indication of the vulnerability of Aboriginal women to contact with the criminal justice system. The RCIADIC found that the underlying problems affecting most Aboriginal people, of racism, alienation, poverty and powerlessness, had lead to hopelessness and alcoholism. How much greater is the load on Aboriginal women who, in addition, suffer violence, abuse and sexism.⁴³ The RCIADIC was not overstating the position

See J Atkinson, "Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward".

40. C P La Prairie, "Some Issues in Aboriginal Justice Research: The Case of Aboriginal Women in Canada" (1989) (1) *Women and Criminal Justice* 1
41. Cunneen and Kerley, "Indigenous Women and Criminal Justice: Some Comments on the Australian Situation" at 81.
42. Cunneen and Kerley, "Indigenous Women and Criminal Justice: Some Comments on the Australian Situation" at 81. See also Atkinson, "Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward" and P Dodson, *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991), and RCIADIC Report, vol 1 at 381.
43. The RCIADIC commented that "Aboriginal women are subject to the structural disadvantages that affect Aboriginal people as well as to the structural disadvantages that affect women generally": RCIADIC Report, vol 2 at 395.

when it found that the 11 Aboriginal and Torres Strait Islander women who died in custody had experienced considerable disadvantage within the wider system, as well as within the criminal justice system. But “until the law recognises the socially and economically oppressed position of Aboriginal and Torres Strait Islander women, it will continue to treat them unequally and, therefore unjustly”.⁴⁴ To this end, it is vital that the criminal law “recognises not only their experiences as women, but as *Aboriginal women*”.⁴⁵

DISCRIMINATION

6.30 The Report of the Chief Justice’s Taskforce on Gender Bias⁴⁶ cautions that Aboriginal women may be denied power under and before the law on three counts.⁴⁷ It found that Aboriginal women’s experiences with the law were affected by their race, their gender and, in addition, their low socio-economic positions, often lower than many other persons in society, including other women. These factors impact on Aboriginal women’s feelings of alienation and on their levels of self-esteem.⁴⁸

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44. Brooks “The Incarceration of Aboriginal Women” at 272-273.
 45. S Yeo, “The Recognition of Aboriginality by Australian Criminal Law” in *Majah Indigenous Peoples and the Law* at 251.
 46. Western Australia, Taskforce Sub-Committee on Aboriginal Women and the Law *Report of the Chief Justice’s Taskforce on Gender Bias* (Western Australia, 1994). The sub-committee included a majority of Aboriginal women members and consulted additional Aboriginal women about matters of particular concern.
 47. Western Australia, Taskforce Sub-Committee on Aboriginal Women and the Law *Report of the Chief Justice’s Taskforce on Gender Bias* at para 52. See also Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (ALRC 69, 1994); Brooks, “The Incarceration of Aboriginal Women” at 270-271; M Paxman, “Aborigines and the Criminal Justice System: Women and Children First!” (1993) 18(4) *Alternative Law Journal* 153 at 156-157; J A Scutt, “Invisible Women? Protecting White Cultural Invisibility on Black Australian Women” (1990) 2(46) *Aboriginal Law Bulletin* 4. Upton writes: “The marginalisation of Aboriginal women is complicated by the additional and continuing obstacles of language, cultural difference and racism”: “By Violence, By Silence, By Control: The Marginalization of Aboriginal Women Under White and ‘Black’ Law” at 869.
 48. These findings are just as applicable to Aboriginal women in NSW, as they are to Aboriginal women in Western Australia.

6.31 Cunneen and Kerley argue that the criminal law, from policing to sentencing, treats Aboriginal women more harshly than any other group. They refer to empirical evidence which “suggests strongly that proportionately more Aboriginal women are detained in police custody for minor offences of public disorder [including drunkenness] than other groups.”⁴⁹

We would argue that particular conceptions of gender and Aboriginality have the effect of creating more punitive interventions in relation to Aboriginal women. A reading of the reports into deaths of Aboriginal women in custody by [RCIADIC] supports such a claim. Many of the women had been in prison on previous occasions. Yet what is remarkable in reading through these cases is that the women were being constantly criminalized because of poverty and alcohol addiction. In addition there was pronounced punitiveness to the intervention.⁵⁰

6.32 In exploring possible explanations for the extent to which Aboriginal women are convicted, and sentenced to imprisonment, on minor charges, Cunneen questions whether “courts simply rubber stamp the process of selective policing for particular offences”. He also challenges the basis upon which imprisonment is being used as a sentencing option.⁵¹ He suggests a “paternalistic racism”,⁵² the existence of which is supported by Commissioner Dodson:

One justice in Western Australia stated that he sentenced Aboriginal and Torres Strait Islander women to terms of imprisonment for ‘welfare’ reasons. ‘Sometimes I sentence them to imprisonment to help them ... To protect their welfare I put them inside for seven days. They get cleaned up and fed then’.⁵³

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49. Cunneen and Kerley, “Indigenous Women and Criminal Justice: Some Comments on the Australian Situation” at 78.
50. Cunneen and Kerley, “Indigenous Women and Criminal Justice: Some Comments on the Australian Situation” at 83.
51. Cunneen, “Judicial Racism” *Aboriginal Justice Issues* at 127.
52. Cunneen, “Judicial Racism” at 127. See also Cunneen and Kerley, “Indigenous Women and Criminal Justice: Some Comments on the Australian Situation” at 82-83.
53. P Dodson, *Regional Report of Inquiry into Underlying Issues in Western Australia* Royal Commission into Aboriginal Deaths in Custody (AGPS, Canberra, 1991) vol 1 at 136.

ROLE IN THE FAMILY AND THE COMMUNITY

6.33 One of the most significant factors affecting all female offenders concerns their relationship with, and responsibility for, their families and children. The role of Aboriginal women in their immediate and extended families is particularly relevant to sentencing. Aboriginal women have the pivotal role in managing the family infrastructure.⁵⁴ Further, there is a high incidence of Aboriginal families where the father is absent (often because he is incarcerated) or ineffective as a parent due to drug and alcohol abuse, or has died. It has been estimated that more than 80% of incarcerated women are single parents. Even though the numbers of Aboriginal female offenders are far less than men, the impact on the community, and the hardship to others, can be greater if women are jailed. Can and should this factor be considered in determining an appropriate sentence?

6.34 In *R v Wirth*,⁵⁵ the South Australian Court of Criminal Appeal held that the fact that imposition of a sentence of imprisonment upon an offender is likely to cause hardship to the family, or to others closely connected with him or her cannot be taken into account in mitigation of sentence, except “where the circumstances are highly exceptional, where it would be in effect inhuman to refuse to do so”. However, Bray CJ noted that if imprisonment will bear with special hardship on an offender, that can always be taken into account; “and it may bear with special hardship on him [or her] because of its effect on his [or her] family”.⁵⁶ Further, Bray CJ noted that “circumstances peculiar to the offender himself [or herself], as opposed to circumstances peculiar to his relations, can always be taken into account. His [or her] family circumstances, for example, may explain or excuse the crime or provide the motivation of it”. The high incidence of “crimes of poverty” among female offenders is often motivated by the need to provide for dependent children.

54. Aboriginal Women’s Legal Service, *Consultation* (23 January 1998); NSW, Department of Corrective Services Indigenous Services Unit, *Consultation* (11 February 1998); NSW, Department of Corrective Services Women’s Services Unit, *Consultation* (13 February 1998).

55. (1976) 14 SASR 291. See also: *Boyle v The Queen* (1987) 34 A Crim R 202; *R v Wayne* (1992) 62 A Crim R 446; *R v Maslen and Shaw* (1995) 79 A Crim R 199; *R v Moffa (No 2)* (1977) 16 SASR 155; *R v Adami* (1989) 51 SASR 229; *R v Edwards* (1996) 90 A Crim R 510; *R v Spiers* (1983) 34 SASR 546; *Wayne v Boldiston* (1992) 108 FLR 252; *R v Leslie* (1995) 21 MVR 208; *R v Alexander* (1994) 78 A Crim R 141; and *Amagula v White* (NT, Supreme Court, No JA92 of 1997, Kearney J, 7 January 1998, unreported).

56. *R v Wirth* (1976) 14 SASR 291 at 294.

6.35 The Northern Territory Supreme Court in *Wayne v Boldiston*,⁵⁷ following *R v Wirth*, found that the fact that the offender's dependent children would have to be separated and cared for by various relatives if she were to be sentenced to imprisonment was not sufficiently exceptional so as to be a relevant factor.⁵⁸ In *R v Burns*,⁵⁹ in which the appellant was the mother of two children aged four and ten, the court adopted dicta of Roden J in *R v Lux*⁶⁰ that "despite the sympathy and compassion [arising from the prospect of the offender's imprisonment], the courts cannot, by their sentencing decisions, create a class of people who are immune from the normal consequences of their criminal conduct".⁶¹

6.36 McInnes SM, in a comprehensive submission to the Commission, argues that the precedent set by *R v Wirth* has a particularly hard impact on Aboriginal women. She urges that legislation should require the sentencing court to take into account the effect of a sentence on dependents where the offender and/or the victim is both a caregiver and the dependents' primary source of financial and/or emotional support.⁶²

57. (1992) 85 NTR 8.

58. See also *R v Maslen and Shaw* (1995) 79 A Crim R 199: the Court of Criminal Appeal held that it is only in circumstances where the hardship upon a prisoner's family is exceptional that it will operate in mitigation; the hardship must be sufficiently extreme going beyond the sort of hardship which inevitably results to a family when the breadwinner is incarcerated – that a "sense of mercy or of affronted common sense imperatively demands that [the sentencing judge] should draw back". *R v Maslen and Shaw* applied *R v Wirth* and *R v Boyle* (1987) 34 A Crim R 202.

59. (1994) 71 A Crim R 450.

60. (NSW, Court of Criminal Appeal, No 480 of 1987, 26 August 1988, unreported).

61. See also *R v Edwards* (1996) 98 A Crim R 510; *R v Everett* [1999] NSWCCA 467; and *R v Robinson* [1999] NSWCCA 468. In *R v Robinson*, the court held that it was appropriate to take into account, in assessing the custodial sentence imposed by the trial court, the existence of a Mothers' and Children's program within the correctional centre: per Carruthers AJ at 9. The Select Committee on the Increase in Prisoner Population has expressed concern over this ruling on the basis that it is contrary to the *Children of Imprisoned Parents Report* which specifically recommends that prison be used as a last resort despite the establishment of the Mothers' and Children's program: New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population *Inquiry into the Increase in Prisoner Population: Issues Relating to Women* at para 2.14.

62. R McInnes SM, *Submission* 4 July 1997.

6.37 Chapter 2 explains the Commission's reasons for not recommending legislative inclusion of principles applicable to sentencing Aboriginal offenders. In accordance with this reasoning, the Commission is unable to make McInnes's suggested recommendation. However, the Commission recognises that Aboriginal women frequently occupy a position in their families which reinforces the principle of imprisonment as a last resort, and that resources should concentrate on diverting Aboriginal women from the criminal justice system.⁶³ The Commission notes the recommendation of the Standing Committee on Social Issues, in its Report, *Children of Imprisoned Parents*, that prison should only be used as an option of last resort when sentencing an offender who is the parent of dependent children, irrespective of the existence of mothers' and children's units in prison.⁶⁴

6.38 If a custodial sentence must be given, it should be served in institutions, or on programs, which minimise hardship to the family and community. Where a non-custodial sentence is appropriate, thought needs to be given to ways in which the needs of the family can be accommodated within the serving of the sentence. Sentencing options currently available which may be appropriate for mothers, and ideas and recommendations for reform, are examined under the heading "Sentencing Options and Initiatives".

WOMEN'S EXPERIENCE OF PRISON

6.39 The RCIADIC Report highlights the particular dangers of incarceration for Aboriginal and Torres Strait Islander people, which for Aboriginal women carries additional factors potentially increasing their suffering.

63. In 1996, a report of the Queensland Office of the Director of Public Prosecutions found that "[f]ear of the complete breakdown of their society and kinship structures, which Indigenous women have become responsible for maintaining, has contributed to an even greater urgency in the collective Indigenous women's appeal to governments at all level to provide culturally sensitive services to address their concerns": Queensland, Office of the Director of Public Prosecutions, *Indigenous Women within the Criminal Justice System* (Report, 1996) at 12.

64. New South Wales, Legislative Council Standing Committee on Social Issues, *A Report into Children of Imprisoned Parents* (Report No 12, July 1997) at Rec 47. The Report documents the trauma, often permanent, that occurs to a family when the mother is imprisoned. The pain and loss suffered by children can result in the child turning to self-destructive behaviour in later life.

6.40 This chapter has already drawn attention to the central position which many Aboriginal women occupy in the family, the high proportion of sole (female) parent households and the large percentage of single Aboriginal mothers in prison. For all inmates who are mothers, it is likely that imprisonment will be particularly “stressful and traumatic”⁶⁵ because of the separation from their children. Brooks argues that this is likely to apply to a greater degree to Aboriginal and Torres Strait Islander women if their families are matrifocal, or mother-centred, in nature, which they often are in New South Wales:

This matrifocality of many families, which is largely the product of absent or “floating” male partners, places total responsibility for childcare on these women along with the affective stress that this obligation implies. Furthermore, I believe that imprisonment for Aboriginal and Torres Strait Islander women is far more stressful than for women generally. It removes these women from the security of a community life which, frequently is so tightly integrated on the basis of contiguity and kinship as to be totally alien to all but those who live in it. To be removed from children who are solely dependent on them, and from a community on which they are so largely dependent socially and – often – economically, is a compounding effect that only imprisoned Aboriginal and Torres Strait Islander women have to endure.⁶⁶

6.41 Aboriginal inmates of Mulawa report experiencing racism, from both other inmates and prison officers, and harsher treatment than non-Aboriginal women. Anecdotal evidence also suggests that Aboriginal inmates are more likely to be blamed for disruption within prisons.⁶⁷ One inmate interviewed by Hampton described the low status of Aboriginal inmates:

Kooris would never look at screws in the eyes when spoken to ... because our people knew how they felt about us ... You [can] ... feel or sense the prejudice. Whenever there was a conflict we knew who would cop the consequences. There was one time I remember there was chaos in one wing ... [and] most of the

65. B Hampton, *Prisons and Women* (UNSW Press, Sydney, 1993) at 2.

66. M Brooks, “The Incarceration of Aboriginal Women” at 275. An Aboriginal inmate of Mulawa interviewed by Hampton described her feelings of anguish: “the worst part of being in prison was being separated from my three children. I missed them very much. I felt the whole world was taken from me”: Hampton *Prisons and Women* at 119.

67. NSW, Department of Corrective Services Women’s Services Unit, *Consultation* (13 February 1998).

blacks got segro for three months.⁶⁸

Recommendation 8

Programs to raise awareness in the judiciary, and all others involved in the sentencing process, of cross-cultural issues should include a component dealing specifically with Aboriginal women offenders. Among other things, such programs should focus on increasing awareness and understanding of:

- **the circumstances surrounding the offences committed by Aboriginal women, including their historical and current social contexts;**
 - **the role which Aboriginal women play within the family and community;**
 - **the potential for Aboriginal women to suffer from both racism and sexism; and**
 - **the impact of imprisonment upon women and their families.**
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SENTENCING OPTIONS AND INITIATIVES

6.42 Although the small number of female offenders makes it difficult to justify and finance a wide range of sentencing options, neither is it appropriate to limit the range of options. Sentencing Aboriginal female offenders requires:

- a flexible approach;
- an understanding of underlying causes of offending behaviour; and
- open-mindedness and lateral thinking in finding the most effective ways to punish the crime, rehabilitate the offender and reduce recidivism.

68. Hampton *Prisons and Women* at 140.

6.43 In particular, the question arises as to “whether prison is the most appropriate arena for a woman to learn to manage her offending behaviour”, given the complexity of issues surrounding this behaviour.⁶⁹ From the Commission’s research and consultations, it appears that rehabilitation of Aboriginal female offenders will be achieved most effectively if it takes place in a communal setting and focuses on building self-esteem, overcoming drug and alcohol dependencies, developing relationship and parenting skills, and equipping women with employment and financial management skills.

Full-time custodial sentences

6.44 At present, all female inmates are received into either Mulawa or Grafton Correctional Centre (“Grafton”), both of which are classified “variable security facilities”. Provided that they have no drug, alcohol or psychiatric problems requiring attention, some inmates are transferred to Emu Plains Correctional Centre (“Emu Plains”), a minimum security facility. Women are occasionally housed at the Broken Hill Correctional Centre but only if they are from the local area and serving a very short sentence. It is not a satisfactory option for female offenders because it is an institution primarily for men. Women are segregated and there are inadequate facilities for longer term female inmates. Appendix B sets out in greater detail information in relation to the custodial facilities available for female inmates.

6.45 Female offenders from rural New South Wales are disadvantaged by the lack of facilities for women in country areas. The only rural custodial facility is the female wing of Grafton; otherwise, the correctional and transitional centres are located in and near Sydney. Distance from their families and communities increases the strain upon rural women, which can be more acute for Aboriginal women.⁷⁰ On the other hand, a female offender in Grafton may miss out on the more extensive programs and services

69. New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population *Inquiry into the Increase in Prisoner Population: Issues Relating to Women* at para 1.6.

70. The Standing Committee on Social Issues, conducting an inquiry into the adequacy of policies and services to assist children of imprisoned parents, spoke to 57 inmates of Mulawa Correctional Centre, 12 (21%) of whom were Aboriginal mothers. The children of nine of these women lived in rural NSW: New South Wales, Legislative Council Standing Committee on Social Issues, *A Report into Children of Imprisoned Parents* at 44.

available to women in single-sex prisons. Because the Grafton Women's Unit is on the site of a men's jail, the policies and management are male-orientated. Prison policies and programs are not usually formulated to meet the specific needs of women, much less Aboriginal women.

6.46 In effect, Mulawa and Emu Plains are presently the only facilities available for the majority of female offenders, and yet for some prisoners neither is suitable. Although Corrective Services has planned the building of further facilities,⁷¹ none are planned for women offenders in the State's west, where there are significant numbers of Aboriginal people. A flexible approach to incarceration, where a custodial sentence must be given, is imperative. Creative alternatives such as mobile prisons, along the lines of those utilised for male offenders,⁷² where female offenders are transported to carry out a particular project, or Women's Business camps,⁷³ or specialised programs implemented in prisons, or to which offenders are taken, may all be effective in reforming criminal behaviour in Aboriginal women.⁷⁴ At present, there are no women participating in mobile camps because, to do so, an inmate must have a C3 security classification. However, most women with a C3 classification are accommodated at Emu Plains. The use of mobile camps for Aboriginal women may give greater scope for them to perform work closer to their communities and in a more culturally appropriate environment.

71. A new facility for 300 women at Windsor is planned, due to be completed at the end of 2001. At the same time, 120 beds at Mulawa Correctional Centre will be closed.

72. For example, through the Mobile Outreach Program operated from St Heliers Correctional Centre, inmates performed work for the State Emergency Service, several Shire Councils and various community organisations. The work ranged from storm clean-up operations to forest regeneration and building maintenance: NSW, Department of Corrective Services, *Annual Report 1996-97* at 33.

73. The Commission is aware that Corrective Services have organised culture camps, with the participation of an Elder, for Aboriginal inmates. The aim of these camps is to build self-esteem through sharing of Women's Business and discussion of the women's personal problems.

74. For example, Ngaimpe Aboriginal Corporation was helped to establish a community-run drug and alcohol residential outpatient program. The program, which is conducted on the NSW central coast, caters for the region's Aboriginal community, including Aboriginal offenders, under the supervision of Corrective Services. The program is intended to help Aboriginal offenders re-integrate into the community. However, the program is for men only: NSW, Department of Corrective Services, *Annual Report 1996-97* at 29.

6.47 All women in custody face problems with security classification. Most women are classified as minimum security but the only all-female, minimum security facility available is Emu Plains. Mulawa has undergone reclassification from a maximum, to a minimum, to a variable security facility, without tangible practical effect. Women of all classifications are accommodated at Mulawa, making it difficult for benefits and privileges to be given to minimum security inmates. Similarly, the female unit of Grafton takes inmates of all security classifications.

6.48 As a matter of Corrective Services policy, inmates serving short sentences serve them at Mulawa. It is not apparent why this must be so. Officers within Corrective Services are of the view that it would be more appropriate to serve short sentences at Emu Plains. Offenders serving short sentences have not committed a serious offence and would be better off at a minimum security centre where there is a greater degree of integration with the community, as well as pre-release programs.

6.49 There may also be greater opportunity at Emu Plains than at Mulawa to address the specific needs of short-term offenders. This category of inmate is often overlooked in the corrective system simply because there is insufficient time for them to be assessed, assigned to a program and to complete a program, or to be treated in other ways. Consequently, recidivism for minor offences, attracting short custodial sentences, is a problem. Workers within Corrective Services believe there should be more services for this category of offender in order to stop the cycle of recidivism. As well, more support on release, such as provision of short-term and emergency accommodation and the establishment of a Mentor Program, may help to avert further offending.

Recommendation 9

The Department of Corrective Services should give consideration to accommodating women serving short sentences at minimum security correctional centres rather than at Mulawa Correctional Centre.

6.50 In finding suitable work for inmates, Corrective Services frequently liaises with community organisations; many community projects are undertaken by inmates. Corrective Services should ensure that, where possible, it involves Aboriginal women's organisations in the provision of work to Aboriginal female inmates.

6.51 In June 1994, Corrective Services endorsed the *Women's Action Plan – A Three Year Strategy for Female Inmates in NSW Correctional Centres* ("the Action Plan").⁷⁵ This was a response to the perception that the needs of women in custody have traditionally been subordinated to those of male inmates.

It resulted in an upgrade to the facilities and programs available to women in custody. Some of the initiatives for Aboriginal female inmates which Corrective Services has implemented, and which the Commission commends, include the appointment to Mulawa of a female Aboriginal Regional Project Officer and the creation of a "sacred space" within Mulawa for use by Aboriginal inmates. Corrective Services is currently developing Phase 2 of the Action Plan.

Mothers' and Children's Program

6.52 At present, mothers who are given custodial sentences may qualify to be placed on the *Mothers' and Children's Program* at Emu Plains or Parramatta. Briefly, this program is open to all female inmates who meet specific criteria, to keep their pre-school aged children with them during their term of imprisonment.

6.53 This is a most commendable approach to meeting the needs of inmates who are mothers, and their families. However, it is limited in several respects:

75. A new *Women's Action Plan* is currently being developed by the Women's Services Unit to update policies, procedures and programs affecting women.

- school-aged children cannot stay with their mothers, although there is an *Occasional Residence Program* whereby children can occasionally be accommodated, usually on weekends and school holidays;
- if the woman is serving a long sentence, her child or children may have to be separated from her at some stage;
- most women serving short sentences (say, three months) are accommodated at Mulawa, which does not have a *Mothers' and Children's Program*;
- the Women's wing of Grafton has a *Mothers' and Children's Program* but it is for babies under 12 months on a short term stay only as the wing is too small to accommodate a full program;
- the program at Parramatta is limited to five mothers.

6.54 An Aboriginal officer within Corrective Services has made the point that it is inappropriate for an Aboriginal woman to raise her child on her own; in Aboriginal culture she raises her child within her extended family. This needs to be borne in mind in offering support to those Aboriginal women on the *Mothers' and Children's Program*.⁷⁶ As well, the Aboriginal Justice Advisory Council has queried the extent to which Aboriginal women access the program and has submitted that the program needs evaluation. In response to this, the Select Committee on the Increase in Prisoner Population in an Interim Report has recommended that Corrective Services ensures that Aboriginal women are participating in the program at a rate at least proportionate to that of non-Aboriginal women.⁷⁷

Recommendation 10

76. In one particular case, Corrective Services demonstrated what can be achieved through flexibility of policy and approach to sentencing Aboriginal offenders, and through an awareness of cultural differences. The Aboriginal woman involved had not previously parented her child without the support of her extended family. She was on the *Mothers' and Children's Program* at Emu Plains and had not been demonstrating good parenting skills. Through a less rigid application of the early release regulations, the offender was given early release into her extended family, with successful outcomes for both herself and the child.
77. New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population *Inquiry into the Increase in Prisoner Population: Issues Relating to Women*, rec 5.166.

The Department of Corrective Services should institute *Mothers' and Children's Programs* at all correctional centres accommodating women.

Transitional Centres

6.55 Parramatta Transitional Centre, accommodating 22 inmates, is a minimum security, community-based facility. Priority is given to inmates in the last twelve months of their sentence, or who have served a quarter of their sentence elsewhere. Because the centre serves as a transition between a correctional centre and community living, offenders cannot serve a whole sentence there. To be admitted to a transitional centre, an inmate must be the equivalent of a C3 classification (Work or Education Release). The purpose of a transitional centre is to prepare inmates to make the adjustment from full-time custody to living independently and responsibly in the community.

6.56 The transitional centre program is successful in its aims but is assisting only a narrow band of offender. Also, its success is no doubt due in part to the motivation of the women themselves who, in order to reach this stage, have progressed through the prison classification system and have the mettle and determination to reform. That is not to say that the program is redundant. On the contrary, the purpose that it serves is valuable and necessary, and should be continued. It may also be possible, however, to expand the application of the concept to other offenders.

6.57 Chronic recidivists, such as women with chronic drug and alcohol problems, would benefit from the approach of Parramatta, being accommodated in programs which focus on community living skills and effective participation in the community, together with specific programs dealing with the issues giving rise to the recidivist behaviour. The experience of many inmates and ex-inmates with drug and alcohol addictions was that “prison exacerbated their problems, partly because drugs were so readily available inside but also because prison, by its very nature, takes away self responsibility and does not equip someone to return to the community.”⁷⁸

6.58 The Action Plan recommended that two further transitional centres for female inmates be constructed. This recommendation has not been implemented to date. The Commission recommends that further transitional

78. E Baldry, “Convicted Women: Before and After Prison” at 278.

centres be established and, in the process of doing so, that Corrective Services take the opportunity to consider catering to a different type of offender.

Recommendation 11

In accordance with the recommendation contained in its report, *Women's Action Plan – A Three Year Strategy for Female Inmates in NSW Correctional Centres*, the Department of Corrective Services should construct additional transitional centres for female inmates in regions of greatest need, and expand the eligibility criteria for all centres.

6.59 Bearing in mind that women with addictions who offend are much more likely than men to have committed theft or fraud rather than a violent offence, a custodial sentence may not be the most appropriate option. An alternative approach to punishment of this type of offender is the use of an intensive supervision order, with attendance at a detoxification unit and drug rehabilitation.⁷⁹

Home detention

6.60 Home detention is an option particularly suitable for women: it enables them “to continue their family responsibilities and relationships with children”;⁸⁰ and because they are likely to be at home with family members, they are less likely to suffer from isolation. The Commission encourages its use in appropriate cases. Chapter 5 discusses shortcomings in the Home Detention Program applicable to Aboriginal offenders generally, including women.

79. Advocated by Baldry, “Convicted Women: Before and After Prison” at 278.

80. Western Australia. Policy and Legislative Division, Ministry of Justice, *Report on the Review of Services to Adult Women Offenders* (May 1997) at 28.

Periodic detention

6.61 Periodic Detention is being under-utilised for female offenders because it is simply too difficult for many women, particularly mothers with dependent children, to report; it is therefore often rejected by female offenders as a sentencing option.⁸¹ Many Aboriginal female offenders do not have a car, nor access to one, and see the distance to centres as too great an obstacle. Mothers with sole childcare responsibilities face difficulties in making themselves available for week-end detention.⁸² This is particularly so if the extended family cannot provide childcare and the woman cannot afford to pay a carer.⁸³

6.62 Campbelltown Periodic Detention Centre provides mid-week detention, but this centre is not open to women. Campbelltown has a large Aboriginal population and Aboriginal workers within Corrective Services have suggested that periodic detention should be available for women there. They also suggest that periodic detention, including mid-week detention,

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81. In the year ended 30 June 1999, 9.6% of offenders serving their sentences by way of periodic detention were female, of whom 5.5% were Aboriginal: NSW, Department of Corrective Services *New South Wales Inmate Census 1999: Summary of Characteristics* (Statistical Publication No 19, 2000) at 37-38.
 82. A 1992 study of periodic detention found that 72% of the 47 women serving periodic detention orders at the relevant time had the primary care of children: I Potas, S Cumines and R Takach, *A Critical Review of Periodic Detention in New South Wales* (New South Wales, Judicial Commission, 1992) at 26.
 83. The NSW Legislative Council Standing Committee on Social Issues recommended that Corrective Services explore the possibility of introducing childcare facilities at periodic detention centres for women in order to ensure that a periodic detention sentence is realistically available to women: NSW, Legislative Council Standing Committee on Social Issues, *A Report into Children of Imprisoned Parents* (Report No 12, July 1997) Recommendation 52 at 116. This recommendation has not, to date, resulted in the provision of childcare at periodic detention centres. The Select Committee on the Increase in Prisoner Population reports that the recommendation was not supported by Corrective Services on the grounds that periodic detention centres have a variety of detainees who may well be volatile and the safety of children in this environment would be a major concern: New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population *Inquiry into the Increase in Prisoner Population: Issues Relating to Women* at para 6.89.

should be available for women at Newcastle, which is central to a number of Aboriginal communities.

6.63 A greater flexibility in the use of existing community centres and institutions as periodic detention facilities, and in the hours when attendance is required, may increase the availability of this option for women. Brand suggests that:

a system of periodic detention that requires female offenders to report to a college, training centre, drug rehabilitation centre or a community corrections centre during school hours, would serve as a true alternative to imprisonment. It would keep the family unit together and provide a means whereby the offender could address the offending behaviour. A number of studies have recognised that periodic detention along these lines would be most suitable for female offenders, particularly those with families.⁸⁴

84. G Brand, "Alternatives to Imprisonment for Female Offenders" (1993) 5(2) *Criminology Australia* 25 at 28.

6.64 The Select Committee on the Increase in Prisoner Population has made three recommendations in relation to periodic detention and female offenders. These are as follows:

That the Attorney General direct the Judicial Commission to undertake urgent research into the reasons for the decrease in periodic detention among women.

That the Minister for Corrective Services investigate the reasons for the increase in the cancellation of periodic detention orders, particularly among women, and develop measures to address this issue.

That the Minister for Corrective Services consider the option of women offenders serving their periodic detention order in a rehabilitation or other suitable facility.⁸⁵

The Commission supports these recommendations.

6.65 In consultations, it has been submitted to the Commission that the availability of suitable community work, in which periodic detainees are occupied, is insufficient. This acts as a further deterrent to the use of periodic detention as a sentencing option for women. However, this is not an insurmountable obstacle; it merely calls for creative thinking and application to the task of finding suitable work.⁸⁶

Community Service Orders

6.66 A community service order (“CSO”) can be difficult for women with dependent children, particularly very young children, and no extended family, or others, able to provide childcare.

6.67 What is needed is development of specific policies to enable women to fulfil a CSO. Organisations which can arrange childcare, or have a creche in place, or can accommodate the presence of a child without inconvenience,

85. New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population *Inquiry into the Increase in Prisoner Population: Issues Relating to Women* Rec 6.94, 6.95, 6.96.

86. The NSW Women in Prison Task Force called for a review of work opportunities for female offenders with a view to reducing the number of domestic and “token” jobs and increasing the number of “non-domestic” duties being performed by women: *Report of the New South Wales Task Force on Women in Prison* (NSW Government Printer, 1985) at 234.

should be targeted and enlisted to provide appropriate work. Alternatives should be sought for ways in which an offender can serve the community. For example, it may be possible for tasks to be performed by the offender in her own home, such as simple clerical work for charity organisations.

6.68 Use should be made of the many women's committees within Aboriginal communities to make CSOs a more viable option for Aboriginal women. These committees could convene CSO programs, supervise the execution of CSOs and could either provide, or assist in finding, suitable work.

Multi-purpose community centres

6.69 An Aboriginal worker within Corrective Services has advocated to the Commission the setting up of multi-purpose community cultural centres in each regional centre with a significant Aboriginal population. This proposal envisages that such centres would be open to all the community, both Aboriginal and non-Aboriginal, and not just offenders. They could incorporate a creche, and possibly even a pre-school and, ideally, would be located near public transport. The purpose of these centres would be to run courses teaching various vocational and life skills, organise Women's Business camps for Aboriginal women, organise and co-ordinate programs for community service, including community service camps, operate Personal Development programs satisfying community service orders, and fulfil other community needs. As the centres would benefit the whole community and fulfil needs falling into several different categories, the financial burden of their development could be spread over several government departments. The Commission sees merit in this proposal and recommends its consideration.

Recommendation 12

A multi-purpose community cultural centre should be trialled in a regional area with a significant Aboriginal population. In addition to serving a variety of community needs, the centre should organise and co-ordinate programs satisfying community service orders.

Canadian initiatives

Healing Lodge

6.70 Corrective Services is currently conducting research into a Canadian criminal justice initiative, to assess whether it might be effective within, and can be adapted to, the New South Wales criminal justice system. This initiative is known as the Okimaw Ohci Healing Lodge. It is a 30 bed treatment facility for Canadian Indigenous women operated by Indigenous staff. Rehabilitation of offenders utilises traditional healing practices, based on healing through Indigenous teachings and culture. The Lodge was developed in accordance with a recommendation of a Canadian Task Force Report into Federally Sentenced Women.⁸⁷

6.71 The Report of the Task Force identified similar problems to those which arise in relation to sentenced women in New South Wales. It found that women were at a disadvantage in comparison with men because of:

- the geographical dislocation of many female inmates from their families, cultures and communities due to the limited availability of provincial facilities for women;
- the security over-classification of these women and the associated lack of significant opportunity for movement to other institutions or lower security facilities; and
- the lack of appropriate women-centred programs, services and assessment tools.⁸⁸

87. Canada, *Creating Choices: The Federally Sentenced Women's Task Force Report* (1990); See "Federally Sentenced Women Initiative: Okimaw Ohci Healing Lodge" <<www.csc-scc.gc.ca/crd/fsw/fsw30/fsw30e02.htm>>.

88. Canada, *Creating Choices: The Federally Sentenced Women's Task Force Report* (1990) referred to in "Federally Sentenced Women Initiative: Okimaw

6.72 Running parallel with findings in New South Wales, the Task Force noted that Indigenous women are doubly disadvantaged, beginning with the fact that they make up less than 3% of Canada's female population but represent approximately 15% of women under federal sentence. They have experienced higher rates of physical and sexual abuse than non-Indigenous female offenders. Substance abuse, mainly alcohol, is another primary factor involved in their offence history and is much more pervasive than in the non-Indigenous population.

6.73 The main recommendation of the Task Force was that the Prison for Women be closed and that four regional facilities and one Healing Lodge (for Indigenous offenders) be built. It was recommended that the concept of the Healing Lodge be developed by the Correctional Service of Canada in full partnership with Indigenous communities and, more particularly, Indigenous women. It is worth drawing attention, at this point, to the Correctional Service of Canada's practice of consulting with Indigenous organisations on programs for Indigenous inmates and the establishment, for many years now, of a National Aboriginal Advisory Committee comprised of representatives from the major Aboriginal organisations involved in corrections.

6.74 The Healing Lodge was completed in 1995, with full participation, from conception to implementation, of Indigenous people. The central emphasis of the healing program is on survival of physical and sexual abuse, and freedom from substance abuse, through reconnection with Canadian Aboriginal culture in its broadest sense. The Indigenous Services Unit of Corrective Services is optimistic that a similar initiative, appropriate for Australian Aboriginal women, can be established in New South Wales. It believes that it could be enormously effective in rehabilitating offenders, and in reducing recidivism. The Commission endorses steps to implement a facility along the lines of the Healing Lodge.⁸⁹

Ohci Healing Lodge".

89. The Law Society supports the creation of a residential rehabilitation facility, offering a holistic program, for Aboriginal women to which they could be diverted from full-time custody: Law Society of New South Wales *Submission to the New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population* New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population *Inquiry into the Increase in Prisoner Population: Issues Relating to Women* at para 6.74.

Other initiatives

6.75 Other recommendations of the Canadian Task Force included improving inmate programs, incorporating: contracted Aboriginal counselling and Elder services; increased substance abuse programs; therapy for survivors of sexual assault/abuse; increased mental health services; and funding for families of inmates to participate in Private Family Visits.

6.76 The Canadian regional correctional centres, built pursuant to the Task Force's recommendations, are small facilities accommodating all inmates, regardless of security classification, in community-living houses. A system of classification has been developed specifically for women so that differences in the degree of liberty of movement within a facility is linked to behaviour rather than sentence or offence. The centres are managed on the basis of a holistic approach to operations, programs and security. The organisational structure is flat, with the potential for staff to get to know each offender, enabling extensive individual interaction. Substance Abuse Treatment Programs have been developed specifically for women. Other programs designed for women which have been implemented include a Living Skills program, Cognitive Skills Training, Parenting Program and a program for violent women, dealing with anger and understanding emotions. It has been found that modifying or adapting programs designed for men is not effective due to the different dynamics and approaches which research has indicated is required for women. A community release strategy specific to women has also been developed. The Commission makes no specific recommendations in relation to these approaches but wishes to draw attention to them as being worthy of consideration.

6.77 In the spirit of the Canadian Healing Lodge and regional centres, Baldry has recommended the development of small, residential centres strategically placed around the State, and run by Aboriginal women, with drug rehabilitation, strong personal support, and living skills and health programs.⁹⁰

6.78 A Canadian research study⁹¹ into the needs of sentenced women released into the community recommended a number of measures to assist these women make the adjustment, and to minimise the possibility of breaching conditions and of re-offending. A number of recommendations have

90. E Baldry, "Convicted Women: Before and After Prison" at 280.

91. Canada, Shaw, Solicitor General, *The Release Study* (1989) <<<http://198.103.98.138/crd/fsw28/fsw28e02.htm>>>.

relevance for New South Wales and also deserve consideration. In particular, the study recommended:

- greater flexibility and availability of half-way houses and community programs;
- fewer conditions, as appropriate, imposed for women released on full parole;
- greater availability of low-cost housing, programs for employment, and counselling and programs for the treatment of substance abuse and physical and sexual abuse; and
- financial advice and support.

THE CRIMINAL JUSTICE SYSTEM GENERALLY

6.79 An Aboriginal employee of Corrective Services⁹² has suggested the development of a scheme for identifying Aboriginal women both at risk of offending and re-offending. An example of a successfully run scheme to identify female offenders at serious risk of a prison sentence if subsequent offence is committed can be found in North Carolina, USA. Probation and community representatives prepare a “sanction program” which makes use of community services, individual or group counselling, day care provisions and third party supervision. The scheme is a form of intensive supervision.⁹³

6.80 The establishment of a Tresillian-type institution for Aboriginal women would be a useful adjunct to this strategy, as, in many cases, enabling a woman to get away from a male partner who is offending can be an effective preventative measure. The availability of accommodation is a significant issue for Aboriginal women; that there is a need for more “safe houses” is reinforced by evidence of the level of domestic violence which Aboriginal women endure.

92. NSW, Department of Corrective Services Indigenous Services Unit, *Consultation* (11 February 1998).

93. E Baldry, “Convicted Women: Before and After Prison” at 280: see R Immarigeon and M Chesney-Lind, “Reducing the Rate of Women’s Imprisonment” (1992) 17(8) *Corrections Compendium* 8-10; M Mauer, “The North Carolina Community Penalties Act: A Serious Approach to Diverting Offenders from Prison” (1988) 52(1) *Federal Probation* 11-17.

6.81 Other Aboriginal workers within the criminal justice system point out that there is very little accommodation for Aboriginal women on Early Release. Most of the accommodation is for men.⁹⁴ Furthermore, of the early release institutions available for women, concerns have been expressed about aspects of the operation of one or two of these. Accreditation of such institutions, setting out clear standards to which they must conform and identifying to whom they are accountable, would be one way of overcoming concerns. Women recently discharged from custody could be also accommodated in the “safe houses” proposed above, while they found more permanent residence.

6.82 Baldry examines other diversionary schemes operating in the USA. These centre on releasing women already imprisoned, and diverting other offenders, into work release and probationary programs. The emphasis is on the individual situations and needs of the offenders. In particular, the emphasis is on addressing financial problems, housing needs, domestic or other violence, drug and alcohol dependency, educational and vocational barriers, mental health, maternal education, childcare issues and life skills training. These programs report low recidivism and a reduction of the numbers of women in prison.⁹⁵

6.83 A report of the Office of the DPP in Queensland into Aboriginal women within the criminal justice system identified:

- a lack of appropriate Indigenous staff within the offices of the DPP and associated agencies in the criminal justice system; and
- a lack of representation by appropriate Indigenous women on advisory bodies and consultative committees which have been established to ensure equity of access to service providers, and to influence policies and programs impacting on Indigenous women.⁹⁶

6.84 These findings are equally applicable to New South Wales. Increasing representation of Aboriginal women at all levels of the criminal justice system, including legal representation bodies and the police force, would, among other things, assist in combating discrimination against Aboriginal women offenders, and in creating appropriate programs and policies. It may also have the effect of increasing the understanding of the offending

94. Aboriginal Women’s Legal Service, *Consultation* (23 January 1998).

95. E Baldry, “Convicted Women: Before and After Prison” at 280.

96. Queensland, Office of the Director of Public Prosecutions, *Indigenous Women within the Criminal Justice System* (Report, 1996) at 12.

behaviour of Aboriginal women, and of ensuring that a sentence handed down is the most effective and appropriate option for the punishment and rehabilitation of the particular offender.

6.85 A Western Australian Taskforce inquiry into gender bias which looked at Aboriginal women's experiences of the law⁹⁷ recommended a number of strategies to increase the participation of Aboriginal women in the legal system, thereby giving them greater control over outcomes affecting Aboriginal women.

It recommended that:

- more Aboriginal people, particularly Aboriginal women, be encouraged to obtain law degrees and be supported in their studies; the Taskforce noted with approval Pre-law programs run by some universities to help Aboriginal students and an Aboriginal Cadetship program run by the Western Australian Law Society;⁹⁸
- the ability of non-Aboriginal persons to represent Aboriginal women be improved so as to increase the willingness of Aboriginal women to access such services;⁹⁹ and
- positions be provided for Aboriginal women in court offices at all levels, including as support and resource persons.

6.86 The Western Australian Taskforce also recommended that there be established a Permanent Committee to monitor the operation of the courts as they affect Aboriginal people, in particular Aboriginal women. Ideally, the Committee would comprise equal numbers of Aboriginal men and women, and would include judicial officers and members of the Aboriginal Legal Services. It would liaise with, or be established under the auspices of, the Aboriginal Justice Advisory Council.¹⁰⁰

6.87 The following initiatives available for Aboriginal men appear to be successful and would translate well into similar programs for women:¹⁰¹

- The "Second Chance" program. A similar program for women, incorporating learning Aboriginal culture specifically in relation to

97. Western Australia, Taskforce Sub-Committee on Aboriginal Women and the Law, *Report of Chief Justice's Taskforce on Gender Bias* (1994).

98. *Report of Chief Justice's Taskforce on Gender Bias* para 112 at 122.

99. *Report of Chief Justice's Taskforce on Gender Bias* para 113 at 122.

100. *Report of Chief Justice's Taskforce on Gender Bias* para 70 at 116.

101. These are discussed in detail in Chapter 2.

females and from a female perspective, would help to increase Aboriginal women's self-esteem, their sense of identity and the value of their role in Aboriginal society.

- A three day camp-out information seminar is held at Lake Cargellicoe for men only. Again, the emphasis is on increasing self-esteem and social responsibility through cultural teachings. In the 1998-1999 year, Corrective Services ran four camps for women, each accommodating 14 inmates, at Goodooga, in far North-West New South Wales,¹⁰² with a similar aim of increasing self-esteem and social responsibility through developing the women's Aboriginal identities. The Commission commends this initiative and encourages Corrective Services to continue to hold regular camps. It may also be beneficial to organise cultural camps, or seminars along the lines of those held at Lake Cargellicoe and Goodooga for women at risk of offending. Further, attendance at these camps or seminars may be appropriate for periodic detainees and may satisfy CSOs.
- Doonooche, at Falls Creek outside Nowra, is a residential program for Aboriginal men, accommodating prisoners coming to the end of their term, offenders on bail and self-referrals. A resident Elder takes inmates on culture camps and prepares them for initiation ceremonies. In-house programs include teaching agriculture and numeracy and literacy, and arts and crafts, with other TAFE programs being introduced in the near future. It incorporates a Rehabilitation centre, although it does not cater to those with drug and alcohol problems. It is a highly successful rehabilitative and preventative initiative. The Commission recommends the establishment of a residence for women modelled on Doonooche and catering to the needs of Aboriginal women.

102. The Goodooga Mercy Camp: NSW, Department of Corrective Services, *Annual Report 1998-1999* at 16. This was pursuant to NSW, Department of Corrective Services, *1996-1998 Action Plan for the management of Indigenous Offenders* (November 1996).

CONCLUSION

6.88 One of the factors which will be instrumental in the success of sentencing options and diversionary schemes for all offenders is for services to be co-ordinated. Specifically in the context of female offending, Baldry submits that a vital feature of programs to keep women out of gaol is that they be centrally co-ordinated and take the woman's whole situation into account. She identifies a major problem in New South Wales for female offenders on community service orders as being an absence of co-ordinated services to meet needs associated with physical and mental health, drug and alcohol dependency, social security, housing, employment and childcare.¹⁰³ We would add that not only is there a lack of co-ordination of services, but also, an absence of a wholistic approach to the problem of female offending. This is not confined to those trying to serve CSOs, but extends to women on probation, parole, periodic, week-end and home detention and women who have served a custodial sentence and are trying to avoid re-offending.

6.89 Although a substantial part of this chapter has been devoted to propounding sentencing initiatives and ideas for reform, it is probably of overriding importance to recognise that many solutions will come from within Aboriginal communities. The success of a number of actions taken by Aboriginal women, including night patrols organised by the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council in the Northern Territory, purchase of women-only transport vehicles, collective action against abuse of alcohol in their communities, strategies to prevent family violence, and support schemes for women witnesses and defendants, demonstrate that solutions reside in Aboriginal women and in their communities.¹⁰⁴ On this evidence, the following approach to reform is a valid one:

One important measure to ensure the success of community work remedies is to encourage and facilitate the growth of Aboriginal organisations and infrastructure to provide services to Aboriginal people. ... It is through such organisations that the avenue for change will continue to emerge.¹⁰⁵

6.90 Atkinson, likewise, argues for support for Aboriginal communities to come up with solutions to the problems giving rise to criminal behaviour. At

103. E Baldry, "Convicted Women: Before and After Prison" at 280-281.

104. ALRC 69 at para 5.32.

105. S Payne in P W Eastal and S McKillop (eds), *Women and the Law* at 72.

the risk of concluding on a pessimistic note, her comments should serve as an admonition to law and policy-makers and administrators in the area of criminal justice:

There has been very little progress for Aboriginal women and their children despite all the myriad reports, Commissions of Inquiry and bureaucratic activity. ... I am yet to be convinced, however, that the legal profession and the government have the will and commitment for real justice reform that will restore to Indigenous individuals, our families and communities the ability to rebuild our lives from the multiple intergenerational traumatisations that comprise the colonising impacts. I do, however, have implicit faith in my own people to do the work of healing and rebuilding, of regenerating and restoring. All I ask of government and the legal institutions is that they support us in those endeavours.¹⁰⁶

106. J Atkinson, "A Nation is Not Conquered" at 9.

7 • Communication and education

- Communication difficulties
- Overcoming communication difficulties
- Legal representation

7.1 Many Aboriginal people experience difficulties in communicating effectively, both as witnesses in the courtroom and as defendants in the sentencing process. Some of the difficulties experienced by Aboriginal people in being understood accurately in court are shared with other minority groups in the community. However, other difficulties originate in distinctive features of Aboriginal language and culture.

COMMUNICATION DIFFICULTIES

7.2 In the most recent census, 94% of the Indigenous population of New South Wales reported speaking English at home. Less than 1% (837 people) reported speaking an Australian Indigenous language. Of those 837 people, 652 also reported speaking English very well, and six not at all.¹

7.3 However, Dr D Eades, a leading linguistic authority in this area, believes that the great majority of Aboriginal speakers in Australia who reportedly speak English, in fact speak Aboriginal English, which is the name given to varieties of English spoken by Aboriginal people across Australia:²

Most Aboriginal people speak some kind of English in their dealings with the law. For most, it is a dialect of English known as Aboriginal English, (hereafter referred to as AE). ... There are a number of varieties of AE, or more accurately, there is a continuum of AE dialects, ranging from those close to Standard English at one end (...“light” AE), to those close to the Aboriginal Kriol³ language at the other (...“heavy” AE). Speakers of heavy AE usually live in more

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1. Australian Bureau of Statistics, *1996 Census of Population and Housing: Aboriginal and Torres Strait Islander People, New South Wales and Jervis Bay Territory* (ABS Catalogue No 2034.1, 1998) at 53 and 57.
 2. ABS 1996 Census of Population and Housing at 53 and 60. However, as discussed further, the exact numbers of Aboriginal English speakers are unavailable.
 3. D Eades, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners* (Queensland Law Society, Continuing Legal Education Department, 1992) at 23: “Kriol is spoken widely throughout northern Australia, especially in the Barkly Tableland of the Northern Territory. Kriol is not a dialect of English; it is a distinctive language. People who speak Kriol and do not also speak a variety of Aboriginal English, need interpreters in order to communicate effectively with speakers of Standard English”.

remote areas, and often also speak a traditional Aboriginal language. Speakers of light AE usually live in less remote areas, and often speak AE as their first language. It is believed that most Aboriginal people in New South Wales speak a light form of AE, although there is virtually no detailed research in this state to date.⁴

7.4 Similar to Scottish English or American English, Aboriginal English is generally understandable to Standard English speakers.⁵ Eades believes heavier varieties of Aboriginal English are spoken in the north-west and west of New South Wales.⁶ Aboriginal English can be distinguished from Standard English in each area of language: sounds or accent, grammar, vocabulary, meaning, use and style.⁷ However, in the legal setting, Eades believes that the areas of meaning, use and style create the greatest communication difficulties for Aboriginal English speakers.⁸

7.5 The following are generally identified as areas where communication difficulties may occur between Aboriginal and non-Aboriginal people in a courtroom setting:

- The courtroom surroundings, in particular its unusual language, procedure, protocol and layout, can confuse and intimidate many people, especially those not from white, Anglo-Saxon backgrounds.
- Differences in pronunciation, grammar and vocabulary exist between Aboriginal English and Standard English. These differences are exacerbated by the courtroom setting where the

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4. D Eades, "Aboriginal English in Court" (1994) 1(4) *The Judicial Review* 367 at 367-368.
 5. D Eades, "Aboriginal English on Trial: The Case for Stuart and Condren" in D Eades (ed), *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (UNSW Press, Sydney, 1995) at 148. See also J M Arthur, *Aboriginal English: A Cultural Study* (Oxford University Press, Melbourne, 1996) at 2.
 6. D Eades, *Letter to the Executive Director of the New South Wales Law Reform Commission* (3 October 1997) at 1.
 7. Eades (1992) at 25. H McRae, G Nettheim, L Beacroft and L McNamara, *Indigenous Legal Issues: Commentary and Materials* (2nd edition, LBC Information Services, Sydney, 1997) at 373 notes that Australian courts have gradually started to accept that expert evidence on Indigenous language patterns, including the nature of "Aboriginal English", may be relevant in deciding the admissibility of statements made by Indigenous accused.
 8. Eades (1992) at 25.

language used is often very technical and much of the verbal communication between parties in the courtroom is governed by specific legal rules.

- Aboriginal society values the use of silence in conversation more than in non-Aboriginal society, which can lead to misunderstanding in court when assessing the reliability or credibility of an Aboriginal witness. Silence can be incorrectly seen as guilt, ignorance or evidence of a communication breakdown.⁹
- Aboriginal kinship ties are more complex than those of non-Aboriginal society and can influence the giving of evidence in court by an Aboriginal witness, including whether or not he or she is comfortable speaking on certain issues in court.
- Aboriginal people tend to avoid sustained eye contact, which can be misinterpreted as defiance or dishonesty in court.
- A long recognised communication problem in court for Aboriginal people is the tendency of Aboriginal witnesses to agree gratuitously with whatever the questioner has put to him or her. This occurs in particular where many “yes-no” questions are being asked by someone in a position of authority.¹⁰
- Aboriginal people frequently do not use numbers or other quantitative means of describing events, such as the days of the week, dates or time. Consequently, in seeking answers to specific “how”, “where”, or “when” type questions in court, Aboriginal witnesses are frequently seen as vague.¹¹
- Aboriginal culture places a high value on intellectual property, which means that access to certain knowledge is restricted, as is the right to reveal it. This includes, for example, certain matters which cannot be discussed in male-female company. This can significantly impact on the ability of Aboriginal witnesses to give evidence in court.
- Some form of hearing loss is very common among Aboriginal people, usually caused by chronic middle ear infections in childhood. The interaction of such hearing loss with the socio-linguistic differences outlined above can greatly compound communication difficulties in court.

9. Eades (1992) at 46.

10. Eades (1992) at 51-53.

11. Eades (1992) at 48-50.

OVERCOMING COMMUNICATION DIFFICULTIES

7.6 The Commission considers that language and communication difficulties for Aboriginal English speakers within the criminal justice system may be ameliorated by:

- increasing awareness of Aboriginal culture within the judicial and executive arms of the criminal justice system; and
- employing linguistic and cultural experts in the sentencing regime.

Increasing awareness of Aboriginal cultural issues

7.7 As previously mentioned, differences in language and communication styles between Aboriginal English speakers and Standard English speakers can give rise to injustice to Aboriginal people in the criminal justice system.

7.8 The Royal Commission into Aboriginal Deaths in Custody (the “RCIADIC”) highlighted the widespread ignorance of Aboriginal culture within the judicial system.¹² It recommended that judicial officers, and those working in the court and in the probation and parole services, participate in training and development programs explaining contemporary Aboriginal society, customs and traditions.¹³ These programs should emphasise the historical and social factors contributing to the disadvantaged position of many Aboriginal people. The RCIADIC also recommended that cross-cultural understanding could be further improved through direct consultation between those working in the judicial system and members of Aboriginal communities and organisations.¹⁴

Aboriginal cultural training programs

7.9 As a response to the recommendations of the RCIADIC, the legal system in Australia has increasingly recognised and accepted the importance of actively encouraging an awareness of Aboriginal culture among judicial officers, lawyers, police and others working in the criminal justice system.¹⁵

12. Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (AGPS, Canberra, 1991) vol 3 at 71-80.

13. RCIADIC Report Recommendation 96, vol 3 at 79.

14. RCIADIC Report Recommendations 96 and 97, vol 3 at 79.

15. For example, The Australian Institute of Judicial Administration, *Cross Cultural Awareness for the Judiciary: Final Report to the Australian Institute of Judicial Administration* (Melbourne, 1996).

The Australian Institute of Judicial Administration (“AIJA”) has a Cultural Awareness Committee, comprising judicial and Indigenous community representatives, aimed at developing and implementing cross-cultural awareness programs for the judiciary in Australia. For example, judicial officers in New South Wales have in recent years participated in a series of visits to Aboriginal communities in New South Wales through programs organised by the Judicial Commission and the AIJA.¹⁶ Several legal forums now include programs on Aboriginal cultural awareness,¹⁷ including those organised by the New South Wales Attorney General’s Department (the “AG’s Department”) which take judicial officers and court staff to Aboriginal communities in the State.

7.10 Within the AG’s Department, courses have been conducted to improve the understanding of court staff in regional centres of issues affecting Aboriginal and Torres Strait Islander communities and to improve the ability of court staff to communicate effectively with members of these communities. The AG’s Department has also arranged similar courses for its senior executives.

7.11 However, while there has been a comparative increase in the number of Aboriginal cultural training programs offered by government agencies, these training programs are often characterised by a lack of dedicated resources and varying standards of quality. Furthermore, few specifically developed training programs exist to meet the needs of court staff, especially in the higher courts.¹⁸ The Aboriginal Justice Advisory Council (“AJAC”) has recently called for the New South Wales government to develop standards around the development, implementation and evaluation of cross-cultural training programs.¹⁹

16. New South Wales Government Report, *Implementation of Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (January 1998-December 1998) at 58.

17. In particular, the Local Courts Annual Conference and the annual National Judicial Orientation Program: New South Wales Government Responses 1988 Report at 58.

18. New South Wales, Aboriginal Justice Advisory Council, *Review of the NSW Government Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (September 2000) (“AJAC Implementation Review”) at 22.

19. AJAC Implementation Review at 20.

7.12 The New South Wales Department of Corrective Services has also recognised the need for cross-cultural awareness among staff. The *Action Plan for the Management of Indigenous Offenders 1996-1998* includes the objectives of increasing the representation of Indigenous staff and raising staff awareness of Indigenous cultural issues.²⁰

Aboriginal Court Liaison Officers

7.13 The RCIADIC also recommended that governments 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.²¹

7.14 There are presently²² four full-time Aboriginal Court Liaison Officers (“ACLOs”) in New South Wales regional courts²³ and another four full-time positions on which recruitment action has commenced.²⁴ The role of ACLOs is to provide regular support to Aboriginal people attending local courts, including information on court processes, explaining the effect and consequences of any orders made, and directing people to appropriate services. ACLOs liaise with Aboriginal legal services to ensure Aboriginal people attending court have legal representation. ACLOs also provide education to the local Aboriginal community on the legal system and assist the court in understanding Aboriginal culture and local Aboriginal issues which may affect those appearing before it.

7.15 However, AJAC has recently observed that while there has been a notable increase in Aboriginal people employed in New South Wales courts, there remain areas with significant numbers of Aboriginal people appearing at local courts where no Aboriginal staff are present. In addition, few

20. New South Wales, Department of Corrective Services, *Action Plan for the Management of Indigenous Offenders 1996-1998* (November 1996). The Department has recently introduced a temporary position, to be made permanent, of Manager Classification, Indigenous Programs. The position encompasses a broad role, but a principal part of this role is to give advice and recommendations on the classification and suitable placement of Indigenous inmates.

21. RCIADIC Report Recommendation 100, vol 3 at 80.

22. As at August 2000.

23. Being Penrith, Nowra, Lismore and Dubbo Local Courts.

24. Being Taree, Moree and Bourke/Brewarrina Local Courts, and Campbelltown Children’s Court.

Aboriginal people are employed in the higher courts of New South Wales.²⁵

25. AJAC Review of New South Wales Government Implementation at 22.

Conclusion

7.16 Although most Aboriginal people in New South Wales do not live traditionally,²⁶ there are still significant cultural differences from Anglo-Saxon Australian culture, such as the importance of community and kinship groups, the concept of time, and the nature of continuing cultural obligations associated with the land.²⁷ Without specific knowledge of these characteristics, many decision-makers within the criminal justice system would remain unaware of the broader factors which may have relevance to the offence or the sentencing conditions.

7.17 The Commission welcomes initiatives by the criminal justice system in New South Wales to promote a greater awareness and understanding of Aboriginal customs and language differences affecting communication within the criminal justice system. Such educational programs should target those involved in making, communicating, and implementing decisions on the sentencing of Aboriginal offenders. These include judicial officers, members of the Parole Board and Serious Offenders Review Council, probation and parole officers, court staff and legal practitioners. The cultural programs should remain a constant feature of the working lives of such people.

7.18 The Commission encourages the development and expansion of Aboriginal cultural awareness programs and wider consultation with Aboriginal communities in New South Wales on the broader social issues flowing from the sentencing of Aboriginal people. It supports such practical initiatives as the ACLOs program. The Commission also encourages the introduction of a readily accessible resource guide for legal practitioners, court staff, and probation and parole officers, outlining significant cultural and linguistic differences between Aboriginal people and the wider community in New South Wales.

Employing linguistic and cultural experts

Background

7.19 Although there are very few Aboriginal people in New South Wales

26. New South Wales, Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996) at 110.

27. See Chapter 3 for a discussion of the relevance of Aboriginal customary law in New South Wales.

who speak a “traditional” language as their first language,²⁸ the great majority of Aboriginal people speak a variety of Aboriginal English.²⁹ It has been suggested that witnesses who speak Aboriginal English may sometimes require the assistance of an interpreter.³⁰

7.20 The RCIADIC noted that:

There is a popular misconception that if Aboriginal people appear to understand conversational English they do not need interpreters. The tension engendered by court proceedings, the style and formality of language used by lawyers often means that much of what occurs is foreign to the defendant.³¹

7.21 The RCIADIC recommended that a court must be satisfied that an Aboriginal defendant appearing before it can effectively communicate in English, including fully understanding proceedings in the English language. If not, a competent interpreter must be provided without cost to that person.³²

Legislation

7.22 The *Evidence Act 1995* (NSW) allows an interpreter for a witness,³³ unless the witness can speak English well enough to proceed without an interpreter.³⁴ In criminal proceedings, where a judicial officer requests an

28. ABS 1996 Census of Population and Housing at 53 and 57.

29. See D Eades, “Aboriginal English in Court” (1994) 1(4) *The Judicial Review* 367.

30. Queensland, Criminal Justice Commission, *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996) at 75. The *Crimes Act 1914* (Cth) includes certain provisions to be followed on the detention and questioning of Aboriginal persons and Torres Strait Islanders arrested for Commonwealth offences: s 23(H). In an investigation where the person under arrest cannot communicate orally in the English language with “reasonable fluency”, because of inadequate knowledge of the English language or a physical disability, an interpreter must be present during questioning or investigation: s 23(N). The Act requires an up-to-date list of interpreters (specifying their languages of competency) for Aboriginal persons and Torres Strait Islanders who are under arrest and under investigation and who cannot communicate orally in the English language with “reasonable fluency”, because of inadequate knowledge of the English language or a physical disability: s 23J(3) and (4).

31. RCIADIC Report, vol 3 at 77.

32. RCIADIC Report Recommendation 99, vol 3 at 79.

33. Section 30: “Witness” includes a defendant in a criminal proceeding: *Evidence Act 1995* (NSW) Dictionary, Pt 2 cl 7.

34. A witness may give evidence in court through an interpreter “unless the

interpreter, the interpreter is provided at no cost to the defendant.

7.23 The *Evidence Act 1995* (NSW) applies in relation to all proceedings in a New South Wales court³⁵ and to other persons or bodies required to apply the laws of evidence.³⁶ However, if such a proceeding relates to sentencing, the Act applies only if the court directs that the law of evidence applies in the proceeding or directs that it applies only to specified matters in the proceeding.³⁷

7.24 Under the common law, which applies to evidence in a proceeding, except as covered by the *Evidence Act 1995* (NSW),³⁸ a witness is not entitled as of right to give evidence through an interpreter. The court has the discretion to allow an interpreter for a witness,³⁹ based on the court's duty to ensure a fair trial in criminal matters,⁴⁰ including giving evidence competently. It could be argued that in most cases, the *Evidence Act 1995* (NSW) does not significantly alter the former position applying to the use of interpreters under the common law.⁴¹

7.25 The *Crimes (Administration of Sentences) (Correctional Centre Routine) Regulation 1995* (NSW) provides, so far as it is practicable, for a person to act as an appropriate interpreter or cultural representative for an inmate "who may be disadvantaged by linguistic or cultural factors".⁴² An interpreter may be used when the inmate is being interviewed by a Case Management or Program Review Committee, or the Serious Offenders Review Council, when assessing the inmate for the purposes of security

witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact": *Evidence Act 1995* (NSW) s 30.

35. *Evidence Act 1995* (NSW) s 4.

36. See *Evidence Act 1995* (NSW) Dictionary, Pt 1 for the meaning of "court" and "NSW court".

37. *Evidence Act 1995* (NSW) s 4(2). In certain circumstances the court must make a direction: *Evidence Act 1995* (NSW) s 4(3), (4).

38. *Evidence Act 1995* (NSW) s 9.

39. *Dairy Farmers Co-Operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458 at 464.

40. See *Dietrich v The Queen* (1992) 177 CLR 292 at 299-300.

41. See A V Ritchie, *Ritchie's Supreme Court Procedure New South Wales* (New edition, Butterworths, Sydney, 1984) Volume 1 at [3250.2] (Service 131).

42. *Crimes (Administration of Sentences) (Correctional Centre Routine) Regulation 1995* (NSW) Pt 2 Div 2 cl 20(1).

classification and placement, and developmental programs.

Role of an interpreter

7.26 Debate exists about the role of an interpreter in court. Specifically, is an interpreter merely a “conduit” through which words are substituted from one language into another or has an interpreter the broader role of a “communication facilitator”, that is, also conveying the cultural context and perspective?⁴³

7.27 Eades believes that the type of assistance required for Aboriginal English speakers is not so much in the narrower role of interpreter as translator, but rather, in the role of a cross-cultural adviser to the court on both language and cultural differences relevant to any misinterpretation of the evidence.⁴⁴ As mentioned earlier, the RCIADIC observed:

There is a popular misconception that if Aboriginal people appear to understand conversational English they do not need interpreters.⁴⁵

7.28 It could be argued that unless the Aboriginal witness in court is as fluent in English as the average non-Aboriginal person of English-speaking background, an interpreter must be present to ensure complete and mutual understanding.⁴⁶ Where cultural information is required in court, for example, on particular types of non-verbal communication, an interpreter could be brought in as an expert witness.⁴⁷

7.29 Sentencing decisions are not necessarily understood by Aboriginal offenders. There is a need for greater explanation of sentences which are

43. See K Laster and V Taylor, “Technocratic Multiculturalism: Lawyers ‘Use’ Interpreters” (1994) 12(1) *Law in Context* 76; AIJA Final Report on Cross Cultural Awareness for the Judiciary at 20-22.

44. D Eades, “Interpreting Aboriginal English in the legal system” paper presented at the Proper True Talk National Forum (Alice Springs, October 1995) in *Report of Proper True Talk National Forum: Towards a National Strategy for Interpreting in Aboriginal and Torres Strait Islander Languages* (Commonwealth Attorney-General’s Department, 1996) at 66-67.

45. RCIADIC Report, vol 3 at 77.

46. This is based on the Anunga Rules for the conduct of police interrogations of Aboriginal criminal suspects in the Northern Territory as first expressed by Forster J in *R v Anunga* (1976) 11 ALR 412 at 414.

47. The *Evidence Act 1995* (NSW) s 79 provides for the admission of expert opinion in court.

handed down.⁴⁸ Failure of the offender to understand the terms of a sentence may lead to a breach of that sentence and further imprisonment. As noted at paragraph 7.14, one of the roles and responsibilities of ACLOs is to ensure that Aboriginal people appearing at court understand the effect and consequences of any orders made by the court.

48. C Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission in Aboriginal Deaths in Custody* (Office of Public Affairs, ATSIC, Canberra, 1997) at 129. This was particularly noted in relation to suspended sentences. For example, any breach of a suspended sentence may activate the original sentence for a relatively minor second offence.

7.30 When sentencing an Aboriginal offender or setting out conditions for parole, judicial officers, members of the Parole Board, members of the Serious Offenders Review Council, probation and parole officers and legal representatives should ensure that the offender understands the specific conditions of the sentence or parole, and the consequences of a breach.

7.31 The Commission considers that when the Parole Board or Serious Offenders Review Council is assessing an Aboriginal offender's potential for parole and setting conditions, an Aboriginal person should be a member of the Board or Council to advise and assist with any cultural or language difficulties in communication.⁴⁹

Conclusion

7.32 In the New South Wales criminal justice system, communication difficulties occur between Aboriginal English and Standard English speakers, rather than between speakers of Standard English and a traditional Aboriginal language. In this area there appears to be little call for interpreters as translators in New South Wales.⁵⁰

7.33 However, the Commission recognises that communication differences between Aboriginal English and Standard English speakers, both in language and style, may give rise to miscarriages of justice.⁵¹ In this situation there is a

49. The Commission notes that the New South Wales Parole Board has an two Aboriginal community members as at August 2000.

50. New South Wales Government Report, *Implementation of Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (1995-1996) vol 2 at 200: However, there are courtroom communication problems arising because of cultural differences between Aboriginal witnesses and non-Aboriginal legal practitioners.

51. The Queensland Criminal Justice Commission Report at 63 concurs: "The apparent similarities between Standard English on one hand and Aboriginal English (or even Torres Strait Creole) on the other have no doubt led some professionals into believing that the risk of misunderstanding is minimal. However, that risk is real, and the consequences may be serious". D Eades, "Interpreting Aboriginal English in the legal system" paper presented at the Proper True Talk National Forum (Alice Springs, October 1995) in *Report of Proper True Talk National Forum: Towards a National Strategy for Interpreting in Aboriginal and Torres Strait Islander Languages* (Commonwealth Attorney-General's Department, 1996) at 57-58, considers that the interpreting needs of Aboriginal English speakers do not have the same overwhelming urgency as in situations where the Aboriginal and non-

need for someone to function in a formally recognised and readily accessible role as communication facilitator between speakers of Aboriginal English and the court to prevent communication problems which can arise between Aboriginal English and Standard English speakers.

7.34 AJAC recently observed that, despite the frequent and ongoing communication problems which occur in court between Aboriginal English and Standard English speakers, there are no accredited Aboriginal interpreters in New South Wales, nor is there a system of formal accreditation or training of Aboriginal interpreters.⁵²

7.35 The Commission believes that a communication facilitator fluent in English and familiar with court processes should be present for an Aboriginal offender or witness who is disadvantaged by cultural or linguistic factors in a proceeding relating to sentencing, whether the sentencing court or Parole Board.

7.36 The role of a communication facilitator would assist the court by explaining differences in communication styles between Aboriginal and non-Aboriginal people as they impact on the particular proceedings. The Commission does not wish to confine the role of communication facilitator through an inflexible definition of that role. It should, however, be formally recognised, properly funded, and permanently accessible to any Aboriginal person who requires it. Many communication difficulties could be overcome by such a flexible role. For example, a communication facilitator could explain the proceedings of the court to the defendant or witness. The communication facilitator could assist an Aboriginal witness to understand a question by explaining or clarifying it in a manner more easily understood by him or her. A communication facilitator could use his or her discretion as to which expressions to interpret, and intercede only when requested by any participant in the courtroom, or when he or she identifies a potential misunderstanding.⁵³ A communication facilitator could relate the defendant's

Aboriginal parties involved have no shared language. Nevertheless, Eades believes that the natural justice of Aboriginal English speakers is denied because of the kinds of misunderstandings which occur between many speakers of Aboriginal English and many non-Aborigines involved in the legal system.

52. AJAC Review of New South Wales Government Implementation at 22.

53. D Nash, "Aborigines in Court: Foreigners in their own land" (1979) 4 *Legal Service Bulletin* 106 at 107.

or witness's statements to the court in Standard English or explain conditions attached to a sentence, including bail or home detention conditions.

7.37 The Commission notes that a similar initiative to that encouraged above is currently being developed by the Queensland Department of Justice and Attorney-General. Under this proposal, a communication facilitator would be used in Queensland courts where an Aboriginal English speaker is a witness or a defendant and requires the services of a facilitator. The Aboriginal English initiative is designed to assist the court in communicating with Aboriginal English speakers. A discussion paper was developed in June 1999, resulting in a two part initiative:

- the publication of the *Aboriginal English in the Courts: a Handbook*⁵⁴ ("Handbook"), to serve as a guide for communication; and
- the identification and training of suitable people as communication facilitators.

7.38 The Handbook has been published as the first stage of the initiative. It is based on the work of Dr D Eades. The Handbook incorporated the comments of and received agreement from the Aboriginal and Torres Strait Islander Studies Unit of the University of Queensland, the Aboriginal Legal Service, the Queensland Bar Association, the judiciary, Legal Aid Queensland, Office of the Director of Public Prosecutions, Queensland Law Society, Aboriginal communities and other relevant groups.

7.39 The second stage of the initiative will involve providing communication facilitators in Queensland courts. Although not interpreters as such, facilitators will be bi-lingual in Aboriginal English and Australian Standard English, and have undertaken a tertiary course in court procedure, legal terminology and the responsibilities of an interpreter. The facilitator would be funded by the Department of Justice and Attorney-General, Legal Aid or other such bodies, similar to the way interpreters are presently funded. The facilitator's role will be to assist counsel in the courtroom to identify communication difficulties that arise during court proceedings, and advise them on how they can use the information in the Handbook to resolve communication problems.

7.40 The Commission recognises that the roles and responsibilities of

54. Queensland, Department of Justice and Attorney-General and Department of Aboriginal and Torres Strait Islander Policy and Development, *Aboriginal English in the Courts: a Handbook* (2000).

ACLOs in New South Wales include the provision of support to Aboriginal people who are attending court, including assistance with any Aboriginal English translation requirements. However, the broad and demanding current role of ACLOs would not appear to extend to the specialised skills and formally recognised role within court proceedings of a communication facilitator as advocated by the Commission. The Commission sees considerable merit in the approach being undertaken in Queensland and encourages consideration of the formal appointment and training of communication facilitators, in addition to the wider, multi-faceted function presently provided by ACLOs to the court and local community.

7.41 The Commission further believes that, wherever possible, the court should exercise its discretion and allow Aboriginal witnesses to give evidence in narrative form.⁵⁵

LEGAL REPRESENTATION

7.42 Specialist legal aid services in New South Wales provide legal advice and representation to people of Aboriginal descent. Aboriginal and Torres Strait Islander legal services (“ATSILS”) are now provided through six legal services with 26 predominantly regional offices in New South Wales.⁵⁶ ATSILS are funded federally by the Aboriginal and Torres Strait Islander Commission (“ATSIC”) and are services provided by Indigenous people for Indigenous people. These services include not only solicitors, but field officers who act as a bridge between clients and the solicitors working in ATSILS. Field officers offer practical assistance and support to Aboriginal people, particularly in rural and remote locations. Field officers liaise between solicitors and clients: for example, translating, explaining the customs and protocols of the local Aboriginal community, assisting with legal forms and documents, explaining court operations and decisions to clients, and providing transportation to court for clients who live in remote locations.⁵⁷ The vast majority of legal advice and representation by ATSILS

55. A witness may give evidence wholly or partly in narrative form, subject to the leave of the court, rather than, for example, using the traditional question and answer method of giving information to the court: *Evidence Act 1995* (NSW) s 29(2).

56. As at August 2000.

57. Field officers also enter specialist courses to enhance their skills in the area of law: for example, court procedure.

involves legal representation in criminal matters, such as bail applications, adjournments and guilty pleas.

7.43 Other legal aid providers, such as the Legal Aid Commission (NSW),⁵⁸ local community legal centres, and pro bono services provided by the legal profession, are also available to Aboriginal and Torres Strait Islander people. However, most Aboriginal people use ATSILS.⁵⁹ Many Indigenous people live in rural areas and frequently the only accessible legal aid service in the area is an ATSILS.⁶⁰

7.44 The Public Defenders Office in New South Wales has dedicated an Acting Public Defender for ATSILS clients,⁶¹ although other Public Defenders also appear for Indigenous clients. Most appearance work is in regional District Courts.

Conclusion

7.45 The Commission believes that good quality, free legal representation must be available to Aboriginal offenders sentenced for criminal offences. The Commission recognises that if, for example, a guilty plea is made, competent legal representation is crucial because the circumstances of the offence should be well-presented to the sentencing judge in his or her determination of the appropriate sentence. The Commission considers there is much value in an independent and regionalised legal service for Aboriginal people provided by Aboriginal people, both for its acceptability and accessibility to Aboriginal people and the specialised nature of the legal services provided. However, the Commission recognises that the quality of

58. New South Wales Government Responses 1988 Report at 52 notes that the: “Legal Aid Commission provides legal aid in criminal indictable and local court criminal matters to all eligible persons, including Aboriginal and Torres Strait Islander persons, subject to a means test. Legal aid is also available for criminal appeals subject to means and merit tests. The Commission addresses the issue of incarceration pending trial by providing aid for bail applications. Aid for first appearance bail applications in the Local Court is not subject to a means test”.

59. See Australian Institute of Criminology and Australian Bureau of Statistics, *Occasional Paper: Law and Justice Issues, Indigenous Australians* (ABS Catalogue No 4189.0, 1994) at 19: 67% of Indigenous people in Australia needing legal services in the twelve months prior to interview used ATSILS.

60. See Australian Institute of Criminology and ABS Paper at 19: 42.4% of Indigenous people in Australia surveyed were more than 50 kilometres from the nearest legal services.

61. As at August 2000.

any legal service and representation greatly depends on the level of financial support. This is particularly so where clients come from remote and impoverished communities. It supports the RCIADIC recommendations⁶² in giving preference to Aboriginal organisations in the delivery of services, including legal services, to Aboriginal people and the regional location of lawyers and field officers:

firstly, because of the accumulated disadvantage which this report indicates; secondly, because a very substantial number of Aboriginal people live in remote areas; thirdly, because they have a different cultural background; fourthly, they are just coming out of a period of having no rights and no say in their affairs; and fifthly, they have continuously been responding to agendas determined by others. To insist upon mainstreaming in service provision in these circumstances is both more costly in the long term and is thoroughly undesirable ... it is quite clear that on those matters which are closest to specialist Aboriginal interest, such as legal rights ... Aboriginal people as a whole greatly prefer their own organizations and services. This is very understandable given the treatment and relationship which Aboriginal people have had from departments in the past. Separate organizations in these areas are very close to Aboriginal conceptions of equality and self-determination ...⁶³

62. RCIADIC Report Recommendation 192, vol 4 at 28-29 and Recommendation 107, vol 3 at 91.

63. RCIADIC Report, vol 4 at 24-25.

APPENDIX A: List of submissions

Submissions received in previous phase of reference

Mr Roger Dive, Magistrate, Local Court, Parramatta, 19 July 1995

Mr Neil Lofgren, Head, Centre for Indigenous Rights and Critical Legal Inquiry Ltd, Bond University, 21 June 1996

Jim Coombs, Barrister, 25 June 1996

Mr Michael Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, 26 June 1996

Submissions received 1997

Martin L Sides QC, Senior Public Defender, 4 February 1997

John Nicholson SC, Deputy Senior Public Defender, 10 February 1997

N R Cowdery QC, Director of Public Prosecutions (endorsing views of members of the Office of Director of Public Prosecutions), 20 February 1997

Mr Bernard Carlon, Acting Director Community Safety Development Branch, NSW Police Service (on behalf of the Police Commissioner, Mr Peter Ryan), 7 March 1997

Mr Terry Murphy, General Manager, Legal Service, Legal Aid New South Wales, 7 March 1997

Mr M I MacPherson, Magistrate, Magistrate's Chambers, Gunnedah Court House, 13 March 1997

Mr R A Brown, Magistrate, Magistrate's Chambers, Moree Local Court, 18 February 1997

Sentencing: Aboriginal offenders

Mr M Dowd, Magistrate, Magistrate's Chambers Griffith Local Court, 20 February 1997

Mr B A Lulham SM, Magistrate, Broken Hill Local Court, February 1997

Mr Neil Lofgren, Head, Centre for Indigenous Rights and Critical Legal Inquiry Ltd, Bond University, 21 April 1997

Mr K B Walker, 12 May 1997

J M A Cramond, Chief Magistrate, Magistrate's Court, Adelaide, 30 June 1997

Ms Roseanne McInnes, Magistrate, Magistrate's Court, Port Adelaide, 4 July 1997

Mr H Hunt JP, 14 July 1997

Law Society of New South Wales, 15 July 1997

Aboriginal Legal Rights Movement Inc, South Australia, 21 July 1997

His Honour, Judge G S Forno QC DCJ, District Court, Queensland, 21 July 1997

Victorian Aboriginal Legal Service Co-operative Ltd, 23 July 1997

Mr G F Hiskey SM, Magistrate's Chambers, Adelaide Magistrate's Court, 16 August 1997

Mr Neville T Bonner AO, Chairman, Indigenous Advisory Council (Queensland), 9 September 1997

Associate Professor Diana Eades, University of Hawaii at Manoa, 3 October 1997

APPENDIX B: Female offenders

Statistics

In New South Wales in 1999, 17% of all people convicted of crimes in Local Courts, and 9.3% of all people convicted of crimes in the higher courts, were female.¹ A breakdown of this percentage into Indigenous and non-Indigenous offenders is not given by the New South Wales Bureau of Crime Statistics and Research. However, of the women in full-time custody at 30 June 1999, 23.9% were Aboriginal and Torres Strait Islander. In 1999, Aboriginal and Torres Strait Islander women made up only 2% of the New South Wales female population. By comparison, as at 30 June 1999, Aboriginal and Torres Strait Islander men, similarly comprising 2% of the New South Wales male population, constituted 15.8% of all men in full-time custody.²

Types of offences

The most recent statistics from the New South Wales Bureau of Crime Statistics and Research do not differentiate between Indigenous and non-Indigenous prisoners in reporting types of offences for which women were imprisoned, and the lengths of sentences received. However, some knowledge of Aboriginal female offending can be gleaned from the overall figures.

Local Courts

In 1999, a total of 18,061 women were convicted of offences in Local Courts. Of these, the most frequently entered convictions were for driving offences (most of these being for mid-range prescribed content alcohol) (6,292), followed by theft offences (4,670). The number of women convicted of offences against the person was 1,804, offences against good order 1,762 and

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1. New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1999* (Statistical Report Series, 2000) at xiv and xxiii.
 2. NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* (Statistical Publication No 19, 2000) at 22.

drug offences 1,524.³

Comparing these statistics with those relating to male offenders, in 1999, of a total of 89,184 convictions, 10,699 men convicted in the Local Courts were convicted for offences against the person and 13,112 men were convicted for theft.⁴

The New South Wales Bureau of Crime Statistics and Research draws attention to different patterns of female and male offending in Local Courts:

Although approximately 17% of persons found guilty in NSW Local Courts in 1999 were female, the proportion of females found guilty of each particular offence varied greatly from this overall figure. Offences where the person found guilty was likely to be female in disproportionate numbers to the total number of females overall include: *prostitution* (82.3% female), *larceny by shop stealing* (42.2%), *fraud* (29.4%), and *other larceny* (28.2%). On the other hand, offences which showed notably larger percentages of males being found guilty include *sexual assault* (99.1% male, compared with 83.2% overall), *weapons offences* (93.7%), *sexual offences against children* (99.0%), *break and enter* (92.3%) and *vehicle theft* (87.8%).⁵

Higher courts

In 1999, a total of 263 women were convicted of offences in the higher courts. Of these, the most frequently entered convictions were for robbery and extortion (67). The next highest category was for drug offences (61 convictions), followed by theft (49 convictions), offences against the person (38 convictions) and offences against justice procedures (31 convictions).⁶

The differing patterns of female and male offending apparent in the Local Courts are reflected in the higher courts. Although 90.7% of persons found guilty in NSW higher courts in 1999 were male, the proportion of males

3. *New South Wales Criminal Courts Statistics 1999* Table 1.13b at 30-31.

4. *New South Wales Criminal Court Statistics 1999* Table 1.13a at 28-29.

5. *New South Wales Criminal Court Statistics 1999* at xv.

6. *New South Wales Criminal Courts Statistics 1999* Table 3.11b at 82-83. The gender-specific classification system used in New South Wales prisons “recognises that most women inmates are not incarcerated for violent offences and generally do not require high levels of security. The system focuses, therefore, on program needs rather than on traditional security classifications. In the past, the same categories were used when classifying male and female inmates although offending patterns, security requirements and program needs were significantly different”: NSW, Department of Corrective Services, *Annual Report 1996-1997* at 11.

found guilty of each particular offence did not correlate with this overall figure. Offences where the person found guilty was likely to be male in disproportionate numbers to the total number of males overall include: offences against the person generally (95.4% of all convictions were entered against a male offender), sexual assault (100% of all convictions were entered against a male offender), sexual offences against children (98.5% of all convictions were entered against a male offender), breaking and entering (93.9% of all convictions were entered against a male offender) and weapons offences (93.1% of all convictions were entered against a male offender). The highest category of offence for male offenders was for offences against the person (787 convictions), followed by robbery and extortion (629), theft offences (485) and drug offences (443).⁷

Offenders given a custodial sentence

Women found guilty of an offence are being sentenced to imprisonment in increasing numbers, both in the Local Courts and the higher courts. In 1994, 451 women were given a prison sentence, representing 25% of all convicted women. In 1998, 48% of all convicted women (630 women) were given a prison sentence, an increase of 40%.⁸

The current correctional centres which can accommodate women are:

- Mulawa, at Silverwater;
- Emu Plains;
- Grafton's Women's Unit;
- Broken Hill; and
- Bathurst.

A further correctional centre is proposed for South Windsor.⁹

7. These statistics are collated from *New South Wales Criminal Courts Statistics 1999* Tables 3.11a and 3.11b at 78-83.

8. New South Wales Bureau of Crime Statistics and Research *Submission to the New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population* New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population *Inquiry into the Increase in Prisoner Population: Issues Relating to Women* (Interim Report, July 2000) at para 3.50.

9. The New South Wales Parliamentary Select Committee on the Increase in

In addition, the Parramatta Transitional Centre, which is not actually a gazetted correctional centre itself, accommodates female inmates serving full-time custodial sentences who have been temporarily released from a correctional centre under s 29(1) of the *Correctional Centres Act 1952* (NSW).¹⁰

All female inmates are received into either Mulawa or Grafton, both of which are classified variable security facilities. Most inmates of Mulawa are automatically assigned a Category 2 Classification, the second most lenient classification involving minimum supervision. Drug withdrawal and other special needs problems are addressed at Mulawa because it has a greater range of programs and 24 hour medical care. After approximately a week, some inmates are transferred to Emu Plains, a minimum security facility, provided that they have no drug, alcohol or psychiatric problems requiring attention.

Women are occasionally housed at the Broken Hill or Bathurst Correctional Centres but only if they are from the local area and are serving a very short sentence.¹¹ These are not satisfactory options for female offenders because they are institutions primarily for men. Women are segregated and there are inadequate facilities for longer term female inmates.

Ideally, women who advance through the prison system should be accommodated in the minimum security Jacaranda Cottages, at Emu Plains, or at Parramatta. However, many female prisoners do not advance this far either because their sentences are short, and they do not have time to progress through the system, or due to persistent drug, alcohol and/or psychiatric problems which are only addressed in Mulawa. Within Mulawa is the Mum Shirl Unit which is a three months, residential program for women with

Prisoner Population has recommended that the Minister for Corrective Services undertake a cost-benefit analysis of this proposal and review the decision to build the South Windsor facility in the light of that analysis: New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population, *Inquiry into the Increase in Prisoner Population: Issues Relating to Women* (Interim Report, July 2000) rec 7.46 and 7.47.

10. NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* at 49.
11. As at 30 June 1999, there were three female inmates in Broken Hill Correctional Centre but no female inmates in Bathurst Correctional Centre: NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* at 27.

chronic, although not acute, behavioural problems.

In order to be received into Emu Plains, inmates must satisfy restrictive eligibility requirements. Prisoners classified as being in need of greater supervision cannot be accommodated. In addition, the following prisoners will not be admitted:

- remandees;
- prisoners with sentences of less than one month's duration;
- prisoners serving sentences greater than one month for fine default;
- prisoners with psychiatric needs;
- prisoners with medical needs beyond the centre's capabilities (unlike Mulawa, Emu Plains does not have 24 hour medical care, but has a nurse in attendance five days a week, during business hours);
- prisoners on "two-out hold", that is, where two prisoners must be accommodated in one cell to lessen a perceived suicide risk; or
- prisoners on protection.

Periodic Detention Centres

As at 30 June 1999, 9.6% of offenders serving their sentences by way of periodic detention were female (109 offenders), of whom 5.5% (six) were Aboriginal.¹²

The following Periodic Detention Centres accommodate female detainees:

- Metropolitan Periodic Detention Centre, although a centre accommodating both male and female detainees, had no female inmates as at 30 June, 1999, nor did it have any female inmates as at 30 June, 1998.
- Norma Parker has a separate facility established as a Periodic Detention Centre, the only centre solely for women, and the only centre accommodating females at which mid-week detention is available. As at 30 June 1999, there were 54 female offenders on

12. NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* at 37-38.

- weekend periodic detention and
24 female offenders on mid-week periodic detention.¹³
- Grafton was designed as a multi-purpose facility, intended to take female offenders on remand and for Periodic Detention. However, as at 30 June, 1999 it had no female Periodic Detainees.¹⁴

13. NSW, Department of Corrective Services, *Annual Report 1998-1999*.

14. NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* at 41.

- Bathurst accommodates both male and female offenders. As at 30 June, 1999, there were five Periodic Detainees.¹⁵
- Mannus, located near Tumberumba, south of Canberra, is a centre for males and females accommodating 32 males and six females. As at 30 June, 1999 it had four female Periodic Detainees.¹⁶
- Tomago is a centre for both men and women, accommodating up to 20 females and 100 males. As at 30 June, 1999 it had 12 female Periodic Detainees.¹⁷
- Wollongong was a centre for men only but was modified in 1999 to accommodate female detainees. As at 30 June, 1999 it had six female Periodic Detainees.¹⁸
- A centre at Broken Hill was opened in February 2000, but as yet no offenders have been sentenced to attend there. It will accommodate up to 18 males and two females. Arrangements will be made to bus offenders in from Wilcannia and Menindi.

The Parramatta Transitional Centre

The Parramatta Transitional Centre is a minimum security facility designed to accommodate female inmates involved in community based pre-release programs. In 1999, 17 inmates were resident of whom one was Aboriginal/Torres Strait Islander.¹⁹

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15. NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* at 41.
 16. NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* at 41.
 17. NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* at 41.
 18. NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* at 41.
 19. NSW, Department of Corrective Services, *New South Wales Inmate Census 1999: Summary of Characteristics* at 49.

APPENDIX C: Justice John Dowd's dissenting view on statutory recognition of Aboriginal customary law

Justice John Dowd, former Deputy Chairperson of the Commission, does not agree with the recommendation that there should be statutory recognition of Aboriginal customary law. His view is that it is established by the existing law that Aboriginal factors may be taken into account in terms of sentencing and in terms of establishing offences and circumstances for the admissibility of evidence and that to give statutory recognition to one section of the community will create problems in relation to other principles of sentencing.

He is of the view that it is not the function of a reference on sentencing to endeavour to achieve other sociological aims in terms of the harms which have been done to the Aboriginal community since British settlement.

Justice Dowd acknowledges that the application of Aboriginal customary law may not be uniform and practices will vary but this is an Australia-wide problem rather than one demonstrated in New South Wales. The very fact of publication of this Report will assist in the education process. Failure to admit evidence concerning Aboriginality and to take it into account would, in each case, be an error in law.

Justice Dowd believes that considerable problems would arise in relation to the principles of parity with Aboriginal and non-Aboriginal offenders. There may be a tendency for people of Aboriginal descent who lead a non-tribal existence to call evidence of customary law during sentencing which would create difficulties for a court and a prosecutor who may not necessarily be in the position to address such evidence. The fact that expert evidence may apply to members of an Aboriginal group will not, in Justice Dowd's view, of itself, establish the extent to which a particular prisoner being sentenced is subject to that law. Assertions will be made but would usually not be supported by evidence which will necessarily be reliable. The calling of relatives of a prisoner being sentenced will be subjective. There will be a tendency for that evidence to favour the interest of the person under sentence, not community.

Justice Dowd is further concerned that statutory recognition of customary law is in opposition to the Commission's recommendations on sentencing

generally:²⁰ namely, that particular sentencing factors not be contained in legislation.

He also argues that there are many communities within New South Wales who, for religious or culture-based reasons, may have an equally valid argument for statutory recognition of their adherence to a particular community, both in relation to sentencing and to the commission of an offence. In his view, this will create resentment if only one group is given statutory recognition. Evidence of membership of a particular group, and customs of that group, should be introduced in the normal way and its relevancy established.

20. New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996).

TABLE OF LEGISLATION

Commonwealth

Crimes Act 1914

s 16A.....	2.14, 3.64
s 16A(2)(m)	2.14, 2.45
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