

**ALTERNATIVE DISPUTE
RESOLUTION**

IN

ABORIGINAL COMMUNITIES

A report to the Northern Territory
Law Reform Committee

Report 17C

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1. SUMMARY OF RECOMMENDATIONS

Recommendation 1.

An Alternative Dispute Resolution Program should be established on Aboriginal communities in the Northern Territory (NT).

Recommendation 2.

The Alternative Dispute Resolution Program should be established by an *Aboriginal Community Justice Act (ACJA)*. This Act would provide a framework for recognition of Alternative Dispute Resolution Program already existing in Aboriginal communities, or which communities desire to establish. Each community wishing to develop a program under the Act would develop a Community Justice Program (CJP). There would, however, be certain limits placed upon the freedom of communities to develop a CJP.

Recommendation 3.

An Aboriginal community which is incorporated under the *Local Government Act* may exercise such powers as are chosen by it and are within the powers set out in the ACJA.

Recommendation 4.

The geographical boundaries of a community shall be those defined for the purposes of a community government scheme under the *Local Government Act*.

Recommendation 5.

No community shall enact a by-law which permits physical sanctions which are in breach of international human rights standards, or of NT law.

Recommendation 6.

A community may enact by-laws relating to thefts of less than \$20,000, and to common assaults, and to certain other matters. It may also enact by-laws recognising certain specified, and negotiated, Aboriginal customary laws.

Recommendation 7.

The ACJA shall state that, unless otherwise provided in a CJP, any by-laws contained in a CJP for a community shall be presumed to be the law for that community in the areas covered. However, the general law of the NT shall continue to apply in all areas not specifically dealt with in the by-laws.

Recommendation 8.

Communities may enact by-laws which duplicate the effect of existing NT legislation, providing the matter is within the by-laws power. However, no community shall enact a by-law which makes legal an act which would be illegal under the general law.

Recommendation 9.

No sanction provided for in a by-law for a community shall exceed the sanction provided for that offence under the general law. However, a community may provide for a sanction of a different type to that provided for an offence under the general law.

Recommendation 10.

Where a community provides for the empowerment of wardens as part of its CJP, the wardens may exercise certain powers as set out in the ACJA. Those powers shall not include the power of arrest, but may include a power to do 'all things reasonably necessary' to the exercise of their duties.

Recommendation 11.

Where a community chooses to establish a 'community court' as part of its CJP, that court shall respect the rights of a defendant in criminal proceedings to the same extent that they are already respected in NT law.

Recommendation 12.

Where a community chooses to establish a 'community court' as part of its CJP, that court shall ordinarily deal with all offences under the community by-laws at first instance.

Recommendation 13.

The ACJA should provide for an appeal from a community court to the Court of Summary Jurisdiction. The right of appeal, and the powers of the Court of Summary Jurisdiction upon appeal, shall be similar to the powers contained in ss. 162-177 *Justices Act* (NT).

Recommendation 14.

Community courts shall not have the option of imposing a sentence of imprisonment upon convicted offenders, nor shall they have the power to impose physical sanctions upon such offenders.

Recommendation 15.

Convictions or penalties imposed by a community court should not count as prior convictions for the purpose of sentencing in the Court of Summary Jurisdiction or in the Supreme Court.

Recommendation 16.

A plain English version of the by-law making power and the procedure for obtaining approval for a CJP should be made available to communities.

Recommendation 17.

The Committee recommends that a Community Justice Plan Implementation Unit (Community Justice Plan Development Unit) be established to oversee negotiation and approval of a CJP for each community which wishes to establish such a plan. Each proposed CJP would be subject to the approval of Parliament, which could disallow all or any part of a CJP.

2. INTRODUCTION

On 24 June 1991, the Attorney-General referred the issue of alternative dispute resolution to the Northern Territory Law Reform for examination and report. The terms of reference are set out in Appendix "A".

The Committee established four subcommittees comprising Committee members and members of the public to deal with this reference. The Subcommittees variously deal with:

- civil dispute (including commercial disputes and disputes relating to human rights);
- disputes involving the criminal law;
- family and other domestic disputes; and
- disputes occurring in Aboriginal communities.

The Committee established a Subcommittee on ADR in Aboriginal communities to examine ADR in this area.

In 1992 a then member of the ADR Subcommittee, Martin Flynn, prepared a Discussion Paper which outlined a number of options for establishing ADR schemes on Aboriginal communities. Public responses indicated that a need for such schemes existed, but that no single scheme or model could be appropriate for all communities. An outline of a draft report was prepared, and in 1994 consultants produced a short report indicating some directions in which a final report should proceed. However it was clear that at that stage the subcommittee lacked the time and resources needed to produce a comprehensive Final Report. In 1996 the Attorney-General granted \$30,000 to the subcommittee, enabling it to engage consultants to complete the Report. Tony Fitzgerald produced a report which forms the basis for much of the Final Report, and which is annexed to this Report as Appendix "B".

It should also be noted that a great deal of work has been done elsewhere concerning ADR on Aboriginal communities, and the closely related issue of recognition of Aboriginal customary laws. Most significant are the Report of the Australian Law Reform Commission on Aboriginal Customary Law in 1986, the 1991 Report of the Royal Commission into Aboriginal Deaths in Custody, the 1992 Discussion Paper of the NT Sessional Committee on Constitutional Development concerning recognition of Aboriginal customary law, and Steve Hatton's Paper concerning recognition of Aboriginal customary laws, presented in March 1996 to the Standing Committee of Attorneys-General.

This Report concludes that an ACJA should be passed which gives legal recognition to the alternative dispute resolution processes already existing in a number of Aboriginal communities across the NT. It will also give Aboriginal communities the legislative authority to establish or adapt their own ADR schemes. These could be based upon the models already adopted by communities elsewhere in the NT, or else a community could, within certain defined limits, develop its own novel scheme. The ADR scheme could, again within certain limits, recognise elements of Aboriginal customary law.

The process of developing an appropriate ADR scheme or CJP for each community must be driven from the "bottom-up" and not the "top-down". This is because of the differences between Aboriginal communities in the NT and in their customary law. Each community is unique and therefore the customary law for each clan is different. Hence, the process must incorporate negotiation and decision making firstly on a clan level, then on a regional and Territory level. This will ensure that all relevant individuals and communities are consulted, and most importantly that each plan is the product of free choice.

3. IS THERE A NEED FOR ADR ON ABORIGINAL COMMUNITIES?

There are three main arguments in favour of passing legislation which provides for the establishment of ADR schemes on Aboriginal communities in the NT:

- the disproportionately high levels of Aboriginal contact with the criminal justice system. The Royal Commission into Aboriginal Deaths in Custody noted the social problems in Aboriginal communities, many of which are associated with the existence of disputes. These included violence, alcohol abuse, poor education and health, and consequent over-representation in the criminal justice system.¹ Since the Royal Commission Aboriginal imprisonment rates have in general increased.² The establishment of effective ADR schemes on Aboriginal communities would reduce the imprisonment rates, and consequently reduce the social and financial cost of community breakdown.
- the perception that denying traditional methods of belief is unjust. Aboriginal customary law is a living system in the lives of many Aboriginal Territorians. Many Aboriginal people have expressed a deep desire for some kind of formal recognition of their customary law.³ Australia's international human rights obligations may also require some recognition of Aboriginal customs and traditions.⁴ An effective ADR scheme will enable Aboriginal communities to have elements of their customary laws recognised, within defined limits, by the legal system.
- communities are best able to solve their own problems by developing their own strategies and programmes. This should be done in consultation with Government and in a way which is compatible with existing Government strategies and programmes such as the 'Family Violence' strategy and the 'Living with Alcohol' programme. Recognition is consistent with the principle of community self-management.

¹ Final Report, Royal Commission into Aboriginal Deaths in Custody, 1991. See also Martin Flynn, "Outline of Draft Report", NORTHERN TERRITORY LAW REFORM COMMITTEE 1993, p.1.

² C Cunneen and D McDonald, "Keeping Aboriginal and Torres Strait Islander People Out of Custody", Australian Institute of Criminology, August 1996, p.29.

³ Sessional Committee on Constitutional Development, Discussion Paper No. 4, "Recognition of Aboriginal Customary Law", August 1992, p.41.

⁴ These include ILO Convention No. 169 on Indigenous and Tribal Peoples. See Sessional Committee above, p.16.

There are several arguments against the establishment of Alternative Dispute Resolution Program on Aboriginal communities in the NT.

- Customary laws may incorporate rules and punishments that are unacceptable to the wider Australian society. The proposed ADR scheme, however, is structured so as not to permit the infringement of international human rights standards. These include the right to life, the right not to be subjected to cruel punishment, and the rights of a defendant in criminal proceedings.⁵
- Some aspects of customary law are secret, and should not be required to be disclosed. The proposed ADR scheme, therefore, does not require Aboriginal communities to formalise any aspect of their customary law. Each ADR scheme must be the product of consultation, and must not incorporate any elements which the community does not wish to have recognised by Australian law.
- Aboriginal people may lose control over their customary law if it were recognised or incorporated within the general legal system. This danger was noted by the ALRC, which commented that "Aboriginal customary laws are as much a process for the resolution of conflict as a system or set of rules."⁶ Recognition could lead to distortion if Aboriginal laws were applied by outside agencies. It is proposed, therefore, that 'recognition' does not imply formal incorporation into the general legal system. Communities will seek recognition only for those traditional laws which they wish to have recognised. As a general rule these laws will be applied only by the authorised members of the relevant community, not by any outside agency.
- Customary law may not adequately protect Aboriginal women. Aboriginal women have an equal, autonomous and independent role in traditional dispute resolution on Aboriginal communities.⁷ However domestic violence is endemic on many Aboriginal communities and it appears that in some places the traditional methods of dispute resolution have broken down. It is important, therefore, that Aboriginal women be consulted on an equal basis with men in developing ADR schemes on Aboriginal communities. It is particularly important that each ADR scheme receive the full backing and authority of women and that domestic violence not be sanctioned in any form.
- Recognition of ADR schemes might create "two laws" within society. It is true that the creation of ADR schemes on Aboriginal communities might involve the creation of rules which do not apply outside the relevant

⁵ See AUSTRALIAN LAW REFORM COMMISSION Report No. 31, "The Recognition of Aboriginal Customary Laws", Vol 1, para 179ff and Martin Flynn, "Outline of Draft Report", NORTHERN TERRITORY LAW REFORM COMMITTEE, 1993, p.3.

⁶ AUSTRALIAN LAW REFORM COMMISSION Report No. 31, p147. See Darlene Jonsson and Stephen Herne, "Confidential Draft Information Paper: Recognition of Aboriginal Customary Law", p.34.

⁷ See for example "We Are Bosses Ourselves: the Status and Role of Aboriginal Women Today", ed. Fay Gayle 1983.

community: eg the prohibition of petrol sniffing within a defined community. However these rules are created by the relevant community in response to the needs of that community. They also apply to everybody on that community, Aboriginal or non-Aboriginal, and hence do not breach the principle of "equality of treatment before the law for all citizens"⁸.

Hence, it is clear that there is a need for ADR on Aboriginal communities. ADR schemes should be established and recognised in accordance with the following principles:

- Not to increase the numbers of Aboriginal people in custody;
- Consistency with international principles of human rights;
- Compatibility with existing Government strategies and programmes such as the 'Family Violence Strategy' and the 'Living with Alcohol' programme, and also with ADR schemes already existing on various Aboriginal communities;
- Recognition that no single scheme is appropriate and that each scheme must be developed in consultation with the community and through their free choice;
- Respect for Aboriginal customary law, including the desire of many Aboriginal people not to have their customary law formalised or recognised by the broader legal system; and
- Not to undermine the role of police and the courts, but rather to ensure that they deal with disputes in an appropriate way.

Recommendation 1: An Alternative Dispute Resolution Program should be established on Aboriginal communities in the NT.

4. AN OUTLINE OF THE COMMUNITY JUSTICE PLAN

The recommended legislation is an ACJA which would provide a framework for recognition of the various ADR schemes already existing in several communities across the NT. It would also provide a framework for the establishment and recognition of these, or other, ADR schemes by other Aboriginal communities. Each community would be given the ability, under the Act, to develop its own CJP. It would do this in consultation with police, government departments and other relevant external agencies, with the aim of ensuring that each CJP is the product of the free choice of the relevant community. Each community could choose one of the 'model' options set out in the Act, or it could develop its own CJP.

The CJP developed by each community would, however, be subject to certain necessary limits set out in the Act.

Firstly, there would be limits as to scope of the subject matter dealt with in each CJP. Thus, for example, no community would be able to exercise jurisdiction in

⁸ See Tony Fitzgerald "ADR in Aboriginal Communities", 1997 (Appendix "B"), p.19; also AUSTRALIAN LAW REFORM COMMISSION Report No. 31, Chapter 9, para 165.

areas, particularly serious criminal matters, which would appear to infringe the principle of "one law for all". Nor could any community impose penalties in breach of international human rights standards. This issue will be discussed further below.

Secondly, each CJP would need to be administered in the relevant community by a community-based council, which would need to be incorporated under the *Local Government Act* (NT) 1993. Depending upon the CJP decided upon by the relevant community, the council might then appoint wardens, whose duties and powers would be set out in the CJP. It might also elect to appoint an 'Elders Council', or body of judicial officers, whose duties and powers would also be set out in the CJP. If the community decided upon a CJP which did not require the appointment either of wardens or of an 'Elders Council', then the CJP would require the negotiation of appropriate protocols between the council and other relevant bodies, eg the police.

Recommendation 2: The Alternative Dispute Resolution Program should be established by an ACJA. This Act would provide a framework for recognition Alternative Dispute Resolution Program already existing in Aboriginal communities, or which communities desire to establish. Each community wishing to develop a program under the Act would develop a CJP. There would, however, be certain limits placed upon the freedom of communities to develop a CJP.

5. OPTIONS WITHIN THE ABORIGINAL COMMUNITY JUSTICE ACT: REFORMS ELSEWHERE

In developing its CJP in consultation with government, an Aboriginal community could elect to follow one of the following 'models'. These models reflect reforms which have been adopted or proposed in various Aboriginal communities in the NT or elsewhere. It is proposed that, in order to facilitate the consultation and adoption process, the models be incorporated as Schedules to the ACJA. While it might save time for a community to adopt a CJP which has already been adopted elsewhere, it is important that a community remain free to develop its own CJP. This should be emphasised in the consultation process.

The following comments outline the basic elements of a number of ADR schemes which have been proposed or adopted elsewhere. Where appropriate it is also indicated how these schemes could be adapted to fit within the basic framework of the ACJA.

While each scheme is different, the various ADR schemes may be divided into four basic types: mediation schemes, magistrates' court advice schemes, wardens' schemes and community court or 'Elders' Council' schemes.

5.1 MEDIATION SCHEMES

Mediation schemes do not involve formally taking away or derogating from the jurisdiction of police or courts, nor any formal recognition of Aboriginal customary law. Hence, where a community elects to establish a mediation scheme as the whole or part of its CJP, it is not necessary to consider in detail the legal issues which arise in the case of wardens' schemes or community court schemes.

In general, it is proposed that mediation in Aboriginal communities should be available at all stages of the criminal justice process, and that it be available for all criminal offences including domestic violence. This is consistent with the discussion and recommendations of the Northern Territory Law Reform Committee Final Report on Mediation and the Criminal Justice System⁹.

Mediation programs have been aimed at various stages of the criminal justice system, particularly prevention of disputes, pre-trial mediation, and sentencing.

(a) Prevention of disputes: community mediation programs

A community mediation program is aimed at preventing disputes that concern a particular community, and the use of 'independent' local community members in 'mediation' roles. Since a community mediation program is community driven, the exact content of an individual program will depend upon the relevant community. Consultation between the community council and Government would consider the disputes which were of particular concern to the community and the measures which were considered appropriate to that community: for example, the establishment of 'safe houses' for women threatened with violence, and the identification of an appropriate local or outside mediator¹⁰. The Tangentyere Council Social Behaviour Project may be an appropriate model to provide ideas and facilitate informal discussions between community councils and Government¹¹.

In order to fit within the proposed ACJA, a community mediation scheme would need to be negotiated between Government and an incorporated community council. If the mediation scheme included the appointment of wardens to carry out night patrols or other duties, the question of the duties and powers of wardens would need to be considered.

(b) Pre-trial mediation

Pre-trial mediation has been conducted as a pilot project by the NT Police in Alice Springs and Yuendumu¹². Offenders and victims met in a conference

⁹ NORTHERN TERRITORY LAW REFORM COMMITTEE, Final Report, Mediation and the Criminal Justice System, February 1996 page (i), recommendations 3-6.

¹⁰ Martin Flynn, "Outline of Draft Report", NORTHERN TERRITORY LAW REFORM COMMITTEE 1993, p.5.

¹¹ Martin Flynn, ADR in Aboriginal Communities: A Discussion Paper 1993, p.22.

¹² NORTHERN TERRITORY LAW REFORM COMMITTEE, Final Report, Mediation and the Criminal Justice System, February 1996. p. 15.

chaired by a mediator in an attempt to negotiate measures for repairing the damage caused by the offence. The mediator was ordinarily a police officer, and the program was aimed primarily at young and experimental offenders. It was necessary for the offender first to admit the offence.

As part of its Aboriginal Mediation Project, Queensland's Department of Justice has also developed a system of pre-trial mediation. In this case alleged offenders are referred to mediation by police instead of being charged. This system has been infrequently used because of the lack of involvement of Aboriginal communities in the process¹³.

Mediation of this type has already received extensive discussion in the Northern Territory Law Reform Committee's "Final Report: Mediation and the Criminal Justice System". Fitzgerald points out that mediation "is a totally foreign concept to Aboriginal communities", and that while it "may be an occasionally successful and useful community justice option, its potential ... appears to be limited because of the relatively few problem areas amenable to its application"¹⁴. Nevertheless, pre-trial mediation of the type described above should be an option for Aboriginal communities developing a CJP. This type of mediation may work well in some communities, particularly those desiring a high level of police presence or in which traditional dispute resolution methods are not working.

(c) Pre-sentencing mediation

Pre-sentencing mediation currently operates in Katherine, and has also been used in Queensland as part of the Aboriginal Mediation Project. In Katherine the scheme is informal and is available to anybody, including juveniles and young adults who plead guilty. The Magistrate has the option of referring a consenting defendant to a Community Aid Panel, which is currently composed of voluntary participants. The Magistrate takes the outcome of the panel counselling into account in sentencing¹⁵.

Currently victims are not involved in the Katherine Community Aid Panel process. In Queensland, by contrast, victims are involved in pre-sentencing mediation directed towards determining a mutually acceptable reparation for the victim¹⁶.

Pre-sentencing mediation may be appropriate in some communities. Communities should be able to determine the composition of the panel and the question of the participation of the victim.

¹³ Tony Fitzgerald, "ADR in Aboriginal Communities", March 1997, p.5 and references cited therein.

¹⁴ Fitzgerald, *ibid* p.6.

¹⁵ NORTHERN TERRITORY LAW REFORM COMMITTEE "Mediation and the Criminal Justice System" 1996, p. 14; Martin Flynn "Outline of Draft Report", p.6.

¹⁶ T Fitzgerald, p.5.

5.2 MAGISTRATES' COURT ADVICE SCHEMES

In both South Australia and the NT various communities have introduced schemes in which community elders advised the Magistrate on sentencing. On Groote Eylandt, a more extensive Magistrate Court advice initiative was developed. In this scheme the Magistrate consulted senior community members concerning traditional factors and other relevant information. Information gained could thus be taken into account during the pre-sentencing trial process, as well as in sentencing¹⁷.

Proposals in which Magistrates hear the advice of elders on customary law and other issues and on sentencing do not involve potential conflicts with the general law. This is because the Magistrate is not bound to take any such advice into account, and will not take such advice into account in a matter inconsistent with the general law. Similarly, such schemes do not involve any derogation from the jurisdiction of police or courts. These formal legal issues would thus not need to be addressed in the development of this type of community justice plan.

One of the major difficulties faced by these types of schemes in the past was problems of personnel. When key personalities were transferred away from Groote Eylandt the crime statistics rose again. On other communities elders have been unavailable to have found themselves in positions of kin conflict. Fitzgerald suggests that a panel of elders or suitable community members, particularly including women, should be assembled¹⁸. These difficulties underline the importance of adequate consultation with the community in both developing and implementing the CJP.

It should be noted that the Royal Commission into Aboriginal Deaths in Custody recommended that Aboriginal communities be consulted by Magistrates in the sentencing process¹⁹.

5.3 WARDEN SCHEMES

Several types of 'warden schemes' exist or have existed in the NT. They contain a range of powers and levels of formality, and consequently different legal issues may be raised.

Some schemes have remained informal, simply involving the appointment of people to perform part of the traditional function of the police, without usurping any part of that function. The Yuendumu Night Patrol Scheme is community-based, and the women patrollers inform the police rather than intervene personally in disturbances²⁰. The women at Yuendumu have stressed that they did not want any kind of 'standard model' imposed upon them.

¹⁷ Steve Hatton MLA, "The Recognition of Aboriginal Customary Law: A Concept Proposal for the NT" Paper presented to STANDING COMMITTEE OF ATTORNEYS-GENERAL, March 1996, p.9-10; and Tony Fitzgerald "ADR in Aboriginal Communities" p.42.

¹⁸ Fitzgerald, *ibid* 42; see also Hatton, *ibid* 11.

¹⁹ Recommendation 104. See Fitzgerald, *ibid* 42.

²⁰ Mary-Lynn Griffith, Submission to LRC re: Discussion Paper on ADR in Aboriginal Communities, October 1992, p.9.

Other schemes, particularly the Ngukurr Warden Scheme, have so far remained informal, but the 'wardens' exercise more extensive powers. At Ngukurr they include that of dealing with issues in accordance with Aboriginal custom and tradition²¹. This type of scheme clearly raises the question of conflict of laws, and the Yugul Mangi Community Council is currently seeking to have by-laws passed which would empower the Ngukurr Warden Scheme. If this occurs, the question of which powers would be possessed by the 'wardens' would arise. It would also raise the question of which 'elders' should participate on the dispute-resolution body, of the range of penalties they could impose, and other legal issues to be discussed below.

Other 'wardens' have more formal powers set out in by-laws. In the NT the most significant current scheme is that existing under *the Yulara Tourist Village Management Act 1984* (NT), the scheme which formed the model for the proposal set out in Tony Fitzgerald's Report which forms Appendix "B" to this Report. This Act creates by-laws for Yulara, giving 'wardens' who are employees of the Ayers Rock Resort Corporation a very wide range of powers. These powers include the admission of people and vehicles, the control of traffic, the securing and maintenance of public order and safety, the prohibition of assault of wardens, and importantly the recognition of certain traditional customs²². However, doubts over the legal validity of the by-laws, and resourcing and other problems have meant that very few of the by-laws are in fact enforced.

Communities should be able to adopt one of, or some variation upon, these Warden Schemes as part of their CJP. They should be entitled to choose the range of duties and powers which they wish their Wardens to possess, or alternatively elect to develop an informal scheme. However, if the proposed powers of the Wardens for a community include matters which may raise issues of conflict with the general law, these powers will need to be set out formally within the CJP for that community. They will also not be able to extend beyond the maximum proposed powers of wardens under the ACJA, to be considered further below.

5.4 COMMUNITY COURTS OR 'ELDERS COUNCIL' SCHEMES

Community court or 'Elders Council' schemes involve the substitution, to varying extents, of the role of non-Aboriginal judges or magistrates and law by that of Aboriginal elders and law.

The degree of substitution varies. Under the *Aboriginal Communities Act 1979* (WA) community councils have been granted a range of by-law making powers including that of entry onto community lands, regulation of motor vehicles, disorderly conduct, and restrictions on alcohol. The by-laws apply to all people within community boundaries, but proceedings are brought by non-Aboriginal police and within the general non-Aboriginal Court system. According to Fitzgerald, the scheme was imposed without consultation with or support for the local communities, and has now largely fallen into disuse²³.

²¹ Steve Hatton "The Recognition of Aboriginal Customary Law" 1996, p.15.

²² T Fitzgerald, above pp 16-17.

²³ Fitzgerald, 34-5; see also Australian LRC Report No. 31, "Recognition of Aboriginal Customary Laws", paras 747-758.

The scheme existing under the *Community Services (Aborigines) Act 1984* (Qld) also empowers community councils to enact by-laws, but differs in that 'Aboriginal Courts' hear and determine breaches of the by-laws. The courts are constituted by two Aboriginal Justices of the Peace resident in the area, or by two members of the local council, and they may impose fines (but not imprisonment) for breach. Again, Fitzgerald points out that the scheme was imposed without consultation or recognition of the role of Aboriginal custom and tradition, and that it has now fallen into disuse²⁴.

More extensive schemes include a recognition of the role of Aboriginal customary law. Of these the best-known in the NT is the Yirrkala proposal. This proposal, which was only ever implemented for a short trial period, was suggested by the Yirrkala Community in the early 1970s. It envisaged the establishment of a Law Council of elders of the clans in Yirrkala, who would name members of the community to constitute a 'community court'. The powers of the community court included that of enforcing general rules regarding social order and discipline, and enforcing Aboriginal customary law. The penalties which could be imposed included fines, banishment, and commitment for re-socialisation to the care of an older member of the clan²⁵. It was envisaged that 'big trouble' would be dealt with by the general courts, but with the advice of the Law Council or community court.

This scheme bears some similarity to the Papua New Guinea (PNG) Village Court system, which has been recognising and enforcing a range of local customs since the *Village Courts Act* in 1974. Village Courts have a criminal jurisdiction in non-indictable and some civil jurisdiction, and apply customary law. Lawyers are excluded, and an appeal lies from village magistrates to the regular magistrates²⁶. Custom is taken into account and enforced by courts except where it would lead to injustice or not be in the public interest, or where it would be adverse to child welfare. The village courts try to mediate disputes at first instance, but can issue fines and work orders and order imprisonment for non-compliance with an order, although imprisonment must be endorsed by a higher court²⁷.

The PNG village court system was regarded by the Australian Law Reform Commission as inappropriate for adoption in Australia. This was primarily because of the danger that Aboriginal people would lose control over their own law where that law was administered by ordinary courts, or where an appeal lay from a Local Court to an ordinary court. This is a valid consideration. It is important that a community not be placed in the position of having to codify its laws or reveal secret laws to outsiders. The consultation process should emphasise that this may occur should a community choose to exercise jurisdiction over more 'serious' areas, to which an appeal to the general legal system may lie. In any case, under the CJP proposal no community is forced to codify or formalise its customary laws.

²⁴ Fitzgerald above, pp 32-34.

²⁵ McRae, Nettheim and Beacroft, "Aboriginal Legal Issues", First Ed, Law Book Company 1991, pp232-234 and references cited therein; Steve Hatton, "The Recognition of Aboriginal Customary Law", above p8.

²⁶ NT Sessional Committee on Constitutional Development Discussion Paper No. 4, "Recognition of Aboriginal Customary Law", August 1992. p.36-7.

²⁷ McRae et al above, pp231-2.

Another Australian proposal is the 'Elders Council' scheme, proposed as a substitute for Magistrates Courts. The Council would consist of male and female elders, and would follow a formal procedure followed by a statement of law and appropriate sanctions²⁸. The proposal does not specify what the range of powers of an Elders Council should be. Arguably, the jurisdiction of the elders would be over those matters currently dealt with in the Magistrates Courts, including indictable offences capable of being dealt with summarily. However, the elders would deal with those matters, together with traditional customary matters, according to traditional law. If this were the case, the question would arise of whether an appeal would lie from a decision of the Elders Council to the general courts, at least in those matters which involve a breach of the general law. If an appeal right did exist, the general courts would then presumably be in the difficult position of deciding upon the correctness of a determination of guilt or innocence, and sentence, which was made according to the relevant traditional law. If it did not exist, the question would arise of how to resolve possible conflict or inconsistency with the general law.

These difficulties highlight the fact that the jurisdiction of an 'Elders Council' or community court needs to be made clear in all cases where the community wishes to enforce rules which may be in conflict with the general law. In any case there would be an upper limit to any such jurisdiction, and the question of appeal rights would need to be clarified. These matters will be discussed further in the next section.

6 ISSUES AND RECOMMENDATIONS

6.1 Method of incorporation

If, as part of its CJP, a community wishes to employ wardens or invest a community court with formal judicial power, it will be necessary for that community to incorporate. Incorporation will enable the community to hold and receive monies, make payments, employ staff and take out insurance, amongst other activities. This requires the Council to have a separate identity to that of its members. According to Fitzgerald, incorporation of the whole community, so that every member of the community is deemed to be a member of the governing body, will give added credibility to the representative governing body²⁹.

The ACJA should provide that a community which wishes to employ wardens or create a community court must incorporate under the *Local Government Act* (NT). The *Local Government Act* provides a method for incorporation of a council, either as a Local Council or as a Community Government Council under Part 5³⁰. The *Local Government Act* provides a convenient method of incorporation, but the powers of councils under this Act are more limited than those contemplated under the ACJA. Therefore, the ACJA should provide that an Aboriginal community which is incorporated under the *Local Government Act* may, notwithstanding any provisions of that Act, exercise such powers as are chosen by it and are within the powers set out in the ACJA.

²⁸ Larissa Behrendt "Aboriginal Dispute Resolution", Federation Press 1995, Chapter 6 discussed in Fitzgerald above, 6-9.

²⁹ Fitzgerald above, p.20.

³⁰ Fitzgerald p.11.

Recommendation 3. An Aboriginal community which is incorporated under the *Local Government Act* may exercise such powers as are chosen by it and are within the powers set out in the ACJA.

6.2 GEOGRAPHICAL BOUNDARIES

The geographical boundaries of the community should be those defined for the purposes of the community Government scheme under *the Local Government Act*. A community wishing to negotiate a CJP under the proposed Act must therefore incorporate under the *Local Government Act*.

It should be possible for a community living in a 'non-traditional' area such as a town camp to negotiate a CJP. In such cases it would be expected that the CJP would, by agreement with councils and other interests, be fairly limited in scope. For example, it might provide for a mediation or 'night patrol' scheme which does not derogate from council or police powers, and does not require the vesting of wardens or a community court with specific statutory powers. This is a matter which should be considered further in negotiations with councils, including those in Alice Springs, Katherine and Darwin.

Recommendation 4. The geographical boundaries of a community shall be those defined for the purposes of a community Government scheme under *the Local Government Act*.

6.3 SCOPE OF BY-LAWS

As proposed above, communities should be free to work out their own CJP. This may or may not require the passing of 'by-laws' or formal statutory powers determining the way in which the CJP for that community is to operate. For example, communities which wish to adopt a mediation or an informal night patrol scheme will not need to pass by-laws.

On the other hand by-laws will be needed for those communities which wish to develop a more far-reaching or formal CJP, particularly where that plan requires the employment of wardens or a 'community court'. The ACJA should specify the maximum scope of the powers which a community may possess under its CJP. Most communities, it is expected, would not wish to possess the full range of powers, but would indicate which of the possible powers they wished to possess during negotiation of their CJP.

In determining the maximum scope of community powers under a CJP, the creation of "two laws" within society should be avoided as far as possible. On the other hand, communities should not be unduly restricted in their ability to address community problems.

Two of the most important problems currently facing Aboriginal communities in the NT are family violence and substance abuse (particularly alcohol, kava and petrol).

This is already reflected in the NT Government's Aboriginal Family Violence Strategy and the Living With Alcohol Programme. It would be consistent with NT Government policy to give communities, within limits, the power to deal with these problems themselves. This would, of course, be with the assistance of police and other Government authorities. Without the ability to deal with family violence and substance abuse, the effectiveness of an ACJA in addressing the severe problems on many Aboriginal communities would be considerably reduced.

Another major problem currently facing many Aboriginal communities is the prevalence of minor property offences. This is frequently related to substance abuse, and is a major cause of the current over-representation of Aboriginal people in the criminal justice system. It is proposed that Aboriginal communities should be given a limited power to deal with such offences, at least at first instance. The likelihood of re-offending, and the consequent cost of the community and to the criminal justice system, is reduced where communities are able to deal with the problem in the early stages. It may also be reduced where penalties are, within limits, appropriate for and in accordance with local custom and tradition.

Allowing each community to develop its own CJP should, therefore, permit a certain level of recognition of Aboriginal customary law. Many communities are already applying some of their own customary laws and punishments. Some communities are happy for this to continue to occur at an informal level. Others are anxious for formal recognition, and clear demarcation between the roles of the general legal and the customary systems of law. It is clear that physical sanctions which are in breach of international human rights standards could not be recognised in the ACJA. Nevertheless, a limited recognition could allow communities to develop sanctions which are appropriate to the individual offender and to community conditions.

Recommendation 5. No community shall enact a by-law which permits physical sanctions which are in breach of international human rights standards, or of NT law.

The ACJA, therefore, should allow communities to enact by-laws relating to common assault: that is, those assaults which are currently dealt with automatically in the Court of Summary Jurisdiction. Communities should also have power to recognise certain customs within the by-laws, and also to impose certain customary punishments such as a period of banishment.

The ACJA should therefore list the following general classes, or heads of power, under which by-laws could be enacted³¹.

- (i) The appointment and powers of wardens to enforce the by-laws (see further 6.5 below);
- (ii) Regulation and control of traffic on community land including manner of driving, speed, parking and traffic routes;
- (iii) Prevention of damage to community lands and waterways, flora and fauna;

³¹ Fitzgerald above, pp 12-14.

- (iv) Prohibition, restriction and regulation of the possession, use and supply of alcohol, kava or other dangerous drugs as defined under the *Misuse of Drugs Act* (NT);
- (v) Prohibition of petrol sniffing, and the possession, sale or supply of petrol for the purposes of inhalation. Communities could also use by-law (ii) above to prohibit or restrict the use of petrol driven vehicles on community land³²;
- (vi) Maintenance of community order through the prohibition of offensive or indecent behaviour or language, and disorderly conduct;
- (vii) Possession and use of firearms and other weapons;
- (viii) Littering community lands;
- (ix) Theft, unlawful use of a motor vehicle and criminal damage, providing the damage or loss is not greater than \$20,000. Communities could be given the option of providing that repeat offenders be dealt with by the general courts: for example, a third and subsequent offence is to be dealt with by the Court of Summary Jurisdiction. In such a case penalties imposed by the community court would not count as prior convictions (see generally 6.7 below);
- (x) Common assault. The decision whether a particular incident should be considered a common or a more serious form of assault should, at first instance, be taken by the warden or police officer concerned, depending on the CJP negotiated in the relevant community. This decision is no different to that taken by police officers under the general law³³. In addition, there could be provision for a separate prohibition upon obstruction or assault of any person executing his/her duty under the by-laws;
- (xi) Attempting to breach a by-law, or being an accessory to a breach. The liability of accessories could be as set out in the Criminal Code (NT). Fitzgerald suggests that the liability of accessories could be extended to those who act as accessories to a breach either on or off community lands. This provision could catch 'grog runners'³⁴, who would need to be arrested or summonsed by police and reported to community authorities, since the power of wardens could not extend outside community boundaries;
- (xii) Control of dogs; and
- (xiii) Recognition of certain specified customs. These could include prohibition of trespass into, or misuse or desecration of sacred/significant areas, a prohibition on unauthorised cursing or sorcery, prohibition on failure to respect ceremonies. This list could be added to during consultation with communities. Note, however, that this does not amount to a general recognition of customary law. As noted above, no community need codify any aspect of its customary law in this way.

Recommendation 6. A community may enact by-laws relating to thefts of less than \$20,000, and to common assaults, and to

³² Fitzgerald above, p13.

³³ For a contrary view, see Fitzgerald, 12.

³⁴ Fitzgerald, p14.

certain other matters. It may also enact by-laws recognising certain specified, and negotiated, Aboriginal customary laws.

6.4 DUPLICATION OR INCONSISTENCY

By-laws passed by communities as part of their CJP may contain provisions which duplicate, or are even inconsistent with, existing Federal or NT legislation. Fitzgerald notes that by-laws may duplicate provisions of NT legislation such as the *Traffic Act*, *Summary Offences Act*, *Aboriginal Land Act*, *Liquor Act*, *Firearms Act* and the *Aboriginal Sacred Sites Act*³⁵.

There is nothing unusual about duplication or even inconsistency in the details of legislation. For example, the NT *Sacred Sites Act* 1978 and the *Aboriginal Land Act* 1980 contain provisions which in some respects duplicate or are inconsistent with, respectively, the *Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 and the *Aboriginal Land Rights (NT) Act* 1976. By-laws under the *Yulara Tourist Village Management Act* 1984 (NT) cover areas such as assault of a warden which are dealt with under existing NT legislation, and also provide for recognition of certain Aboriginal customary laws³⁶. Problems are likely to arise where there is no clear division of responsibility between various departments or officials, or where the effect of one provision explicitly or implicitly contradicts another.

It should be clear, firstly, that there is no question of the by-law making power under the ACJA being used to contradict the effect of existing NT legislation. No community, for example, would be able through the exercise of its by-law making power, to declare that theft is not theft or that family violence is not an assault. Rather, the by-law making power would enable communities to regulate certain instances of theft or assault at a community level. Communities would be able to provide procedures and penalties which are appropriate for the problems within that community. By this means communities would be able to deal with some of their own problems for themselves, and some of the social and financial cost to the general community of these problems would be avoided.

Secondly, it is particularly important in this area that a clear division of responsibility be negotiated between wardens or other responsible community members and police. It must be clear to all parties whether an offender will be proceeded against under the relevant community by-law, or under the general law. Communities will have different views about this issue, and the precise roles of police, wardens and other involved parties will need to be determined during negotiations of each CJP.

Nevertheless, the ACJA should set out some general principles governing the question of possible duplication or inconsistency.

Firstly, the ACJA should state that, unless otherwise provided in a CJP, any by-laws contained in a CJP for a community shall be presumed to be the law for that

³⁵ Fitzgerald above, p15.

³⁶ Fitzgerald above, p17.

community in the areas covered. The general law of the NT shall continue to apply in all areas not specifically dealt with in the by-laws for the community.

Recommendation 7. The ACJA shall state that, unless otherwise provided in a CJP, any by-laws contained in a CJP for a community shall be presumed to be the law for that community in the areas covered. However, the general law of the NT shall continue to apply in all areas not specifically dealt with in the by-laws.

Secondly, and notwithstanding the first general principle, no community shall enact a by-law which makes legal an act which would be illegal under the general law. However, a community may prescribe as punishment an act which might be illegal under the general law, within the limits to be discussed at 6.7 below. This provision is designed to prevent the possibility of communities being perceived as 'legalising' any offences, particularly theft or family violence.

Recommendation 8. Communities may enact by-laws which duplicate the effect of existing NT legislation, providing the matter is within the by-laws power. However, no community shall enact a by-law which makes legal an act which would be illegal under the general law.

Thirdly, and notwithstanding the first general principle, no sanction provided for in a by-law or a community shall exceed the sanction provided for that offence under the general law. This provision shall not, however, be construed as restricting the freedom of a community to apply a sanction of a different type to that provided for under the general law (eg banishment). See further discussion at 6.7 below.

Recommendation 9. No sanction provided for in a by-law for a community shall exceed the sanction provided for that offence under the general law. However, a community may provide for a sanction of a different type to that provided for an offence under the general law.

6.5 DUTIES AND POWERS OF WARDENS

The term 'wardens' is used generically, to identify those people within a community who have identified duties and powers under the CJP for that community. However, the duties and powers of 'wardens' will be very different in different communities. In some communities, the powers of wardens will be informal, being for example the carrying out of night patrols or participation in informal mediation. In other communities they will be formal (see paragraphs 5.3 above).

The question arises of the maximum range of the duties and powers of wardens under a CJP. Clearly the maximum range of offences over which a warden will have authority will be that set out in 6.3 above.

The next issue is the way in which wardens will be able to exercise those powers. In general, it is proposed that the maximum range of powers possessed by wardens should be broadly similar to those of police, with the major exception of the power of arrest, to be discussed below. Wardens may issue 'on the spot' penalties of particular offences (see discussion of penalties at 6.7 below). The offender may, by analogy with the 'on the spot' penalty in the general law, elect to have the matter dealt with by the community court. The range of penalties which may be issued in this manner would be determined by the community concerned in negotiation of its CJP. Alternatively, the offender could be issued with a 'summons' to appear before the community court. While this would need to be a written document, its exact form could be determined by the community in negotiation of its CJP.

The most important limitation on the exercise of powers by wardens is that wardens should have no power of arrest. There are a number of reasons for this. As Fitzgerald points out, the law of arrest and bail is complex and legal difficulties could arise with the exercise of arrest powers by wardens³⁷. As with any other group exercising authority, there is also the possibility of abuse of power. In addition, many communities do not have arrest facilities of any kind, let alone facilities of the standard recommended by the Royal Commission into Aboriginal Deaths in Custody. Extending the power of arrest would be contrary to a number of recommendations of the Royal Commission, including particularly the principle that imprisonment should be a sanction of last resort³⁸. It would also be contrary to one of the aims of the ACJA, that of reducing the social and financial cost of Aboriginal imprisonment. Finally, arrest and imprisonment is not a traditional sanction under Aboriginal customary laws, and it would be inappropriate to give communities the option of exercising this type of power.

Nevertheless, wardens must have effective powers to deal with disputes. This necessitates a very limited form of detention or arrest, an issue to be discussed in 6.5(a) below.

Wardens under the ACJA should possess the following maximum range of powers. These powers should be set out in the Act, and communities in negotiating their CJP may elect that some, or all, of these powers be exercised by their wardens. The powers are:

- identify the date and place of the alleged breach of the relevant by-law;
- identify the alleged offender;
- power to request name, and where appropriate address;
- issue and serve penalty notice ('on the spot fine') or summons upon alleged offender;
- confiscation of prohibited substances (eg alcohol, kava, dangerous drugs, petrol) and equipment (eg fishing nets, offensive weapons) from alleged

³⁷ Fitzgerald above, p22.

³⁸ Recommendation 92, Royal Commission into Aboriginal Deaths in Custody.

offenders³⁹. However, wardens should not have the power to confiscate motor vehicles since the exercise of this power may lead to conflict and the possibility of abuse⁴⁰; and

- power to prevent the repetition or continuation of an offence, and to do all things reasonably necessary to this purpose. This could include a power to gather evidence regarding a matter, and to report to police.

6.5.a "DOING ALL THINGS REASONABLY NECESSARY"

This power is designed to allow wardens to intervene effectively in violent situations, particularly family violence or violence where alcohol or other drugs are involved. Without this power the only step wardens would be able to take in such situations would be to issue the offender with a summons or penalty notice, a response which is often unlikely to defuse the situation. Wardens under this power would be able to intervene physically in a violent situation without the possibility that their reasonable actions would be construed as assault.

This section should note that, notwithstanding any other provision of the ACJA, sections 27 and 28 of the NT Criminal Code continue to apply to wardens in the reasonable exercise of their duties. Thus, wardens would be entitled to use reasonable force to defend themselves, or others, against attack. Of course, if wardens act aggressively or use excessive force, they may themselves be charged with assault in the community courts or under the general law.

The power of 'doing all things reasonably necessary' to this purpose should include the power, where necessary, to remove an alleged offender physically from the scene. This power should not be exercised as a de facto form of arrest. It is necessary for wardens to have this power in order that the aggression or hostility not simply resume as soon as the warden has left the scene. However, the power should be qualified by a requirement that an alleged offender be released as soon as reasonably possible, and that in no case should an alleged offender be left in a place where they might be exposed to danger or undue discomfort. This requirement is designed to prevent alleged offenders being deposited by wardens 'out bush'. A maximum time limit of, say, one hour should also be imposed upon detention of this kind.

Recommendation 10. Where a community provides for the empowerment of wardens as part of its CJP, the wardens may exercise certain powers as set out in the ACJA. Those powers shall not include the power of arrest, but may include a power to do 'all things reasonably necessary' to the exercise of their duties.

³⁹ These duties and powers are as recommended in Fitzgerald above, p23.

⁴⁰ Fitzgerald, p27.

6.5.b ROLES OF WARDENS AND POLICE

The ACJA should provide that, as a general rule, the primary responsibility for enforcing any by-laws passed by a community shall rest with the wardens. This is in accordance with one of the primary goals of the legislation, being to enable communities to take responsibility for and deal with some of their problems themselves. By-law schemes in other jurisdictions have failed where the local community were not involved in developing or operating the scheme.

However, this primary responsibility may be varied by agreement with the police and other interested parties during negotiation with a CJP. In some communities, lack of resources, kin conflicts or other problems may lead the community to seek the assistance of police in the daily enforcement of their by-laws⁴¹. In other communities, the agreement might be that police be available to enforce the by-laws in any situation which the wardens were unable to handle without police assistance.

Wardens should also, in general, oversee any orders made by a community court.

6.5.c TRAINING AND WORKING CONDITIONS OF WARDENS

As Fitzgerald points out, it is essential as a general rule that wardens be properly trained to carry out their duties and responsibilities on their community⁴². Wardens on different communities will, however, have different duties and powers. On some communities the duties of wardens might involve a great deal of liaison with police and other non-Aboriginal organisations. Consequently, the assistance and involvement of police and other government departments would be an important part of the training program. On others, wardens would have relatively little contact with non-Aboriginal organisations, and in such cases the primary responsibility for training would rest with the community.

The form and content of training given to wardens must in the first instance be determined by the relevant community in negotiation of its CJP.

The remuneration and working conditions of wardens should be appropriate to their level of responsibility⁴³. These issues would need to be resolved by negotiation, given that the level of responsibility of wardens would vary across different communities depending on the scope of their power. In general a comparison would need to be made between the level of responsibility of wardens and the responsibilities of police, Aboriginal Community Police Officers and Aboriginal Community Corrections Officers. It should be noted that cost savings could be made in some cases by combining the roles of wardens with those of Aboriginal Community Police Officers or Aboriginal Community Corrections Officers. On the other hand it is inevitable that the introduction of a CJP into a community would require a greater level of professionalism from wardens and this would require greater cost.

⁴¹ Fitzgerald above, p28.

⁴² Fitzgerald above, 23-24.

⁴³ Fitzgerald above, p24. Fitzgerald suggests that these conditions should approximate those of police aides.

The community council should have power to dismiss wardens. The ACJA should set out a broad ground of dismissal, that of unfitness to discharge duties or unsatisfactory performance. Communities may, if they wish, include within their by-laws other formal provisions governing circumstances in which wardens could be dismissed. These might include negligence or carelessness in the performance of duties, commission of an offence, or absence without good cause⁴⁴.

6.6 PROCEDURE/RIGHTS OF DEFENDANT/APPEAL

The procedure followed by a community court under the ACJA should be appropriate to the needs of the community and, as far as possible, consistent with customary law. The process needs to be flexible. It is inappropriate, therefore, to seek to impose upon communities a predetermined procedure such as that advocated in Larissa Behrendt's 'Elders' Council' proposal⁴⁵, or as followed in PNG's Village Courts (see 5.4 above). The Yirrkala Law Council proposal may be appropriate for some, but not all, communities. An outline of the operation of each of these schemes should, however, be included as a Schedule to the ACJA, for the reference of those communities which choose to establish some form of 'community court'.

However, the ACJA should establish certain fundamental principles which would govern the operation of any 'community court'. These should concern the rights of the defendant, the question of choice of court, and the question of appeal.

6.6.a THE RIGHTS OF THE DEFENDANT

The rights of a defendant in criminal proceedings include the right to be informed of the charge, the right to legal assistance, and the right to an interpreter⁴⁶. In addition, more general requirements of natural justice recognised at common law include the right to silence, the right of a defendant not to be convicted in his or her absence, and the right to be heard.

There is no evidence that Aboriginal customary laws respect these rights to any lesser extent than they are already respected in the NT Courts. Nevertheless, the ACJA should contain a provision confirming that 'community courts' exercising jurisdiction under the Act must respect the abovementioned rights of a defendant to the same extent as they are already respected under general NT law. The Act should not be any more specific than this regarding the precise manner in which these rights are to be respected, this being a matter best left to each community concerned. Any dispute over whether these rights had been respected could be dealt with by way of appeal (see 6.6.c below).

Recommendation 11. Where a community chooses to establish a 'community court' as part of its CJP, that court shall

⁴⁴ Fitzgerald above, p25.

⁴⁵ Larissa Behrendt "Alternate Dispute Resolution" Federation Press 1995, especially pp 80-87.

⁴⁶ Martin Flynn "Outline of Draft Report", p3.

respect the rights of a defendant in criminal proceedings to the same extent that they are already respected in NT law.

6.6.b CHOICE OF COURT

There is no reason on principle why defendants should be presented with a choice between having a charge against them dealt with by a community court or by the Court of Summary Jurisdiction. This would lead to an undesirable level of uncertainty within the community about which of "two laws" would be applied and also place the Court of Summary Jurisdiction in the difficult position of attempting to apply community law. The interests of certainty and the avoidance of the "two laws" situation suggest that, where a community has established a community court to deal with offences under its by-laws, the community court should ordinarily deal with all such offences at first instance.

There is, of course, no obligation upon a community to establish a 'community court' at all. Negotiations with police may lead to an agreement that police enforce some or all of the by-laws passed. Alternatively, a community may appoint wardens to enforce by-laws, but provide that all not guilty pleas and other disputes be heard in the general courts. Where a community passes by-laws containing a large customary law element - for example prohibition on disrespectful language or failing to respect sacred sites - it would usually be inappropriate for the general courts to attempt to apply them. A community which wished to pass such by-laws would need to consider establishing a community court during negotiation of its CJP.

Recommendation 12. Where a community chooses to establish a 'community court' as part of its CJP, that court shall ordinarily deal with all offences under the community by-laws at first instance.

6.6.c APPEAL RIGHTS

The ACJA should provide for an appeal from a community court to the Court of Summary Jurisdiction. The appeal right should be broad, and similar to that established under section 163 of the *Justices Act* (NT). Appeal should be possible on a question of law or fact, or mixed law and fact, but there should be no appeal against an order dismissing a complaint.

It might be argued that an appeal right places a community court in a subordinate position, or that it has the potential to undermine the authority of the community court. However, it is expected that an appeal right would be relatively rarely used, except perhaps by non-Aboriginal people who appear as defendants. A community would have the ability to include as part of its CJP a provision that lawyers not be permitted to appear before a community court. Provided that the community court is appropriate to the needs of the community concerned, there would be little incentive for either party to appeal from a responsive Local Court to an unfamiliar system which might impose a greater penalty. In addition, it would be expected that there

would be strong social pressure not to appeal. An appeal right is, nevertheless, an important safeguard against abuse or breakdown of the system within an individual community.

The Court of Summary Jurisdiction would need to determine an appeal by reference to the by-laws of the community concerned. In many cases this would raise no particular difficulty, the question being simply whether a particular by-law had or had not been breached. Where the court had to consider a case arising under a by-law which contained a strong customary element, the question would be whether the offence had been committed by reference to the laws and customs of the community concerned. The court would need to determine this issue by calling evidence from all relevant parties, including where necessary the community elders. The Court of Summary Jurisdiction would, of course, follow its own rules of evidence and procedure in deciding this question. The *Evidence Act* (NT) may, however, need to be amended in accordance with the suggestion of the ALRC, in order to provide for the admissibility of evidence of customary law⁴⁷.

Similarly, the Court of Summary Jurisdiction would need to consider an appeal against sentence by reference to the sentencing standards of the community concerned. In doing so it could call evidence from relevant community members. It could also consider general sentencing law, bearing in mind that no sentence imposed by a community court should be harsher than that which would be imposed for the same or a similar offence under the general law.

The powers of the Court of Summary Jurisdiction in hearing an appeal under the ACJA should be similar to those of the Supreme Court in hearing an appeal from the Court of Summary Jurisdiction, set out in section 177 *Justices Act*. In particular, note that the court should have power to dismiss an appeal if convinced that no substantial miscarriage of justice has occurred.

Recommendation 13. The ACJA should provide for an appeal from a community court to the Court of Summary Jurisdiction. The right of appeal, and the powers of the Court of Summary Jurisdiction upon appeal, shall be similar to the powers contained under sections 162-177 of the *Justices Act* (NT).

6.7 RANGE OF PENALTIES

The ACJA should contain the following maximum range of penalties, from which communities may select in determining the penalties which might be imposed by a community court:

- Fines, up to a maximum of, say, \$750 for any single offence⁴⁸;

⁴⁷ See Fitzgerald p44, and vol 1 AUSTRALIAN LAW REFORM COMMISSION Report, para 642, and the discussion generally at paras 627-642.

⁴⁸ The maximum suggested by Fitzgerald: see above p27.

- Community Work Orders. As noted by Fitzgerald, these could be similar to the Community Service Orders currently imposed by the courts⁴⁹, but the precise nature of any work done would be determined by the community court. The maximum could be 60 hours for any single offence⁵⁰;
- Restitution of property stolen or damaged;
- Banishment to an outstation, or to a substance abuse program or to some other appropriate program for a specified period;
- Imposition of curfews;
- A power to order offenders to attend ceremonies;
- Home detention. Fitzgerald suggests a maximum of 15 days for any single offence⁵¹; and
- Confiscation of prohibited substances, prohibited weapons and other prohibited equipment except motor cars⁵².

Community courts should not have the option of imposing a sentence of imprisonment. If communities wish to have community members imprisoned for breaches of by-laws, they will need to negotiate this issue with a view to including a clear statement in their CJP that particular by-laws breaches are to be dealt with by police and by the general courts.

Consideration should also be given to allowing community courts to impose limited physical sanctions in certain circumstances. It should be noted that human rights standards do not necessarily preclude the use of controlled physical sanctions in accordance with customary law⁵³. Current NT law allows consent as a defence to common assault. Thus, provided that the sanction applied was consented to and did not go beyond a common assault, it would not be in breach of section 188 of the NT Criminal Code. In addition, it is arguable that communities will continue to use physical sanctions in any case, and that possible legal problems are best avoided by clarifying, as far as possible, the extent of the acceptable legal use of such sanctions.

Nevertheless, it is arguable that legitimising the use of physical sanctions is too far out of step with current NT and Australian public opinion. It is not recommended at this stage. Any monies raised would remain within the community for funding of the CJP.

Recommendation 14. Community courts shall not have the option of imposing a sentence of imprisonment upon convicted offenders, nor shall they have the power to impose physical sanctions upon such offenders.

⁴⁹ Fitzgerald, p26.

⁵⁰ Fitzgerald, p27.

⁵¹ Fitzgerald, p27.

⁵² Fitzgerald, p26.

⁵³ AUSTRALIAN LAW REFORM COMMISSION Report on Recognition of Customary Law 1986, para 184ff. See also Martin Flynn "Outline of Draft Report", p3.

6.7.a FAILURE TO OBSERVE SANCTIONS

As Fitzgerald points out, failure to observe penalties is a constant problem within the criminal justice system⁵⁴. While failure to observe a penalty should not of itself be an offence, there should be some incentive for obedience, which may take the form of tougher penalties for breach.

It is expected that CJPs which are properly negotiated and responsive to the needs of the community concerned would, in general, be respected by community members. There should frequently be strong social pressure upon those who fail to abide by penalties imposed by a community court. However, this may not always be the case. Communities which face a problem of disobedience will need to consider their options during negotiations of a CJP. Thus, as a matter of course penalties imposed by a community court could include a specified provision to the effect that offenders who fail to respect the by-laws sanctions should be referred to the Court Of Summary Jurisdiction for sentencing⁵⁵. The Court Of Summary Jurisdiction would have the power to impose a sentence of imprisonment in an appropriate case. It should also have the power to impose a garnishee order, enabling financial penalties to be enforced through a deduction from wages or other income sources.

6.7.b PRIOR CONVICTIONS

As noted above, the ACJA should provide that convictions or penalties imposed by a community court should not count as prior convictions for the purpose of sentencing in the Court of Summary Jurisdiction or the Supreme Court. If a defendant appealed and the matter was considered by the general courts, however, a conviction could be recorded. This would provide a further incentive for communities to resolve disputes without recourse to the general law.

The community court itself should retain an unfettered discretion concerning the effect, if any, of prior convictions upon sentencing. The community court and the council would, however, need to keep a formal record of offenders charged, convictions recorded and penalties imposed. This would be necessary in case of appeal. There would be no need, however, for proceedings of a community court to be recorded or transcribed, since an appeal before the Court of Summary Jurisdiction would be *de novo*, or by way of a complete rehearing.

Recommendation 15. Convictions or penalties imposed by a community court should not count as prior convictions for the purpose of sentencing in the Court of Summary Jurisdiction or in the Supreme Court.

⁵⁴ Fitzgerald, p28.

⁵⁵ Fitzgerald, p28-29. See generally discussion of sentencing options for communities at Fitzgerald, p29. These options could be included in negotiation of a CJP.

7. IMPLEMENTATION PLAN

Within the limitations discussed in Part 6 above, each Aboriginal community should have the freedom, under the ACJA, to develop its own Community Justice Plan (CJP). A community might therefore choose to develop a mediation scheme, a court advice or wardens scheme, or a community court scheme, or some combination of the above. The primary necessity is that each CJP should reflect, and be responsive to, the needs of the community concerned.

Clearly each community needs assistance in developing its CJP. In addition each plan must be subject to negotiation with government, and with all interested parties. A CJP Development Unit (the Community Justice Plan Development Unit) should be established to discuss and negotiate a CJP with each Aboriginal community which wishes to take part in the scheme.

7.1 THE COMMUNITY JUSTICE PLAN DEVELOPMENT UNIT

The Community Justice Plan Development Unit should consist of representatives of the various government departments and agencies interested in the CJP. These should include the Office of Aboriginal Development, Territory Health Services, the NT Attorney-General's Department, the NT Police, NT Correctional Services, the Liquor Commission and the Department of Housing and Local Government⁵⁶. It is most important that the combined expertise of the Unit should include knowledge of community development principles, laws of the NT and Australia, of the processes and procedures of the police, courts and the legal system, and knowledge of the language most commonly used in the relevant community during the detailed negotiation stage⁵⁷. The Unit should be co-ordinated by the Attorney-General's Department.

The task of the Unit would be to:

- i. Identify communities which may be interested in developing a CJP;
- ii Discussion and negotiation of a CJP with the relevant community (see 7.2 below);
- iii Identification of the resources required to establish and maintain the CJP desired by the relevant community. This would include an identification of costs for training, education, as well as costs for monitoring and reporting back on the progress of the CJP. It would also include identification of the roles and responsibilities of government agencies in the implementation process. This information would be contained in a feasibility report to government on the implementation of the proposed scheme⁵⁸; and

⁵⁶ See Fitzgerald at pp 37-41.

⁵⁷ Steve Hatton MLA, "The Recognition of Aboriginal Customary Law: A Concept Proposal for the NT" March 1996, p19.

⁵⁸ Seema Srivastava "Draft Final Report on ADR in Aboriginal Communities" August 1997, para4.5.

- iv. Assuming that the proposed CJP is approved by government (see 7.3 below), the Unit should facilitate the establishment of the CJP within the community, and establish an appropriate mechanism for monitoring and reporting back on progress.

7.2 NEGOTIATION OF A CJP

Negotiation of a CJP with each participating community is likely to require detailed discussion and a reasonable period of time. Negotiation of a CJP will need to include discussion of the following issues:

- i. Educating communities on the purpose of the ACJA, and where necessary the value and purpose of a CJP;
- ii. Clarifying community boundaries;
- iii. Determining the areas in which the current community justice system is seen as inadequate to meet community needs: ie those matters which need most urgently to be addressed in a CJP;
- iv. Determining those responsible community members who might participate in a CJP for that community, and detailed discussion of what their roles and responsibilities might be. For example, community leaders might participate as advisers to the courts, consultants with police, as community wardens, or as elders in a community court. Where a community court or 'Elders Council' was established, the method of appointment of members of the community court would need to be considered⁵⁹;
- v. Development of protocols, or co-operative agreements, between government agencies and departments and the community. Again this requires detailed discussion concerning the roles and responsibilities to be adopted by each body. For example, agreement might need to be reached concerning the respective roles of police and community wardens, or concerning appropriate offences to be diverted to a community mediation scheme;
- vi. Where a community wishes to pass by-laws under the ACJA, clarification of the areas over which the community wishes to exercise jurisdiction. This will include clarification of community views concerning the extent of community control, the respective roles of magistrates and community courts (where established), how to deal with possible inconsistency, and ascertaining community views concerning the rights of the defendant, court procedure, penalties and appeal;
- vii. Establish training needs of wardens, mediators, administrators, clerks, council and any other relevant participants in the CJP; and

⁵⁹ See Larissa Behrendt "Alternate Dispute Resolution" above, p80. Normally the members of the community courts should be elected by the community council.

- viii. Discussion and development of a monitoring procedure⁶⁰. This would include ascertaining the level of continuing community support for the CJP scheme.

A plain English booklet setting out the scope of the by-law making power and the procedure for obtaining approval of by-laws would help facilitate the negotiation process.

Recommendation 16. A plain English version of the by-law making power and the procedure for obtaining approval for a CJP should be made available to communities.

7.3 APPROVAL OF A CJP

The time taken to negotiate, draft, reconsider and approve a CJP for a community is expected to be considerable: Fitzgerald predicts a 'lead time' of about 18 months⁶¹.

Once the detailed views of the community concerning its desired CJP had been ascertained, the Community Justice Plan Development Unit would then be required to draft the proposed plan for the consideration of Government. Where necessary, this would include drafting of proposed by-laws.

When a detailed plan had been drafted there would need to be a second period of consultation with the community, to ensure that the plan as drafted remains consistent with community views. At the same time, there would need to be consultation and negotiation of the draft plan with Government.

Where Government wished to alter elements of the proposed CJP, there would need to be further consultation with the community to ensure that the alteration was acceptable to the community.

The formal process of approval of a proposed CJP would be by Parliament. A CJP, or any part of a CJP, would be subject to disallowance within a fixed period of sitting days by the Legislative Assembly. This procedure would be consistent with the procedure currently established under the *Interpretation Act* (NT).

The procedure to be followed by the Assembly would clearly be a matter for the Assembly but it may consider it desirable to establish a Standing Committee that could consider each CJP in detail and bring reports to the Assembly within the period for disallowance⁶².

Recommendation 17. The Committee recommends that a Community Justice Plan Implementation Unit be established to oversee

⁶⁰ See Fitzgerald, pp 45-6.

⁶¹ Fitzgerald, p37.

⁶² Steve Hatton "The Recognition of Aboriginal Customary Law" above, p.20.

negotiation and approval of a CJP for each community which wishes to establish such a plan. Each proposed CJP would be subject to the approval of Parliament, which could disallow all or any part of a CJP.

8 WHAT ARE THE ESTIMATED COSTS OF THE REFORM?

It is difficult to provide an exact estimate of the costs of this reform. The proposal will involve either the creation of a new position of Community Justice Plan Development Unit Co-ordinator, or combining the duties of this position with an existing legal officer.

In addition, the commitment of time and resources by police, the Office of Aboriginal Development and other government departments and agencies will be necessary. It is not considered necessary at this stage that a person from each of these agencies be assigned full-time to the Community Justice Plan Development Unit. However, a substantial proportion of the time of at least one experienced officer from each agency would need to be devoted to the Unit, particularly during the period of intensive negotiation of a CJP with communities.

There would be travel and accommodation costs incurred during the negotiation stage. It would be necessary for members of the Unit to remain on a community for some days during initial negotiation of a CJP, and at least one further visit would be required. The cost of accommodation would vary depending on availability of existing accommodation on each community.

It is considered that the most appropriate place to locate a new Community Justice Plan Development Unit Co-ordinator would be within the Attorney-General's Department. The Co-ordinator would need to be familiar with the legal issues which will arise in drafting of a CJP, and with the requirements of negotiation on Aboriginal communities. It is important at the same time to ensure that the Unit maintains strong links with, and representation from, other government departments, particularly the police.

There would also be costs incurred in employing wardens to enforce by-laws passed under a CJP. It is expected that these costs would be offset by the reduced costs of stationing police or other law enforcement officers on the relevant community, by monies collected through fines, as well as with reduced costs associated with crime.

8.1 COST EFFECTIVENESS

Again, cost effectiveness is difficult to assess. The cost of establishing a Community Justice Plan Development Unit, and of negotiation with Aboriginal communities, must be balanced against the current cost of the community justices system on Aboriginal communities.

The cost of Aboriginal offending is clearly the major cost of operating the criminal justice system in the NT. A major proportion of the budget of the police, Attorney-

General's Department, NT Correctional Services, Territory Health Services and Local Government is related to Aboriginal offending. Aboriginal people comprise, at a given time, between 75% and 80% of the prison population in the NT.

The major aim of the ACJA is ultimately to prevent further offending by Aboriginal people living on communities. This will potentially save considerable amounts of police time, legal aid expenditure, court costs and costs to NT Correctional Services in housing a prisoner.

Another aim of the ACJA is to enable Aboriginal communities to deal with their own problems themselves. If communities are successful in dealing with their own problems, this will mean less 'overflow' of community problems into urban centres such as Darwin and Alice Springs. This will further reduce crime and imprisonment rates, and cut the costs of operating the criminal justice system. In addition it may result in cost savings in health and housing, and potentially in reduction of roadworks and maintenance costs through the performance of work by offenders for the community⁶³.

It is considered that in the long term the revenue raised and money saved through the scheme will offset costs of establishing the scheme. It should be noted in addition that in many communities such as Ali Curung, Port Keats and the Jawoyn in Katherine, implementation of a CJP has already started. On such communities the costs of establishing a CJP would be low, since establishment would largely be a matter of giving legislative approval to processes which are already in existence.

8.1 SOURCES OF FUNDING

Traditionally, costs associated with the conduct of the criminal justice system have been funded from consolidated revenue. It is recommended that funding be from consolidated revenue.

APPENDIX A Terms of Reference.

APPENDIX B Fitzgerald report.

⁶³ Fitzgerald above, p49.

TERMS OF REFERENCE

ALTERNATIVE DISPUTE RESOLUTION

On 24 June 1991, the Honourable Daryl William Manzie, Attorney-General, referred to the Northern Territory Law Reform Committee for examination and report the following questions:

1. Is there a need to introduce reforms providing for the use of ADR in the Northern Territory:
 - in relation to civil issues;
 - in relation to criminal issues;
 - both?
2. If so, what are the reforms?
3. If so, what will the reforms require as regards -
 - infrastructure;
 - personnel;
 - training?
4. If so, what will be the estimated cost of these reforms?
5. If so, what are possible sources of funding for these reforms having regard to the sections of the community who will have the benefit of the reforms?

In considering these Terms of Reference and when making its recommendations, the Committee is asked to bear in mind the role of these reforms in Aboriginal communities in the Northern Territory and also the Territory's isolation and distance problems.

The Committee is also asked to bear in mind that the Northern Territory Government, in considering the Committee's recommendations, will have regard to the costs of implementation of any recommendations of the Committee and whether these costs will effectively be justified in meeting the needs of all citizens of the Northern Territory.

**ALTERNATIVE DISPUTE
RESOLUTION
IN
ABORIGINAL COMMUNITIES**

by Tony Fitzgerald
27 March 1997

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SUMMARY

There has been widespread recognition for many years, in a variety of commentaries culminating in the R.C.I.A.D.I.C Final Reports, that the Australian Legal System operates in an alien, unfair and sometimes discriminating manner against Indigenous Australians.

The inadequacies of the existing legal system have provided the stimulus to investigate alternative dispute resolution processes within Aboriginal communities in the Northern Territory.

The object of the investigation is to devise a dispute resolution process which is developed in conjunction with Aboriginal communities using local knowledge and resources, which operates in conjunction with the general law, and which is designed to respond to the particular needs of the various Aboriginal communities that elect to participate in the process.

The recommended process, which accords with the above objectives, is a comprehensive mosaic of complementary community justice initiatives called the "Community Justice Plan (CJP)". The centrepiece, or legislative lynch-pin, of the CJP is the Aboriginal Community Justice Act -- which is itself but one of the measures proposed in the overall CJP.

This report recognizes the need for exhaustive consultation and negotiation with Aboriginal communities prior to the introduction of any CJP initiatives, and also that the CJP will fail unless adequate resourcing and support for CJP initiatives is provided by government.

In spite of the massive size of the (recommended) project, the Law Reform Committee is confident of the success of the CJP because:

- of its innovative coordinated approach
- it relies on consultation with target groups (Aboriginal communities) from the very outset.
- it is the product of choice by participating Aboriginal communities.

1. INTRODUCTION

1.1 *Terms of reference*

Recognising the need to "improve" ¹ "the legal system" ² as it impacts upon Indigenous Australians in the Northern Territory, this report will discuss:

- dispute resolution options that are alternatives to existing legal mechanisms in Aboriginal communities, and the advantages and disadvantages of same.
- recommended option(s) for the Northern Territory.
- an implementation plan for recommended option(s) including any necessary legislation...

The proposals contained herein are not designed to apply uniformly throughout the NT, indeed the Law Reform Committee accepts that an improvement to the "system" will not come unless the community justice priorities of each Aboriginal Community in the NT are recognised.

Whilst it is unlikely that all of the proposals herein will be appropriate for all Aboriginal Communities - because no one scheme can meet the variety of special needs of (say) town campers, out station dwellers, isolated settlement dwellers etc. - it is likely that the proposals in general will be more appropriate for "remote" communities (i.e. communities situated outside the urban areas of Darwin, Katherine, Alice Springs etc).

The suitability of the proposal to remote regions is mainly due to the virtual absence of any conventional or alternative community justice or dispute resolution measures in those regions.

¹ i.e. Through encouragement of Indigenous Australian participation in the legal system by making it more relevant to needs.

² i.e. Not only the courts, but also the various public service departments and other institutions (including police) which administer the law.

Arguably though there is a place for the implementation of alternative proposals in the urban town camp communities managed by the Tangentyere, Julalikari and Kalano organizations (at Alice Springs, Tennant Creek and Katherine respectively) because the negative impact of the mainstream legal system in those Aboriginal communities is as pronounced as that in remote communities.

On the other hand the implementation of new proposals in town camps may cause difficulties such as a duplication of existing police powers and a jurisdictional problem - namely, is an Aboriginal town camper who offends in Todd Street, Alice Springs subject to the new proposals or the general law?

The answer to the question of which proposals are appropriate for various regions of the Northern Territory may be revealed during the process of consultation and negotiation with Aboriginal communities which this report recommends must proceed any changes to the existing system.

1.2 *Methodology*

Review of materials.

Interviews - Judiciary, police, public servants -(Northern Territory, Western Australia, Queensland).³

Discussion at several meetings of the LRC.

1.3 *History of reference*

On 24 June 1991 the Attorney-General referred the issue of "Alternative Dispute Resolution" ("ADR") to the Law Reform Committee of the Northern Territory for examination and report. A Law Reform Committee sub-committee was established to

³Informants are noted in the List of References at p.52

consider "Disputes in Aboriginal Communities".

An ADR sub-committee member, Martin Flynn, prepared a discussion paper in 1992 ("The Flynn Paper") which was widely distributed.

Responses to the Flynn Paper indicated that Aboriginal communities perceived a need for dispute resolution processes within Aboriginal communities in lieu of existing legal mechanisms.

At all stages of the Reference it has been recognised that alternative mechanisms or processes shall not permit or condone the infringement of International Human Rights Standards⁴, namely:

.... the inherent right to life;

.... the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;

.... the right to be treated equally before courts and tribunals;

.... the right of a defendant to a criminal charge to certain minimum guarantees, i.e. to be informed promptly of the charge against him, to be tried in his presence, to defend himself in person, to have legal assistance assigned to him, to have the free assistance of an interpreter if required, and not to be compelled to testify against himself or to confess guilt;

.... the right not to be tried or punished twice for the same offence;

.... the right to equality before the law and to the equal protection of the law;

⁴ As contained in the International Covenant on Civil and Political Rights 1966, the essential elements of which may be found in Volume 1 of Report No. 31 of the Australian Law Reform Commission ("ALRC") "The Recognition of Aboriginal Customary Law" at paras 179ff.

.... the right of ethnic minorities to enjoy their own culture, practice their own religion and use their own language;

2. ALTERNATIVE SUMMARY JUSTICE PROCESSES

The criminal justice system and especially the mainstream court system has failed to significantly impact upon continuing unacceptably high levels of conflict and violence in Aboriginal Communities and upon Aboriginal over-representation in that criminal justice system.

A dominant theme in the Final Recommendations of the Royal Commission Into Aboriginal Deaths In Custody³ is that the solution to social problems in Aboriginal communities lies in empowering Aboriginal people, through adequate resourcing and/or proper training and/or appropriate service delivery, to actively participate in the recovery process themselves.

The dominant theme in the alternative summary justice processes discussed below is the requirement for involvement of Aboriginal people in those processes. Self control is an important part of community development.

2.1 *Mediation*

Since 1991 the Alternative Dispute Resolution Division ("ADRD") of Queensland's Department of Justice, through its Aboriginal Mediation Project, has been developing mediation initiatives for Aboriginal communities.

The process of mediation is one by which the parties involved, with the assistance of a neutral mediator, isolate issues in dispute and then develop and consider options to resolve those issues. The mediator does not advise the parties, but facilitates the resolution process.

³ See generally RCIADIC "National Report Overview and Recommendations" by Commissioner E Johnson QC, Australian Government Publishing Service, Canberra 1991, and particularly RCIADIC "National Report Volume 1 AGPS 1991 at pages 22-23.

The advantage of mediation is that it gives Aboriginal people the opportunity to find their own solutions to conflict and dispute in their communities.

In Queensland mediation has been used in three ways.⁶

Firstly, alleged offenders are referred to mediation by police instead of being charged.

According to Pringle⁷ Queensland Police have been guarded in their response to the initiative, it is infrequently used, and "Aboriginal people have very little participation in it". The latter statement presumably means that Aborigines are not involved in the establishment of the mediation process.

Whilst this measure may be a useful police strategy, it relies exclusively on police initiative and does not involve Aboriginal communities in the process. As such it does not fit the alternative summary justice model as defined above in paragraph 2. In any event, the measure is restricted to minor criminal acts allegedly committed by first offenders - so that the target group is too narrow to have any significant impact.

Secondly, mediation is used to bring together victims and minor offenders, after conviction and before sentencing, to work with a mediator towards determining mutually acceptable reparation for the victim. The court may take the mediated outcome into account on sentence.

Even if mediation is only used as a means of diverting Aboriginal defendants from the criminal justice system and/or possible detention⁸, in the ADRD model described by Pringle⁹ its impact

⁶According to Pringle, Karen L in her article "Aboriginal Mediation: One Step Towards Re-empowerment" ADR Journal, November 1996, Page 253

⁷ ibid page 256

⁸ i.e. The offender is "diverted" by the court to victim/offender mediation after entering a plea of guilty. Depending on the outcome of the mediation, the offender may be dealt with by way of bond with or without conviction recorded.

⁹ Op. cit. pp 253-270.

is limited because only minor offences are targeted. Indeed Pringle herself acknowledges that mediation is but one of a "set of interlocking strategies" ¹⁰ aimed at dispute resolution in Aboriginal communities.

Thirdly, mediation has been used on an ad hoc basis to attempt to resolve major intra-community disputes.¹¹ The ad hoc mediations cited by Pringle ended successfully, but external (i.e. external to the community) ADRD mediators were used and the impression created by Pringle's article is that Aboriginal communities have availed themselves of this process only occasionally since 1991.

The third option appears to have had as little lasting impact as the first two options, and has proceeded (presumably for reasons of kin conflict and lack of training) without local mediators - which compromises the empowering effect of the exercise.

It is apparent that the ADRD model, which is a totally foreign concept to Aboriginal communities, requires a major allocation of resources - namely resources to enable consultation, training of external and internal mediators in each community, follow-up assistance to trainees and the community in general, the establishment and development of dispute resolution co-ordination bodies in the communities, and the development of dispute resolution management systems.

Whilst mediation may be an occasionally successful and useful community justice option, its potential as an alternative summary justice measure appears to be limited because of the relatively few problem areas amenable to its application. The devotion of substantial resources to a program which appears to have little impact on Aboriginal communities cannot be justified.

2.2 *Elders Council*

The next Alternative Summary Justice option is the creation of a formal Elders Council to preside

¹⁰ Ibid p 256.

¹¹ i.e. Where an inter-family dispute has escalated so as to involve a significant proportion of the whole community.

over community disputes and over breaches of community laws.

It has been suggested that a largely autonomous Council of Elders be constituted in each community as a substitute for Magistrates Courts.

2.2.1 *Concept*

According to the literature, Aborigines traditionally regulated themselves and resolved disputes through the involvement of elders exercising their traditional authority. The notion then is by no means a novel one - except the model suggested and described below, which is an adaptation of the ideas of Behrendt, suggests the formalization of a currently existing or pre-existing informal process.¹²

2.2.2 *Characteristics*

- Comprised of particularly respected male and female elders.
 - Council membership is not dependant on training or election - but by community respect which is derived from members' life experience, knowledge of traditional customs, interest in the process and the community's welfare.
 - Elders Council controls/facilitates the process.
 - Formally convened at regular intervals.
- Public forum - outdoors or community hall? Note that Land claims are held outdoors: the proximity to the community and openness of the Elders Council forum may strengthen the process.

¹² Behrendt, Larissa "Aboriginal Dispute Resolution" Federation Press 1995, especially Chapter 6.

2.2.3 *Procedure*

- Elders elaborate upon issues/allegations.
- Statement of aggrieved party (which may include family).
- Respondent replies.
- Responses by interested community observers - community forum.
- Response by others affected by issue.
- Elders question the parties - definition of boundaries of dispute.
- Discussion of settlements/compromises/determinations.
- Statement of law and findings by Elders.
- Elders pronounce verdict and, if applicable, invoke sanctions.

2.2.4 *Comments and Criticisms*

It is likely that an "alternative summary justice process" such as an Elders Council will meet with limited success because:

- Strength of tradition varies from community to community. In some places traditional law has not kept pace with modern institutions such as cars, grog, pensions, supermarkets, houses etc. and is ineffective in dispute resolution involving "modern" concepts; accordingly Elders have only limited powers.

In other places, tradition is strong.

If the impact of tradition varies from community to community, then the value of the Elders Council as a universal summary justice process is diminished.

An Elders Council is not a traditional structure, would have little impact, and would therefore become a largely irrelevant externally imposed justice initiative. This shortcoming may be especially relevant for juvenile offenders whose respect for traditional elders is on the wane.

According to Pringle, Behrendt¹³ and Yarmirr¹⁴ Elders already mediate in "traditional" disputes using traditional law principles; so, why interfere with this (seemingly effective) informal process by creating a formal structure?

Elements in mainstream society may argue that a Community Court or Elders Council breaches the principle of "equality of treatment before the law for all citizens" on the basis that Indigenous Australians in remote communities are ruled by a different system to the rest of Australia. As the Australian Law Reform Commission points out¹⁵, the argument is unsustainable where a law is designed to advance the interests of an under-privileged minority. However, the potential controversy is perhaps best avoided.

An Elders Council is inevitably compromised by kin conflict problems.

Restricting an Elders Council to those Aborigines living in remote communities may discriminate unfairly against urban Aborigines.

¹³Pringle op. cit. and Behrendt op. cit.

¹⁴ Yarmirr, Mary - Minjilang (Croker Island) President; discussion at Minjilang on 22 November 1996.

¹⁵"The Recognition of Aboriginal Customary Laws" - ALRC Report No. 31, Volume 1, Chapter 9 at pp. 98-9, 108 and 123-4.

2.2.5 *Jurisdiction*

This aspect has not been analysed or discussed in any depth because the notion of Elder's Councils has been dismissed as unworkable.

2.3 *Community Justice By-Laws*

2.3.1 *Outline*

This proposal provides individual Aboriginal communities with a discretionary power to enact by-laws for the regulation of various "community justice" matters which are of concern to them.

The by-law proposal submitted for consideration is an adaptation of similar proposals introduced by legislation in Western Australia and Queensland¹⁶. The interstate proposals have met with limited success for a variety of reasons discussed below.¹⁷

Broadly, it is envisaged that the observance of Northern Territory community justice by-laws will be enforced through the issuing upon alleged offenders of "on-the-spot" penalty notices by local wardens or by-laws officers. Offenders shall elect to abide by locally imposed penalties or have the matter determined in a Court of Summary Jurisdiction. A detailed analysis of the proposal follows:

2.3.2 *Need for Legislative Framework?*

As the proposal contemplates investing Aboriginal communities with (previously unavailable) power to enact by-laws a legislative framework is required. First, it is necessary to determine whether the Northern Territory legislation which currently controls Local Councils and

¹⁶ Aboriginal Communities Act 1979 (WA), Community Services (Aborigines) Act 1984 (Old).

¹⁷ *Infra* para 2.4.

Community Government Schemes (CGS) is an appropriate vehicle for the regulation of community justice by-laws.

2.3.2.1 *Local Government Act (NT) ("LGA")*

The LGA is the vehicle by which local councils enact their own by-laws within their own declared jurisdictions. However, as the by-law making power contemplated for Aboriginal communities extends way beyond those powers presently enjoyed by Local Councils, it may be inappropriate to encapsulate community justice by-laws within the already existing provisions of the LGA.

2.3.2.2 *Community Government Schemes ("CGS")*

CGS are dealt with under Part 5 of the LGA. A Community Government "Council" may enact "provisions"¹⁸, in the nature of by-laws, which are registered under the LGA as part of the CGS. Community government legislation will not accommodate community justice by-laws because:

- (i) the proposed scope of community justice by-laws extends beyond that of CGS.
- (ii) many Aboriginal communities have elected not to bring themselves within the CGS.
- (iii) CGS may not be recognised by Aboriginal communities as having a legitimate role in community justice.

2.3.3 *Proposed Novel Legislation*

Given that the community justice by-law proposal is legislatively unique, separate legislation is required.

Let us call the legislation the Aboriginal Community Justice Act ("ACJA"). It should be specifically enacted to enable Aboriginal communities, to whom the act applies, to make a range of by-laws unique to community lands within a particular region.

¹⁸ Section 97(2) LGA.

2.3.4 Scope of By-Laws

By-laws within a community shall be the product of consultation with that community. Hopefully this will result in the creation of by laws which are both workable and reflect community needs.

In order to as far as possible ensure ease of application and simplicity of operation of the by-laws, limits may need to be placed upon the powers of by-laws enforcement officers (or "wardens").¹⁹

Similarly, the range of offences under the by-laws may need to be limited in the interests of simplicity. For instance by-laws proscribing theft and assault should be avoided because under the NT Criminal Code both offences are comprised of many categories which depend on the facts in issue. Wardens would be required to continually exercise discretion in deciding under which of the various categories of these offences to prosecute and/or penalize.²⁰ Theft and assault should continue to be dealt with by police.

2.3.4.1 Generic Heads of Power

ACJA should list the general classes (or heads of power) under which by-laws may be promulgated by communities so that the extent of community power is certain. Without wishing to limit or restrict heads of power in any way (because their ultimate construction will depend upon consultation with the communities), a suggested format is as follows:

"A community may enact by-laws relating to

- (i) The appointment and empowerment to Wardens to enforce the by-laws.
- (ii) Admission of persons, vehicles, animals to community lands i.e. a permit system.

*conflict with
ATR Act*

¹⁹ Infra para 2.3.8 for a discussion of wardens powers.

²⁰e.g. Simple larceny, larceny of a dwelling house, or burglary? Common assault, aggravated assault, or assault "occasioning...?"

- (iii) Regulation and control of traffic on community land including provisions as to manner of driving, speed, parking, routes (one-way traffic etc.), authorised removal of vehicles etc.
- (iv) Prevention of damage to community lands, flora and fauna (including fish).
- (v) Prohibition, restriction and regulation of use and supply of alcohol, kava or other dangerous drugs as defined under the Misuse of Drugs Act (NT). Such a provision could obviously impact upon the operation of wet canteens and licenced clubs. Communities could liaise with the Liquor Commission before enacting such a provision to ensure that responsibilities are consistently divided. As part of a co-ordinated community justice plan, consideration should also be given to Aboriginal representation on the Liquor Commission.
- (vi) Prohibition of petrol sniffing and the possession of petrol for other than approved purposes.²¹ Communities (especially inland communities where there are no boats) could also restrict the availability of petrol through use of by-law (i) above to prohibit the use of petrol driven vehicles on community lands.
- (vii) The regulation and conduct of community council meetings.
- (viii) Securing and maintenance of public order and safety through prohibition of specified summary offences such as offensive or indecent behaviour or language, or disorderly conduct.
- (ix) Regulation of the possession and use of firearms and other weapons.
- (x) Littering community lands.

²¹ Note Section 42d of the Pitjantjatjara Land Rights Act 1981 (South Australian Legislation) prohibits the possession, sale or supply of petrol for the purposes of inhalation and prescribes maximum penalties for breach of \$2000.00 or 2 years imprisonment.

- (xi) Preservation of buildings and structures through prevention of criminal damage.
- (xii) Prohibition on obstruction and/or ~~assault~~ of any person executing his/her duty under the by-laws.
- (xiii) Prohibition on facilitating the commission of by-laws breaches ²².
- (xiv) Control of dogs.
- (xv) Failure to provide name and address ²³ to wardens when requested.
- (xvi) Recognition of custom such as a prohibition of trespass into sacred or significant areas, a prohibition on unauthorised cursing or sorcery, penalties for failure to respect ceremonies (eg. attending whilst drunk) or totems, and a penalty for misuse or desecration of sacred sites. The idea is that individual communities decide on which, if any, customary laws would be codified under the by-laws.

2.3.4.2 Customary Law - Commentary

Debate over the recognition of Aboriginal Customary Law and its incorporation into the general law has raged since European settlement of Australia. The issue remains unresolved. Both the Australian Law Reform Commission in its major report ²⁴ and the Northern Territory Legislative Assembly Sessional Committee on Constitutional Development ²⁵ were unable to recommend formal recognition. Also, the Royal Commission into Aboriginal Deaths in Custody was unable

²² Designed mainly to curtail the activities of those who provide offenders with prohibited substances or equipment such as alcohol, prohibited drugs, petrol, firearms, fishing nets etc. The prohibition could be extended to make it an offence to facilitate the commission of an offence under the by-laws either on or off community lands. This provision would catch the "grog runners", including taxi drivers, who off-load their grog outside community boundaries.

²³ Relates directly to the power vested in wardens under the Community Justice By-Laws (infra para 2.3.8.1).

²⁴ ALRC op cit Volume 1: Chapter 8.

²⁵ See generally discussion paper No. 4, August 1992, "Recognition of Aboriginal Customary Law".

to thoroughly examine the issue and recommended that further investigation be carried out by Government.²⁶

Obstacles to recognition included the lack of an homogenous group of Indigenous Australians living in accordance with a single code of customary law; the reputed decline of customary law; the great diversity of customary law (and resultant difficulties in codification); the difficulty in codifying customary law that is secret in nature because of the reluctance of informants and the (probable) resultant loss of control of the (secret) law by its Aboriginal guardians, and; the problem, as described by Bird Rose²⁷, of formally recognising traditional law sanctions which are not uniform but are the product of negotiation between family groups.

The limited recognition afforded to customary law in the community justice by-laws is simply a reflection of the unresolved debate on the topic. Subject to the usual human rights safeguards²⁸ and subject to an exclusion of any customary law which conflicts with existing Northern Territory law; it is intended to as far as possible enable and facilitate the inclusion, as they see fit, by Aboriginal communities of (additional) customary law(s) within the community justice by-laws.

2.3.4.3 *Duplication of Existing Northern Territory Legislative Provisions and Functions*

Where by-laws duplicate provisions already contained under existing Northern Territory legislation such as the Traffic Act, Summary Offences Act, Aboriginal Land Act, Liquor Act, Firearms Act, Territory Parks and Wildlife Conservation Act, Fisheries Act, Misuse of Drugs Act, Aboriginal Sacred Sites Act, or any other Northern Territory Act; it must be ensured both that sanctions provided under the former do not exceed those of the latter and that communities negotiate a consistent division of responsibility with all relevant officials (eg. police, rangers, liquor inspectors, sites inspectors as the case may be).

²⁶ RCIADIC Report Volume 4 1991, Recommendation No. 219.

²⁷ Bird Rose, Deborah "Indigenous Customary Law and The Courts" NARU Discussion Paper No. 2/1996.

²⁸ *Infra*. Para 1.3; this is why, in the Northern Territory, "pay back" is recognised in the general sentencing discretion of the court, but not condoned.

The absence of this safeguard would subject the community justice by-laws to criticism that a minority group was dictating to the majority or that a "dual legal system" was operating in the Northern Territory.²⁹

2.3.4.4 *Community Specific By-Laws*

Individual communities may then create and enact, subject to Ministerial approval, specific by-laws within the general heads of power outlined in para 2.3.4.1. above.

A decision will need to be made on whether model by-laws should be provided with the Act - in much the same way that the Associations Incorporation Act (NT) provides Associations with a model constitution.

The ALRC noted ³⁰ that standard by-laws circulated with the Queensland By-Laws legislation were adopted with "very little local variation". Care needs to be taken that model by-laws do not stifle creativity or create by-laws inappropriate to the needs of communities.

Note that Aboriginal communities have never had direct access to such powers in the past. The power has been the preserve of some other Government department or agency. In addition powers to control petrol sniffers, and to assist in the recognition of Aboriginal custom, have never existed in the Northern Territory. By-laws wardens, excluding parking officers, have never before possessed statutory powers except at Yulara (see next para).

2.3.4.5 *Yulara Tourist Village By-Laws*

The regulations to the Yulara Tourist Village Management Act 1984 (NT) ("The Management

²⁹Supra para. 2.2.4 at page 8.

³⁰ Op. cit. Vol. 2 para 727.

Act") create by-laws for Yulara and, given their similarity and scope³¹ to those proposed in para 2.3.4.1 above, provide a convenient precedent for the latter.

Discussions with the Yulara Council Town Clerk and the head of security at the Ayers Rock Resort Corporation ("ARRC") revealed that the by-laws do not operate effectively for reasons related to unique circumstance at Yulara - rather than deficiencies in the construction of warden-enforced community by-laws - namely:-

1. ARRC's legal advice is that the by-laws power under section 12 of the Management Act may not be sufficient to create the presently existing by-laws - which are extremely broad in scope (see footnote 31). As a consequence ARRC mainly confines its by laws activities to traffic control -³² so that the remaining by-laws are not enforced by the Wardens. For example, misconduct within Yulara³³ is not controlled by ARRC, but reported by ARRC security officers/wardens to the Yulara Police:
2. There is confusion over what role should be played in by-laws enforcement by ARRC, whose by-laws have existed since 1984, the Yulara Council, formed in 1992 under the CGS., and the NT Police. Confusion has resulted in a power vacuum.
3. ARRC issues traffic infringement notices, a pro-forma of which appears at schedule 2 to the Y.T.V by-laws, but the response by offenders is poor. For example, of the 29 traffic infringement notices issued in Feb/Mar'97, only 3 offenders paid³⁴. ARRC does not have the resources to prosecute offenders for

³¹ Yulara by-laws cover items (i), (ii), (iii), (iv), (vii), (viii), (x), (xi), (xii), (xiv) and (xvi)) in Para 2.3.3.2, and also appoint a Warden to enforce them by way of an infringement notice.

³² Yulara Tourist Village By-Laws Part V.

³³ Y.T.V By-Laws Part IV.

³⁴ Maximum penalty \$200.00 under section 12 of the Management Act.

non-payment and would prefer the prosecuting role to be handled by someone else.

The community justice by-laws scheme will not be burdened with demarcation problems because there will be no power sharing between the community and a private corporation. Even so, lessons to be learned from the Yulara experience are firstly, the need for care in drafting the legislation, and; secondly, the need to consider whether the prosecution of offenders who elect to be dealt with by the Court of Summary Jurisdiction and/or who fail to comply with sanctions imposed for breach of by-laws should be managed by the community or referred by the community to (say) the Attorney-General's Department.

Whilst community managed prosecutions will require additional resourcing and training and may be more expensive than an Attorney-General's Department managed alternative, the final decision may depend upon the opinions of remote communities -- which will be elicited during the consultation stage of the scheme.

2.3.5 *Jurisdiction*

Communities must be afforded to opportunity to discuss and negotiate their respective boundaries.

A "community" might be defined as a group residing in a defined geographic area. The whole of "remote" Northern Territory could be divided into "geographic community areas" provided that the division is in accordance with the wishes of communities. Alternatively, communities may wish to focus on language groups as boundaries.

All persons within community boundaries are bound by the by-laws - whether they belong to the community or not, and; whether they are Aboriginal or non-Aboriginal. This approach affirms the principle of community control of its constituents, and is in stark contrast to the parallel Queensland legislation which exempts persons who hold an appointment requiring their residence

in the community from liability under the by-laws.³⁵ Also, the universal application of community by-laws indicates that by-laws do not breach the principle of "equality of treatment before the law for all citizens".³⁶

2.3.6 Control

The Act shall empower an Aboriginal Council ("the council") to make and enforce by-laws, which reflect the community justice priorities of that particular community, on community lands. Under the Act the council must apply to the Minister for approval and ratification of its by-laws.

2.3.7 Procedure

Subject to the results of initial consultations and negotiations with communities over the introduction and general format of the Act, the following procedural steps are suggested:

2.3.7.1 The Community Council

The Council in relation to a community means the elected council of management or other elected governing body at that community.

The aim is to enable the community to elect an appropriate and representative governing body. The recognition by the community that its elected governing body is representative is crucial to the successful operation of the Act.

2.3.7.2 Incorporated Communities

The Act (ACJA) shall only apply to communities which are declared by the Minister to be incorporated for the purposes for the Act.

³⁵ *Infra*, para 2.4.

³⁶ *Supra* para. 2.2.4 (4th dot point).

Incorporation is essential. Implementation of the by-laws will oblige the community through its council to inter alia hold and receive monies, make payments, employ staff, effect insurance - all of which activities require the council to hold a separate incorporated identity to that of its members.

Incorporation of the whole community, so that every member of the community is deemed to be a member of the incorporated body, will give added credibility to the representative governing body.

2.3.7.3 *Method of Community Incorporation*

During their initial consultations with Government departments over the creation of the ACJA, not only will communities need to decide upon their own geographic boundaries, but they must choose the incorporation method which best suits them.

Incorporation options include:

- (i) Where prior to the commencement of the Act a community was already incorporated, eg. as part of the CGS, then the Minister may declare that community to be incorporated and to be a community to which the Act applies.
- (ii) A community may opt to incorporate by bringing itself within the CGS. Even though the proposed scope of community justice by-laws extends beyond those of the present CGS, the latter is able to accommodate the by-laws in theory. During the consultation and negotiation phase communities should be advised that there is no obligation to utilize the CGS.³⁷
- (iii) As a significant number of communities have not favoured the CGS in the past, it may

³⁷supra para. 2.3.7.1.

be appropriate to provide an incorporation procedure under the ACJA.

- (iv) Note that the Associations Incorporation Act (NT) is an inappropriate vehicle for incorporation of a community. The last named Act is designed to cover the incorporation of specific purpose Associations within a community and not the community as a whole.

2.3.7.4 *Council Elections*

Election of council members by the community shall be in accordance with the council's approved constitution.

2.3.7.5 *Qualification of Council Members*

Qualifications for council should not be made too onerous or casual vacancies may be difficult to fill. By way of comparison qualification for jury duty is not particularly onerous.

A requirement that prospective councillors normally reside in the particular community may suffice. However consideration could also be given to making the position of councillor subject to satisfactory completion, within (say) three months of election to council, of an approved training course.³⁸

2.3.7.6 *Community Input into By-Laws*

The council as the elected governing body of the community shall be required under the Act to consult with community members before making, amending or revoking by-laws. As noted above, the by-laws will have already been the subject of extensive community consultation.

³⁸ Sections 15, 48 and 53 of the Private Security Act 1995 (NT) provides in a similar way for provisional and full licences to be given to security officers whilst they undergo a course of training.



2.3.7.7 Council Voting on By-Laws

By-laws shall be made by resolution passed by a majority of councillors at a council meeting.

2.3.8 Wardens

The ACCA shall empower the council to appoint and employ "wardens" who shall enforce by-laws through the imposition of "on-the-spot" penalties for by-laws breaches. In order to give effect to community justice principles discussed below³⁹, it is essential that by-laws are capable of enforcement from within the community and by the community⁴⁰.

The Act enables wardens to dispense "summary justice" through invoking fixed penalties⁴¹ for alleged breaches of particular by-laws. In other words, wardens have no discretion on the imposition of penalty - except perhaps where restitution is sought.⁴² Penalties would be limited to fines, CSO's, restitution, confiscation, home detention and curfews.

Note that wardens have no power to arrest or detain offenders; they simply issue and serve "on-the-spot" penalty notices upon alleged offenders. This means wardens are not preoccupied with the complexities of bail and arrest law - involving as it does the exercise of varying amounts of discretion. All wardens do is hand the alleged offender an "on-the-spotter".

If the alleged offender disagrees with the penalty imposed by the warden then, in similar fashion to an on-the-spot parking fine, the former may elect to have the matter dealt with by a Magistrate

³⁹ Infra Section 3, Page 31.

⁴⁰ A criticism of the corresponding Western Australian legislation (infra paragraph 2.4) is that enforcement power is vested solely in police. The community justice by-laws are designed to avoid the need to call police all the time.

⁴¹ i.e. Fixed by the particular by-law.

⁴² Infra paragraph 2.3.10.

in the Court of Summary Jurisdiction ("CSJ"). This measure will protect constituents against any over zealous use of power by communities and/or wardens.

Also, the Act should provide Magistrates with power to impose a greater penalty than that imposed by a Warden. This may dissuade offenders from accessing the CSJ in the same way that guilty pleas in the criminal justice system may attract a "discounted" penalty.

2.3.8.1 Duties and Powers of Wardens

Community Warden Schemes auspiced in the past by the Office of Local Government (NT) have been limited by the lack of power of wardens. The ACJA shall assist in the more effective operation of wardens by providing them with the following duties and powers:

- Identify date and place of alleged offence (breach of by-law).
- Identify alleged offender.
- Request the name and address of any person reasonably suspected of being in breach of any by-law.
- Confiscation of prohibited substances (eg. alcohol, kava, dangerous drugs, petrol) and equipment (eg. fishing nets, offensive weapons) from alleged offenders.
- Issue and serve penalty notice/summons upon alleged offender.

2.3.8.2 Training of Wardens

Training of wardens is essential to ensure the proper discharge of duties, to ensure that wardens are able to record and report upon their activities, and to facilitate the development of a career path for wardens within the community and outside the community.

Pursuant to the ACJA the engagement of a warden should be made conditional upon the completion of an approved training course within (say) three months of the commencement of training. Under the Act wardens would first be employed by the council as trainees whilst undergoing training.

Responsibility for training of wardens shall lie with police, the Attorney-General, and Territory Health Services (formerly and the Department of Health and Community Services). Interpreters may be required. It is essential that training is ongoing and continues beyond the completion of the initial training course.

2.3.8.3 *Remuneration and Conditions of Wardens*

Wardens shall be employed by the community council. In many respects their work is similar to that of Police Aides. In order to encourage participation in the scheme by quality staff, pay and conditions of wardens should where appropriate approximate that of Police Aides. For instance; wardens may be required to work shifts and should receive appropriate salary, sick pay, workers' compensation, leave entitlements etc.

Whilst on duty wardens will probably require a motor vehicle, a "two-way" radio, and office/administrative facilities.

2.3.8.4 *Wardens and Kin Conflict*

Kin conflict is a difficult issue for those Aborigines who hold positions of authority in small communities. Wardens will be subjected to similar pressure.

Conflict may be minimised through application of the following measures:

.... Appropriate education and training for wardens.

.... As far as possible insulate wardens from conflict situations, eg. "on-the-spot" penalties imposed upon next-of-kin are easier to manage than (say) the arrest of next-of-kin offenders or the confiscation of their motor vehicles.

.... Engagement by community councils of several wardens to enable the "rostering away" of the latter from kin conflict.

2.3.9 *Dismissal of Council Members and Wardens*

The Act should make provision for the dismissal of council members and wardens in the following circumstances:

- (i) Failure to complete the approved training course within the time stipulated.
- (ii) Commission of an offence against the ACJA.
- (iii) Unfitness to satisfactorily discharge duties (on health, or other grounds).
- (iv) Negligence or carelessness in the discharge of duties.
- (v) Absence from duties without good cause.

2.3.10 *Penalties*

As part of the consultation process, communities will need to be heard on their desired range of penalties. Hopefully the consultation process will hit upon innovative penalties that are relevant and effective for particular communities.

2.3.10.1 *General and Specific Penalties*

The general range of penalties available to communities and contained in the Act will be the product of consultation and negotiation between communities and government departments and agencies. The Act may also stipulate penalty ceilings.

Each community shall make provision in its by-laws for exact penalties for breaches of specific by-laws. There may also be discussion between communities and government on the precise penalties arrived at by communities and on penalty ceilings.

As indicated above, and subject to consultation, a likely range of general penalties under the Act might be:

- Fines.
- Community Work Orders (CWO's).⁴³
- Restitution.⁴⁴
- Imposition of curfews.
- Home detention.
- Confiscation of prohibited substances, prohibited weapons and other prohibited equipment except motor cars.

Arguably, imprisonment ought not to be considered as an "on-the spot" penalty at this stage. The preferable community justice option is to devise creative alternatives to prison. Also, apart from

⁴³Similar to the Community Service Orders (CSO's) imposed by the courts and administered by the NT Correctional Services Department, but given this name to avoid confusion with the latter.

⁴⁴The by-laws do not cover theft (supra para. 2.3.4.). Restitution may be imposed for property damage, damage to community lands, or damage to sacred sites. See also para. 2.3.10.2.

the serving of the demand notice, it is suggested that confiscation of motor vehicles is best left to mainstream courts so as to limit as far as possible the exposure of wardens to conflict situations.

Useful penalty ceilings for consideration might be \$750.00 for fines,⁴⁵ 60 hours community work,⁴⁶ and 15 days home detention.⁴⁷

2.3.10.2 *Rationale for Fixed Penalties*

Where possible by-laws should provide for exact fixed penalties for their breach so as to eliminate the need for an exercise of discretion on penalty by the warden, eg a community may decide that "disorderly conduct in the main street" is punishable by a fixed penalty of a \$350.00 fine.

Each "on-the-spot" penalty notice issued by the wardens could list all the community by-laws and their fixed penalties - in similar fashion to the traffic infringement notices issue by police and parking inspectors in Darwin. All the warden is required to do is tick the appropriate offence on the notice and then serve the notice on the offender.

Some penalties will vary depending on the circumstances of the matter, eg CWO's may vary depending on the availability of, and requirement for, community work, and restitution will vary depending on the loss to the victim or the value of damaged property. In these cases the community council or (say) the CSO panels created pursuant to the regulations of the Prisons and Correctional Services Act (NT) are best placed to exercise the discretion involved.

2.3.10.3 *Enforcement of By-Laws by Police*

⁴⁵ This is \$250.00 greater than the maximum under the parallel Queensland legislation described at para 2.4.1, yet less than statutory maximums imposed under all the Northern Territory Legislation cited in para 2.3.4.3.

⁴⁶ This is the equivalent of a \$750.00 fine - i.e. at \$12.50 per hour which is the price of labour adopted under the Sentencing Act (NT). The latter Act contains a ceiling of 480 hours community work.

⁴⁷ Which is equivalent to \$750.00 in fines at \$50.00 per day - which is the going rate at Northern Territory Courts of Summary Jurisdiction.

The Act should confer power on police to enforce community justice by-laws.⁴⁸ This device helps overcome any possible sense of unease in the broader non-Aboriginal community over the existence of "dual laws", and also enables wardens and/or communities to call upon police for assistance if the need arises.

It is noteworthy that police power over by-laws may also result in individual community members seeking the assistance of police upon matters which, according to the police/community protocol, are the responsibility of community wardens. Whilst this may be an unfortunate outcome where police resources are scarce, the reality is that protocols cannot bind individual community members. The possibility of such outcomes may provide the necessary incentive for police to assist in educating communities about the value of protocols.

2.3.10.4 *Failure to Observe By-Law Sanctions.*

This is a difficult problem which appears to have no completely satisfactory solution. If the penalty imposed by the community for breach of its by-law is ignored, the offender could conceivably receive a term of imprisonment - and one of the aims of the scheme is to consider alternatives to prison. However, if the community justice by-laws "system" fails to provide tougher penalties for those who refuse to abide by its sanctions, then offenders may lose respect for the system altogether.

The views of the communities on this issue need to be ascertained during the consultation process because, in the interests of transparency and procedural fairness, the method of dealing with those who ignore the system should be set out in the Act.

It is suggested that as a general rule those who fail to abide by the by-laws sanctions should be referred to the Court of Summary Jurisdiction or the Supreme Court for sentencing.

⁴⁸ Generally police would exercise that power subject to protocols entered into between police and the community.

However, there are several options prior to referral which could be provided for in the legislation:

- (i) The Act could offer offenders an incentive to comply with by-laws sanctions by clearly providing for stiffer penalties if the matter is referred to a superior court.⁴⁹
- (ii) Offenders needing time to pay on-the-spot fines should be afforded the opportunity of negotiating a payment plan with the appropriate officer in that community.
- (iii) Unpaid on-the-spot fines could be converted to a CWO. This assumes that Section 33 of the Sentencing Act NT does not apply to "on-the-spot" penalties. Section 33 states that "traffic infringement notice" penalties may not be converted to CSO's, and there is an argument that this restriction may apply to infringement notices generally. It is also arguable that CWO's may be classified as CSO's for the purposes of section 33.

In the unlikely event that Section 33 prevents the conversion of "on-the-spotters" to CWO's, then the council could order home detention for the offender rather than referring the offender to a superior court where he or she may risk gaol for non-payment of the fine.

- (iv) If an offender breached a CWO which was imposed at first instance by a warden for a by-law breach, the council could again consider the home detention option. This may be preferable to referring the offender to a superior court to be dealt with for breach of CWO (the breach of a CSO invariably results in gaol or home detention).

In some cases, the council may have no choice but to refer the matter to the superior court and expose the offender to the risk of gaol. Some of those referrals will end up in gaol. The unfortunate reality is that a proportion of the overall population of offenders go to gaol.

⁴⁹Supra end of para 2.3.8.

It is hoped that the very creation of a host of new offences under the community justice by-laws will not result in an increase in the number of offenders from Aboriginal communities who receive gaol terms. Arguably, there are two reasons why such an adverse outcome should not ensue:

First, as discussed above there is considerable capacity for the local community to deal with offenders prior to referral to the CSJ.

Second, when the community justice by-laws are operational and fully supported by government³⁰ the incarceration rate should fall in conformity with the Groote Eylandt, NT justice initiative.³¹

2.3.11 Revenue.

Any revenue obtained from by-law enforcement shall be applied towards administration and other costs of the community by-laws:

2.3.12 Monitoring

The ACJA will require ongoing support, funding and resource allocation from a combination of government departments and agencies to ensure its continued operation and development.

The level of support required for the scheme will in turn require the striking of formal agreements between communities and those government departments and agencies to establish the rights and obligations of all the stakeholders.

³⁰ and when the by-laws are complemented by the overall Community Justice Plan [infra para. 3].

³¹The Groote justice initiative was masterminded by Bruce McCormack SM. in the early 1990's. Basically it created, encouraged and supported community-based alternative sanctions to gaol. When the initiative was fully supported it yielded a significant reduction in the appalling number of gaol terms imposed upon Groote offenders. Now that the initiative at Groote is not fully supported, incarcerations are on the rise.

The formal agreements should *inter alia* contain provisions pertinent to monitoring of the scheme by government, and the provision of performance indicators and operational statistics by communities.

The scheme should be formally reviewed after 6 and 12 months of operation.

2.3.13 *Advantages of Community Justice By-Laws*

- (i) There is no delay between the commission of an offence, and the imposition of a sanction. Contrast this with the frequent lengthy delays, often to the bewilderment of Aboriginal defendants, in the existing system.
- (ii) By-laws are community created and managed, and a response to community requirements; they are a vehicle for community empowerment.
- (iii) By-laws constitute a relatively simple "starting" model in terms of enforcement and administration. Communities will doubtless propose refinements to the model during its operation.
- (iv) The by-laws are complementary, and not alternative, to the general law. In other words the by-laws do not create a dual court system or "two laws" - the inadvisability of which is discussed at para 2.2.4.
- (v) The withholding of the power of arrest and detention from wardens minimises the potential for conflict (kin conflict or otherwise) between alleged offenders and wardens at the point of detection. The warden is simply required to issue and serve the "on-the-spot" penalty.

- (vi) The beauty of community by-laws is their simplicity and ease of application in that the exercise of very little discretion is required. Consequently the ACJA contemplates the granting of only minimal powers to wardens. As powers are increased the requirement to exercise discretion becomes inevitable and a simple process is made complex.

For instance wardens have no power of arrest and by-laws proscribing theft and assault have been avoided.⁵² These measures not only simplify the scheme for wardens, but relieve them of the added difficulty of exercising discretion in pressure situations.

2.4 *Comparative Queensland and Western Australian Legislation*

2.4.1 *Community Services (Aborigines) Act 1984 (Qld)*⁵³

2.4.1.1 *Features of the Act*

- Establishes Aboriginal courts constituted by two Aboriginal Justices of the Peace resident in the area or by two members of the local Aboriginal council.
- The court has power to hear and determine breaches of by-laws applicable within its area or other disputes not being breaches of any law of the Commonwealth or Queensland.
- Aboriginal councils are empowered to enact by-laws for peace, order, discipline, comfort, health and moral safety; convenience; food supply; housing and welfare within the area; entry of persons into areas; regulation of beer canteen in the area.
- Penalties for breach of by-laws may not exceed \$500.00 or \$50.00 per day. There is

⁵²Supra para. 2.3.4.

⁵³ Discussed by ALRC op. cit. Vol. 2 paras 723-746.

no power to imprison, but fines may be converted to community work orders. The question of whether imprisonment may be ordered for fine default is unresolved.

- The council may appoint Aboriginal police to enforce by-laws, bring offenders before the court, present evidence to court and assist in running the court.

- The Act provides for a visiting justice, usually a local Magistrate, to every three months inspect records of punishment, hear offences, and report on the administration of the system.

2.4.1.2 Criticisms

- Problems with Aboriginal community police - high turnover, kin conflict problems in trying to effect arrests.

- Insufficient training provided for Aboriginal police and no formal tuition. If Aboriginal police act in a way deemed inappropriate they are "advised" by the local Executive Officer or the local Queensland Police officer.

- Lack of real Aboriginal influence or control - poorly trained staff and supervising Magistrate visits may conflict with the philosophy of self-management.

- The courts do not administer any laws based on local custom or tradition.

- Court has jurisdiction over Aboriginal and non-Aboriginal residents within the community - except persons who hold an appointment in the community that requires their residence, i.e. most non-Aboriginal residents.

- The overriding criticism of the Act is that the Queensland Government failed to adequately consult local Aborigines on the content of the scheme, failed to cede

control of the Aboriginal court scheme to local Aboriginal communities, and failed to properly resource the scheme. Communities were never assisted in putting the Act into operation.

The scheme has now fallen into disuse.

2.4.2 Aboriginal Communities Act 1979 (WA)⁵⁴

2.4.2.1 *Features of the Act*

The Act was piloted at several communities in the north of Western Australia and gave community councils power to make by-laws covering entry onto community lands; regulation of motor vehicles; damage to local flora; littering; disorderly conduct, language or behaviour; restrictions on alcohol; and regulation of firearms.

By-laws apply to all persons within community boundaries whether they are Aboriginal or non-Aboriginal.

Penalties for breach of by-laws are by way of fine not exceeding \$100.00 and imprisonment for a maximum of 3 months.

Proceedings are brought by police and come before an ordinary Magistrates Court staffed by JP's or a Magistrate; the intention is that eventually courts will be staffed by Aborigines and Aboriginal JP's - although there is no requirement in the legislation for this.

2.4.2.2 *Criticisms*

No provision for by-laws to deal with local Aboriginal custom.

⁵⁴ Discussed by ALRC op. cit. paras 747-758.

- Not a particularly adventurous scheme - basically an extension of the existing system.
- Very little consultation with local Aborigines.
- This scheme too has fallen into disuse; it was never properly resourced or encouraged by Government and no real assistance was provided by Government to communities in putting the Act into operation.
- The by-laws were never fully supported or recognised by police who were supposed to enforce them.
- In June 1993 an inter-Departmental task force⁵⁵ in Western Australia proposed amendments to the Act and recommended its revival. The amendments included the granting of enforcement powers to community wardens. Little has happened to date.

2.4.3 *Contrast Northern Territory Proposal*

The deficiencies of the Queensland and Western Australian by-laws schemes are largely avoided in the Northern Territory proposal.

There may be kin conflict problems for Northern Territory wardens, but the potential for conflict is minimised by appointment of several wardens per community, keeping the scheme simple, and withholding from wardens the powers of arrest and detention and confiscation of motor vehicles. (Supra paras 2.3.8 and 2.3.8.1).

Queensland and Western Australia by-laws have not been adequately supported or resourced by government. In order to have any chance of success the Northern Territory scheme must be the product of extensive consultation with Aboriginal communities and must be adequately resourced.

⁵⁵ Inter-Departmental Task Force report on Aboriginal Communities Act 1979 - "Proposals for Implementation of Recommendations Arising from Reviews" Aboriginal Affairs Planning Authority WA, June 1993.

3. COMMUNITY JUSTICE PLAN ("CJP")

3.1 *Features of the Plan*

Community justice by-laws are but one measure in a comprehensive community justice initiative called the Community Justice Plan ("CJP"). The CJP would comprise the following features:

- A commitment by the community to become fully involved in the development and practice of community justice. The challenge is to encourage communities to willingly participate as the success of the plan will depend upon community enthusiasm and will rely upon community support/pressure. If communities are not prepared to commit themselves to the development of the CJP then they will continue to suffer the inadequacies of the present system:

- The CJP must be developed by the community in conjunction with government and police, i.e. a co-operative approach to community concerns.

- CJP must be relevant to the community justice needs of the particular community.

- CJP entails a properly co-ordinated "mosaic" of community justice measures, i.e. a co-ordinated approach from a number of different government departments and agencies (eg. police, corrections, law, courts, OAD, OLG etc) to the law and justice concerns raised by particular communities - so that in all probability no two CJP's will be identical. In other words, the various community justice measures chosen by communities compliment one another.³⁶

³⁶For instance, the ACJA containing the community justice by-laws is complemented by protocols between community and police [infra para. 3.4. (x)], and, the community justice measure calling for an enhanced role for women in the community justice process [para 3.4 (v)] might result in representations by communities to courts that perpetrators of violence upon women serve out CSO's in full view of the community [para. 3.4. (iii) and (iv)].

A CJP Task Force, possibly auspiced by the Attorney-General's Department, will need to be established. The task force shall comprise representatives of the various government departments and agencies interested in the CJP, and shall convene meetings for the purpose of planning strategies to raise the consciousness of Aboriginal communities about the CJP.

The Task Force shall proceed on the basis that the consultation lead in time for the CJP may be 18 months, that the various initiatives within the CJP should only proceed if the local community accepts their validity, and that the very success of the CJP depends on effective community consultation.

3.2 *Inter-Departmental Co-Operation*

The Attorney-General's Department shall be the "primary sponsor" of the CJP responsible for the co-ordination of inter-departmental effort. Government departments and agencies involved in the CJP need to ascertain their respective responsibilities and then enter into formal co-operative agreements reflecting those responsibilities between themselves and the various Aboriginal communities.

Co-operation will be required from various government departments and agencies as follows:

Office of Aboriginal Development

- Educate communities on the value of the CJP.

- Clarification of community boundaries through consultation.

- Establish training needs of wardens, administrators, clerks and council.

Territory Health Services

- Monitor the implementation and operation of the scheme.

- Educate communities on the value of the CJP

- Develop training models for wardens, administrative staff and councillors.

- Participate in training of wardens and administrative staff.

- Investigate adequacy of sobering up shelters.

- Create facilities for petrol sniffers where appropriate.

Attorney-General's Department

- Assist in training wardens and administratives.

- Explain ongoing role of mainstream systems and the operation of by-laws through inter alia seminars in communities.

- Assist in drafting by-laws.

- Assist in developing protocols between

police and communities.

Monitor the implementation and operation of the scheme.

Facilitate negotiations between communities and various government departments over their respective spheres of influence and areas of responsibility; also ascertain where community by-laws duplicate provisions already contained in existing Northern Territory legislation³⁷ and organise protocols.

Prosecute community justice by-law offenders who either wish to be dealt with by the Court of Summary Jurisdiction or who fail to comply with sanctions imposed for by-law breach.

Assist in training of wardens.

Explain role of police and police prosecutors in the mainstream system and the operation of the community justice by-laws where by-laws - both in isolation and where by-laws breaches are dealt with in the Court of Summary Jurisdiction.

NT Police

³⁷ Supra para 2.3.4.3.

- Develop protocols with communities on level of police intervention.

- Assist in the monitoring process.

- Assist communities in the enforcement of by-laws.

Correctional Services

- Develop, in consultation with community, systems of managing community based CSO's and other forms of diversion from custody.

- Assist in development of administrative systems for enforcement and maintenance of by-laws.

- Supervision of punishment/sanctions.

Liquor Commission

- Develop protocols with communities in relation to intervention by Liquor Commission into community affairs such as licenced clubs, grog runners, and vehicle confiscations.

- Contribute to debate on sobering up shelters.

**Department of Housing and
and Local Government**

- Create positions for Aboriginal members on the Commission.

- Assist in development of administrative systems.

- Assist in the training of wardens, administrators, clerks and community councils.

- Assist in the monitoring process:

- Assist in clarification of jurisdictional boundaries for community by-laws.

Government must ensure that its departments and agencies are appropriately resourced to manage their respective roles and discharge their duties.

3.3 *Operation of the CJP*

A Community might be presented with a range of justice measures and then, with the assistance of the various government agencies, given the opportunity to determine through intra-community discussion and consultation its own balance of measures or solutions to problems.

3.4 *Range of Community Justice Measures*

- (i) Night patrols - involving protocols with police (cf. Tennant, Broome, Geraldton).

(ii) Greater use of, and commitment to, community policing (meaning use of police as educators and facilitators - rather than just law enforcers - who are equipped to meet the social and cultural needs of people in the area) and the preventative aspects of police work. Greater use of Aboriginal police and police aides. The existence of community police could form part of the protocols between police and communities.

(iii) Provision of genuine opportunity for the local community to be heard on sentencing of offenders in Supreme and Magistrates Courts. The idea is that court and community arrive at a consensus as to the type of sentence that will best ensure good conduct by the accused and reconcile him/her with the community.

Over many years various schemes involving court input by elders into sentencing have been tried in the Territory (at Port Keats, Galiwinku, Maningrida, Groote Eylandt and Yirrkala). The schemes have ultimately failed or been discontinued because on small communities elders have inevitably found themselves in positions of kin conflict, or were unavailable for some reason.

In the absence of some other method of receiving local input into sentencing the idea merits perseverance. Perhaps a larger panel of elders/suitable community members (especially including women) could be assembled and trained to ensure the accessibility of alternate elders in cases of kin conflict⁵⁸ or unavailability.

(iv) A more creative use of community service orders, i.e. consistent input from community members enabling locally targeted orders, the operation of which are visible in the community. For instance, the establishment of locally constituted community service order panels; in contrast to locking offenders away in prisons,

⁵⁸ This approach accords with that recommended by the RCIADIC at recommendation 104 where it was suggested that the views of communities as to a general sentencing range should be canvassed prior to sentence. The method adopted in South Australia is that the Pitjantjatjara Legal Service provides a community representative (a lawyer) at each of its circuit courts - namely Pipalyatjara, Amata, Pukatja (Emabella), Fregon, Mimili, Iwantja (Indulkana), and Maria Bore - to put the community view on sentencing to the court.

locally targeted CSOs require offenders to suffer the approbation of the community and involve offenders in useful work. Also consideration should be given to early release from gaol on CSOs.

- (v) Upgrading the role of women in the community justice process⁵⁹. The existence of this measure is crucial given that "... the appalling level of domestic violence against Aboriginal women is not being addressed by Aboriginal law".⁶⁰
- (vi) Children's aid panels - tried at Yuendumu. Offenders in appropriate cases referred by court to locally constituted panel for imposition of sanctions; victims have input into panel; victim nominated community work; a satisfactory outcome before panel enhances child's chance of no conviction good behaviour bond or community service order, cf Katherine Community Aid Panels.
- (vii) Encourage Aboriginal representation on the Liquor Commission and the Drug and Alcohol Advisory Committee⁶¹.
- (viii) Consideration should be given to remote court venues; should the court room be part of the police complex or a separate purpose built structure?
- (ix) Amendments to Sentencing Act (NT) should be effected to signify recognition of the need for Aboriginal community input into sentencing.

Section 5(2) of the Sentencing Act (NT) currently allows the court to take into account inter alia "any other relevant circumstance" when considering sentence.

Section 5(2) should specifically provide for the wishes of an Aboriginal community or

⁵⁹i.e., in both the initial consultation and negotiation phase, and in the operative phase.

⁶⁰RCIADIC National Report Volume 5 AGPS Canberra 1991, Appendix D(i) "Too Much Sorry Business" - Report of the NT Aboriginal Issues Unit at para 2.5.4.

⁶¹This is a recommendation of the Aboriginal Issues Unit of the RCIADIC op. cit. Page 314 ff.

Aboriginal elders where appropriate when considering sentence.

Also, Section 5(2) of the Sentencing Act could specifically require a court to take into account the imposition of tribal punishment - provided that an acceptable means of proving that tribal punishment has taken place is devised.

(x) Admissibility of evidence of customary law.

Some Aboriginal communities and/or litigants are concerned that traditional reasons behind a dispute which ends up in court are not put squarely before the court. However, rules preventing the receipt of hearsay evidence may create difficulties for traditionally oriented Aborigines in proving the existence of their own customary laws.

Legislation, eg. an amendment to the Evidence Act (NT), should provide for the admissibility of evidence of customary law in accordance with the suggestion of the ALRC.⁶²

This proposition is not advanced to permit the recognition of customary law in determining criminal liability under the general law (i.e. customary law as a complete defence to criminal charges), but merely to provide the court with evidence in mitigation of criminal offences and perhaps with background evidence to civil disputes.

It is interesting to note that the ALRC recommends a partial customary law defence which if proved would have the effect of reducing murder to manslaughter.⁶³ The NT Criminal Code could likewise be amended to accommodate such a defence.

(xi) Protocols with police (infra para 3.7).

⁶² At para 642 Volume 1 of ALRC Report No. 31 *op.cit.*, and see the discussion generally at paras 627-642.

⁶³ *Ibid* para 451 and see general discussion paras 441-451.

- (xii) Young people and children - development of a scheme to focus on their needs given that there are no secondary schools in remote areas of the Northern Territory, and very little employment for young people. The potential for an intimate relationship between young people and the justice system is great; the challenge is to devise programs to minimise the contact of young people with the justice system. Appropriate community based sanctions should be explored when young people fall foul of the law.
- (xiii) Develop strategies for the treatment of petrol sniffers. Community justice by-laws targeting sniffers⁶⁴ are a start, but the possibility of sniffers being imprisoned for "sniffing" simpliciter is created by the operation of the said by-laws. Consideration needs to be given to the provision of facilities for the treatment of sniffers and whether those facilities should be located inside or outside communities of origin (i.e. in major centres). Once appropriate treatment strategies devised, then courts must be given the power to divert sniffers in that direction.
- (xiv) Resourcing and training.
- A commitment to resourcing and training is absolutely essential to prevent Aboriginal communities being "set up to fail".
- Training must be made available in the following areas:
- to wardens, administrative staff, council members, and police in the administration, management and enforcement of the by-laws;
- for negotiators and facilitators and council members to participate in the drafting of by-laws;

⁶⁴ Supra para 2.3.4.1 (v).

.... for administrative staff to enable them to keep records of and compile reports about community justice activities including the operation of the ACJA;

.... the development of models and training program aids to assist in the above training.

.... to educate the whole of the community on the existence of the CJP and the various community justice issues contained therein.

(xv) Interpreters

The need for interpreters in the legal system and in particular the court system was a recommendation of the Aboriginal Issues Unit of the RCIADIC⁶⁵. Interpreters are still unavailable in the legal system. It goes without saying that the vast amount of consultation, negotiation and training required for the advertising, implementation and operation of the CJP will require the assistance of interpreters - or many proposed beneficiaries of the scheme will be unable to fully participate.

3.5 *Comments*

Most of the CJP community measures set out above require community input. This in turn gives effect to principles of self-determination and empowerment, and hopefully ensures that the CJP is relevant to community needs.

Most elements of the CJP are not particularly revolutionary. OAD and police have recognised the need for protocols with communities for some time now. The novelty of the CJP is its emphasis upon a co-ordinated approach to community justice by communities and various government agencies (including police), and its simultaneous application of a mosaic of community justice measures.

⁶⁵ *op. cit.* recommendation 2.13 at page 400.

The CJP is relatively ambitious in its scope compared to other community justice initiatives in that the latter have tended to promote one justice measure rather than the mosaic approach. The sheer breadth of the CJP will require a significant commitment from all stakeholders in terms of time, and preliminary negotiations, and then followed by a considerable lead-in time whilst the various components of the scheme are firstly discussed at community level and then arranged, eg. it may be that wardens need to be closely monitored for at least the first 12 months of operation.

3.6 *Estimated Costs*

It is difficult to estimate the cost of a co-ordinated process of reform such as the CJP.

3.6.1 *Preliminary Costs*

The proposals will probably involve the creation at the outset of a CJP Task Force to consult, educate and negotiate with Aboriginal communities over features of the scheme such as the creation of a consistent method to ensure that Judges and Magistrates receive input from communities on an appropriate sentencing of offenders both generally and on a case-by-case basis; the creation of a method to consistently involve communities in the planning and implementation of community service orders; the upgrading of the role of women in the CJP; the creation of the jurisdictional boundaries, the by-laws, and penalties for breaches of the by-laws under the community justice by-laws scheme; and the establishment of performance protocols between communities and police.

The cost of the task force, including travel and accommodation costs, will depend on the number of appointees and the duration of the education/consultation/negotiation process.

3.6.2 *Implementation and Operational Costs*

A fairly accurate quantification of these costs should be possible once the task force has established the community justice requirements of particular communities. For instance, the

number of wardens and clerical staff, and the cost of training, renumeration, insuring, resourcing and monitoring them, should be readily ascertainable. Adequate resourcing will require ongoing training and may require the provision of office facilities and community council sitting fees.

3.6.3 *Who Pays?*

As part of the requirement for co-operation⁶⁶ between various government departments in the establishment and implementation of the CJP, the share of these departments in the cost of the CJP should be in direct proportion to their respective levels of involvement in the scheme. Once the various departments have reached agreement on task sharing, then the tasks can be costed and submitted to government as part of the normal budgetary process.

3.7 *Cost Effectiveness*

Cost effectiveness - in comparison to the present system with its high rate of imprisonment and massive court lists - is also difficult to assess.

The costing of tasks, as described in para 3.6 above, provides a starting point and then a cost/benefit analysis in social terms is required. The latter is most difficult to quantify in that it involves such intangibles as social justice, empowerment, education and negotiation.

A commitment to the CJP by government may reap the following savings:

- (i) Properly resourced diversionary strategies aimed at avoiding detention will reduce jail associated costs.
- (ii) Principle aims of the CJP are to reduce levels of offending, and imprisonment rates. A successful strategy will result in a reduction in police costs, legal aid costs, court costs and jail costs.

⁶⁶ Described in para 3.2.

- (iii) Involvement of communities in the planning and implementation of CSO's will result in valuable work being performed by offenders for the community. This will reduce current expenditure costs (eg. roadworks, general maintenance) for the immediate community and, ultimately, government.
- (iv) The existence of the CJP may enable the diversion of resources from existing programs aimed at combatting social disharmony which overlap with or duplicate CJP initiatives.
- (v) Similarly, if the CJP is successful in combatting social disharmony, then cost savings in areas such as health and housing may result.

3.8 *Protocols and Memoranda of Understanding between Police and Remote Communities*

Protocols are desirable in determining roles and responsibilities (eg. type and level of service) to be provided by police and local communities in the CJP. A protocol at Tennant Creek was crucial to the success of the Julalikari Night Patrol, and a protocol between police and many Northern Territory Aboriginal communities will be crucial to the success of the community justice by-laws ("the ACJA").

However care needs to be taken that enthusiasm for protocols does not result in a drastic reduction in the level of service provided by police. Complaints have already been received from some communities (Ngukurr, Minjilang, Numbulwar) about the inability of police to attend call outs. Police claim an inability to access remote areas on demand due to resourcing problems.

Remote area work is difficult enough for police without resourcing problems. Accordingly police resourcing problems should be addressed by government as part of the CJP.

There is an issue of human rights here. Remote communities are as entitled to a police presence

as the more accessible communities. Unfortunately a failure to maintain uniform policing standards throughout the Northern Territory is likely to impact heavily and detrimentally on female victims of domestic violence.

Police are empowered under the ACJA to prosecute breaches of community justice by-laws and also to prosecute offences committed under mainstream laws.

Undoubtedly, due to kin conflict or due to the sheer intensity of some disputes, many communities are desirous of a "neutral" police presence on occasions. Accordingly, police will continue to receive "call-outs" despite the existence of protocols. Obviously protocols cannot remove the right of individual community members to call police outside the protocols, but presumably the existence of protocols (especially if the nature and purpose of the protocol is known to community members) will result in a drastic reduction of police business on communities.

As a general rule, protocols should never result in a diminution of the rights of individual community members because such an outcome infringes basic human rights. Also protocols should not result in a failure by police to meet their duties and responsibilities pursuant to the Police Administration Act (NT).

There can be no doubt that properly negotiated protocols operate in the best interests of the parties (i.e. communities and police) and the CJP.

It would be unfortunate indeed if the growth of protocols throughout the Northern Territory was restricted in any way. Accordingly a method is needed to ensure as far as possible that the parties abide by protocols so that police, subject to protocols, attend communities upon request; and so that communities, subject to the protocols, do not call police each time there is a disturbance.

Perhaps the parties could consider formal ratification of the protocols by the relevant Minister so as to bring the existence of the protocols to the attention of the parties and the general public.

4. POTENTIAL OBSTACLES TO CJP

CJP stakeholders should use their best endeavours to ensure that the CJP does not founder due to:

- (i) Lack of proper consultation with Aboriginal communities on their CJP interests and requirements.
- (ii) Poor protocols between stakeholders.
- (iii) Lack of resourcing - in the areas of training, establishment, and/or support.
- (iv) Impatience by government to secure immediate outcomes.

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