# LAW REFORMING LAWYERS AND ABORIGINAL SOCIAL CONTROLS: THE CASE OF THE WESTERN AUSTRALIAN *ABORIGINAL COMMUNITIES ACT*

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## I Introduction

The proclamation of the *Aboriginal Communities Act 1979* (WA) ('*Act*') made it possible for Aboriginal community councils to make and enforce by-laws in an attempt to limit civil disobedience and to enable them to regulate matters of concern to Aboriginal people on their own lands.[1] A by-law only applies within the boundaries of the community and can only be made by a unanimous vote of all council members. Initially the *Act* was restricted to two Aboriginal communities in the Kimberley region (La Grange and One Arm Point), followed by three more (Beagle Bay, Lombadina and Balgo). Following a positive review by John Hedges in 1986, the *Act* was extended further afield to other Aboriginal communities in Western Australia including communities which lie in the east of the State, bordering the Northern Territory and South Australia. These are the Ngaanyatjarra lands, where traditional owners were particularly interested in the power given to them under the *Act* to create local by-laws to deal with alcohol-related troubles and petrol sniffing. The communities of the region had struggled since the 1970s to manage chronic petrol sniffing[2] which was a cause of substantial morbidity and mortality among young people.[3] Petrol sniffing had spread rapidly amid a highly mobile population, so that between 1980 and 1988 sniffing was associated with at least 14 deaths in the Ngaanyatjarra lands,[4] several of them from horrific burn injuries, car accidents, septicaemia and chronic lead poisoning. There were five deaths in Warburton alone over 14 months between 1988 and 1989. Sorry (grieving) camps, abandoned houses and continual funerals were all regular features of life in that period. The communities also had to deal with the disruptive effects of liquor imported from outlets many kilometres away to the east and the southwest. These substance abuses were matters of grave concern to the communities themselves. They were not just the cause of morbidity and mortality among users, but constituted reckless and socially corrosive behaviours affecting entire communities.[5] After numerous meetings, letters to Ministers and drafts, the Ngaanyatjarra succeeded in formulating by-laws to deal with their major concerns: the possession and use of alcohol, petrol use and possession and entry onto Aboriginal lands. The by-laws were designed by local Aboriginal people to deal with their needs on the ground. As a result of their active involvement in the drafting process, the Ngaanyatjarra felt a strong sense of ownership of the by-laws, which were eventually gazetted in July 1989.

However in 2005, lawyers working for the Western Australian Law Reform Commission enquiry into the interaction of Western Australian law with Aboriginal law and culture, recommended that the *Act* be repealed, which would effectively dismantle the by-law system. The proposed repeal of the *Act* hinged on the Commission's assertions that the by-laws were in effect, not *cultural* enough, paid insufficient attention to customary law mechanisms, and were an unwarranted extra layer of regulation that had been imposed on Aboriginal people. The Western Australian Law Reform Commission's proposal to repeal the *Act* was met with dismay by the Ngaanyatjarra; this was ironic in view of the fact that the opposition derived from the very Aboriginal Elders whose interests were ostensibly in need of protection.

In this paper I examine why the Ngaanyatjarra were so supportive of an external, state-based regulatory framework in the form of the *Aboriginal Communities Act 1979* (WA) and its by-laws, and why they objected so vigorously to the proposal for repeal. In order to do so, I draw on an anthropological analysis of the ethic of non-interference and the primacy of personal autonomy among Aboriginal

people. I go on to show how the by-laws came to carry such importance for the Ngaanyatjarra, becoming a symbol of their local self-determination, by discussing the origins of the *Act* itself and development of the Ngaanyatjarra-speaking peoples of the region into a community of interest with a degree of solidarity and political experience. Finally, the paper examines the differing perspectives of Aboriginal people, lawyers and anthropologists around the vexed issue of customary law and what it can deliver.

## II The Origins of the *Aboriginal Communities Act*

In the 1970s an experienced stipendiary magistrate working in the Kimberley region of Western Australia observed that the Aboriginal people appearing before him had little understanding of the legal process. In an attempt to inform himself as well as the communities concerned, Magistrate Terence Syddall invited Aboriginal individuals to participate with him in dispensing justice. He envisaged a community justice system allowing for an English court model to be operated by Aboriginal people, as his discussions with local people revealed that they believed Aboriginal 'traditional' law and Australian law could complement one another. With the support of the Attorney General of Western Australia, Syddall met with communities to discuss how to improve their law and order. His subsequent recommendations led to the passage of the *Aboriginal Communities Act 1979* (WA).

The *Act* gave Aboriginal councils the power to write and maintain local by-laws that dealt among other things with the regulation of access to community lands and the prohibition, regulation, use or supply of alcohol and inhalants.[6] It provided for the appointment of Aboriginal justices of the peace and local 'wardens',[7] and breaches were actionable by police. Perhaps most significant for the purpose of this discussion is that Magistrate Terence Syddall's original recommendations were designed to facilitate sanctions for offences not previously encountered by so-called traditional communities. His recommendations perceptively addressed the absence in Aboriginal communities of what he called 'inherited rules' for disciplining troublemakers whose offences related to private property or stemmed from the abuse of alcohol.[8]

In the years following its passage there was considerable debate about and criticism of the *Act*.[9] Much of this related to the difficulties experienced by the 'tribal Elders' who had been selected as justices of the peace but whose kinship obligations conflicted with their new role. Their illiteracy, insufficient training and unclear role added to these problems. Attempts at local punishment evidently caused real anguish; for example, one Aboriginal justice of the peace commented in 1983:

> Every time I got to go to court I get sick inside my stomach. When I sentence my people I got to be easy – he my [relation]. It would be better to go back to 'one law' for all people.[10]

Much critical comment on the *Act* from the legal fraternity concentrated on the idea that the *Act* represented 'white man's law'. An example comes from Gyanraj:

> The Act displaces traditional authority with a system based on white man's law. The by-law powers are framed in orthodox legal terms, the enforcement procedures are strongly linked to the legal system and the penalties are of the same kind as those in force under legislation covering the same ground as the by-laws do.[11]

In a report on Aborigines and local government prepared for the Human Rights Commission in 1986, Rumley reiterated some of the perceived problems with the *Act*, which included the by-laws being framed in orthodox legal terms and the retention of control by the Minister over which communities can be proclaimed under the *Act*. Nevertheless, Rumley concluded that in conjunction with its by-law making power, the *Act* could potentially enhance the development of effective local autonomy.[12] Although the by-laws drawn up by the communities dealt with 'a fairly limited range of non-controversial topics' she observed correctly that these constituted a significant proportion of daily issues over which Aboriginal councils wished to exercise greater control (such as drinking and petrol sniffing).[13]

## III Creating the By-laws

While this debate was taking place among the lawyers, out on the lands the Ngaanyatjarra were struggling to manage the disorder and distress brought about by the illegal 'sly grogging' and widespread petrol sniffing referred to in the Introduction. At their council meetings they were beginning to discuss the need for by-laws to help manage these antisocial activities.

The Ngaanyatjarra lands comprise a vast area of desert country (the Western Desert) within Western Australia.

Around 2,000 Aboriginal people speaking Western Desert languages live in 12 discrete communities and outstations in the region. The nearest significant towns are Alice Springs (1,000 km to the northeast) and Kalgoorlie (900 km to the southwest). Western Desert peoples with cultural attachment to the land such as the Ngaanyatjarra were particularly lacking in services and support from the Western Australian Government, had been largely ignored by both Commonwealth and state governments and as late as 1957 their lands were still officially designated as 'uninhabited'.[14] There was no special Aboriginal land tenure in Western Australia and no method for applying for such tenure until 1986. Local and state authorities perceived Aboriginal affairs to be a Commonwealth responsibility and local shire officials were reluctant to acknowledge any responsibility for servicing Aboriginal communities.

Despite this unpromising historical context, from the 1970s onward the Ngaanyatjarra had begun to form a community of interest, building on the new (Commonwealth) policy environment of self-determination. Until the 1970s there was virtually no organised Aboriginal voice in Australia at any level,[15] with Aboriginal bodies largely restricted to advisory roles.[16] But in 1980 the Ngaanyatjarra met at Warburton to form their own land council, quite separate from the Pitjantjatjara Council that had existed since 1976.[17] The Ngaanyatjarra Council was started 'from ourselves, self-help. We didn't wait for the government to give us something'.[18] Then in 1984, having been previously disenfranchised within Western Australia's shire system (because they were not property-owners paying rates) the Ngaanyatjarra were for the first time able to vote for their council representative within the Shire of Wiluna.[19] These were major achievements for the Ngaanyatjarra.

By 1987 by-laws had been implemented across the border in South Australia, where Pitjantjatjara-speaking communities had also been struggling to deal with substance abuse since the late 1960s. These communities share strong kinship and marriage alliances with the Ngaanyatjarra. After 20 years of offending and social disorder associated with petrol sniffing, numerous unsuccessful interventions and the failure of local community and 'traditional' controls, the Pitjantjatjara began to demand legal remedies. In 1987 they added by-laws as amendments to the *Pitjantjatjara Land Rights Act 1981* (SA), the Act that gave them freehold title to the land under South Australian law. The by-laws dealt with the control of alcoholic beverages, gambling and the use of petrol, empowering police to confiscate and dispose of petrol suspected of being used for the purpose of inhalation. Partly influenced by these developments across the border, in September 1987 the Secretary of the Ngaanyatjarra Council wrote to the Western Australian Minister of Aboriginal Affairs, Ernie Bridge:

> I refer to the discussions which took place with you about by-laws at the Ngaanyatjarra Council meeting in July at Warakurna. The Council members were especially concerned about 'grog' on the Ngaanyatjarra lands and about petrol sniffing and wanted by-laws to make possession of 'grog' and petrol and glue sniffing an offence. You agreed to the Council being given the power to make by-laws for this purpose under the Aboriginal Communities Act. Having considered the by-laws in existence for La Grange, we are also keen to have by-laws giving the Council the power to give entry permits.[20]

Attached to the letter was the draft set of by-laws drawn up by the Ngaanyatjarra Council. The Ngaanyatjarra was the only Aboriginal group in Western Australia to negotiate successfully with the state government for 99-year leases over their lands. When the lease was finalised in 1988 it cleared the way for the Ngaanyatjarra to take on a degree of local management of their lands and for the next move towards local autonomy: the creation of the by-laws which had been under discussion at land council meetings for so long. The by-laws were finally gazetted in July 1989.

## IV The Proposal for Repeal

Despite the initial debate over the *Aboriginal Communities Act 1979* (WA) in the late 1970s and early 1980s, the Law Reform Commission of Western Australia ('LRCWA') recommendation in 2005 for its repeal was unexpected. The (new) critique of the *Act* and the proposal to repeal it emerged in the course of a six-year enquiry by the LRCWA that was focused on Aboriginal customary laws and their interaction with state law. Prior to finalising its enquiry, the LRCWA published a Discussion Paper in which one of the proposals (No 11) recommended scrapping the *Act* and the accompanying by-law scheme on the grounds that the by-laws comprised an additional set of laws to which community members are subject.[21] The by-laws, it said, 'appear to simply create another layer of law applicable only to Aboriginal communities', and they had 'no cultural basis in the custom of those communities'.[22] In addition, the Commission was concerned about the fact that the by-

law scheme was controlled by community councils which it thought 'may not necessarily be reflective of traditional authority structures'.[23] Instead of the by-laws (which could be enforced by the police), the Commission proposed the formation of community justice groups to be composed of 'elders and respected persons' and which it thought would better reflect culture and custom.[24] These groups would 'deal with social and justice issues in their own way' and could 'ban or restrict the use of alcohol as part of their community rules'.[25] Members of such a community justice group would be 'made' into authorised officers who could take an inhalant away from a petrol sniffer.

In a separate publication the writer and editor of the Commission's report echoed these sentiments. She expressed the opinion that many of the problems experienced by Aboriginal communities (feuding, dysfunction, the misuse of alcohol and other substances) were symptomatic of a decline in cultural authority and that among other supposed causes this decline was partly due to the imposition of white governance structures on communities.[26] Indeed, the Commission's Discussion Paper strongly implied that the by-laws, and the *Act* itself, had been government *impositions* on communities. As a result of this interpretation, the LRCWA took upon itself the task of 'empowering' and enhancing the cultural authority of Elders so that they could (it was hoped) create community rules and sanctions to 'reflect customary law as well as deal with other issues such as alcohol and substance abuse'. Despite implying that the *Act* had been an imposition, the LRCWA now proposed a new Act of its own, the 'Aboriginal Communities and Community Justice Groups Act'. This would establish the community justice groups 'which seek to consolidate the cultural authority of Elders and offer a culturally appropriate, community-owned process for control of behaviour in the place of the current by-laws'.[27]

In view of these well-meaning aspirations, it was perhaps a surprise to the Commission to discover that the majority of submissions and responses to the Discussion Paper disagreed with its observations and recommendations.[28] The most spirited defence of the *Act* and the by-law scheme emanated from the Aboriginal people of the Ngaanyatjarra lands.

## V The Ngaanyatjarra Defence

When the LRCWA published its Discussion Paper recommending the dismantling of the *Act* and the by-laws, the Ngaanyatjarra Council defended both of them on behalf of its member communities by sending in a submission unanimously approved by its governing committee composed of a representative of each of the 12 communities. The submission was drafted by the Council's staff lawyer, drew on detailed interviews with affected Ngaanyatjarra people and was based on several years of fieldwork experience of Council staff.[29]

The Ngaanyatjarra Council relied on the evidence of community members to explain to the Commission why they relied on these non-customary and allegedly culturally inappropriate by-laws. 'The by-laws that are in place give people self-determination, because the communities write the laws. The existing by-laws give people authority over their land' said one man. Without the by-laws, said another man from Warburton community, 'we don't have our rights and we can't help anybody. We can't do anything.' This sense of powerlessness was particularly apparent when it came to managing trouble with family members. The Chairman of Cosmo Newberry community observed: 'It would be hard work [without the by-laws] because you have to deal with your own family; you can't deal with other families'. Another Council chair said: 'We wanted to keep communities safe from alcoholics. By-laws are for the protection of children and the future of the people'.[30]

The Ngaanyatjarra Council and its members saw no conflict between the by-laws and the custom of their communities. In direct contradiction to the claim by the LRCWA that the by-laws were unacceptable because they were not culturally based in the custom of the communities, for the Ngaanyatjarra it is precisely because a by-law is *not* associated with family-based, customary or 'cultural' matters that it has such traction at the level of local social controls. By-laws (and other external regulatory structures) act to quarantine people from the cultural constraints that hinder the exertion of local authority over certain issues, particularly those associated with drunkenness or petrol sniffing – matters of personal comportment. These by-laws from 'outside' were favoured because the Ngaanyatjarra themselves recognise that their customs do not authorise members of the community (even the 'Elders'), to chastise or control others in secular matters such as antisocial behaviour. Cultural norms and expectations also make it difficult to deny entry to people onto the lands. The main barrier for the Ngaanyatjarra in apprehending an intoxicated person was a lack (rather than a loss) of cultural authority over such matters. As several anthropologists have

observed,[31] this is because the autonomy of the individual is considered to be paramount and it is deemed neither appropriate nor possible for co-residents – even those bearing titular authority such as 'warden' or 'councillor' – to intervene in the drinking or sniffing behaviour of their fellows. This ethic of non-interference has been noted in other Indigenous societies as well, particularly in Canada.[32]

Fred Myers was the first anthropologist to make explicit how these socially embedded values have influenced the way in which Aboriginal people invoke the authority of certain outsiders and 'higher authorities' such as Christianity. Based on fieldwork among the Western Desert Pintupi, Myers wrote of the overriding concern of individuals with 'egalitarianism' so that, 'except for very close kin, no individual simply on the basis of being an elder can tell one what to do.'[33] Myers explains how even the elected members of the community council had no real power of sanction, so that no one feels much obligation to follow their rulings and as a result, repeated decisions to ban liquor had been to no avail. In order to be authoritative about secular, non-Law matters (such as drunkenness for example), the local village council sought a European 'boss' who provided an external, impersonal authority for difficult decisions and interventions – and who could be sacked if necessary. For example, the relatives of someone who needed to be punished for wrongdoing could (and did) circumvent their socially- and culturally-derived feelings of sorrow and compassion for that individual by using *an outsider* for such punishment.[34]

Another example of this phenomenon of invoking what I have called the 'authorising other',[35] is when a former drinker explains and legitimises his or her abstinence to former drinking mates as being adherence to an authority outside him or herself, such as following the advice of a well-respected doctor or conversion to Christianity ('I can't drink; I'm a Christian').

State-based by-laws act in this way, and provide the Ngaanyatjarra community and council members with reinforcement and an external source of legitimation and back-up *from beyond their immediate social network*, that is necessary for action at the local level (against drunks for example, or petrol sniffers). These laws form a structural and institutional reference point; invoking them enables and reinforces local social controls rather than undermining them. As a result, the Ngaanyatjarra submission to the LRCWA argued that the communities wanted this 'extra' layer of regulation and saw little, if any, duplication – partly because under mainstream law the possession, use and supply of alcohol and of inhalants were not offences as the Ngaanyatjarra believed they should be. Not only did the Ngaanyatjarra want to keep their by-laws, they continued to stress that they needed help and back-up in enforcing them. The police fulfil this role, and in marked contrast to Aboriginal attitudes towards the police in other regions of Australia,[36] the communities had long argued strongly for a police presence on their lands. Enforcement of the by-laws had been a key issue from the early stages of discussion with John Hedges in 1985.[37] And while the Western Australian police department believed that the by-laws should really be policed by the communities,[38] the Ngaanyatjarra had no doubt but that the by-laws should be enforced by the *police* rather than by Aboriginal wardens who were hamstrung by the cultural constraints on their actions. As one community council chair explained in the submission, 'Parents can't lay a charge [against petrol sniffers] – their only help is through the police. The community can't do it – they [the sniffers] don't want to listen to anyone.'

To its credit, in the final report the LRCWA heeded the (majority) negative responses to its proposal and decided that it would be inappropriate to recommend the repeal of the by-law scheme.[39] However, the Commission continued to promulgate the idea of community justice groups, which would 'set community rules and community sanctions',[40] without, however, clarifying from whence community justice groups would derive their authority to make rules, how their decisions could be enforced, nor how they would avoid the problems of legitimation and authority discussed earlier.[41]

## VI Discussion: A Case of Mismatched Expectations

This case study from Western Australia illustrates how the expectations and aspirations associated with a law-reforming endeavour can be out of step with the pragmatic needs, daily experiences and expressed wishes of Aboriginal people on the ground. Apparently unaware of the earlier history of Aboriginal disenfranchisement and indifference within Western Australia, the LRCWA had underestimated the extent to which the by-laws had come to represent a hard-won sense of local autonomy, local control and pride for the Ngaanyatjarra. For the Ngaanyatjarra, writing their own by-laws based on *their* definitions of acceptable behaviour was the culmination of a history of political engagement and

grassroots activism.[42] Far from being an imposition of the government as suggested by the LRCWA, the Ngaanyatjarra believed the by-laws were *theirs* and they were proud of them. The LRCWA clearly failed to fully appreciate this.

The law-reforming lawyers were also keen to resurrect and incorporate the notion of customary law and it was this ambition that guided many of the LRCWA objections to the by-laws and the *Act*. By continually stressing customary law, the Commission's lawyers were evincing a high degree of idealism, while simultaneously failing to absorb the findings of earlier enquiries made in the 1980s, including the work of magistrate Terence Syddall, John Hedges and the Australian Law Reform Commission ('ALRC').

The LRCWA seemed unaware of the intentions Terence Syddall originally had for the *Act*, which he saw as strengthening Aboriginal Law, not replacing it. Discussing his efforts to involve and educate Aboriginal people in the (Australian) law in 1983, Syddall had written that:

> Fears were expressed – *almost exclusively by Europeans* – that participation in the European system of law would result in diminution or total abandonment by the Aboriginals of their traditional law. No such fears were held by either the Aboriginal leaders or by me. On the contrary I envisaged fortification of their law within the wider ambit of the general Australian law (emphasis added).[43]

In a similar vein, Hedges' 1986 report contains a withering response to suggestions that the community justice aspects of the *Act* should encompass customary law, saying that such suggestions were usually unspecific about what exactly they meant by 'customary law' and exactly *how* it could be incorporated.[44]

The optimism around customary law notions expressed by LRCWA stands in marked contrast to the pragmatism and caution expressed in the original federal ALRC Inquiry into Aboriginal Customary Laws, as well as several other significant publications at the time.[45] Leaving aside the more exotic aspects of customary law (such as spearing, payback and promised marriage) which are not our concern here, it is significant that the 1986 ALRC Report was extremely circumspect about the supposedly restorative role of customary remedies in matters of social disorder and intoxication. It stated unequivocally that problems of crime and violence cannot be resolved by the recognition or restoration of Aboriginal customary laws – even if communities were relatively homogeneous and living on their own land.[46] Further, the ALRC suggested that high offence and imprisonment rates among Aboriginal people could not be explained by the *non*-recognition of customary laws.[47] Even where 'tradition' was strong, it said, local responses to crime will not necessarily rely on customary laws but may involve an appeal to the general Australian law to assist.[48] The ALRC heard from the staff anthropologist of the Pitjantjatjara Council who explained why Aboriginal people in the region supported the role of 'mainstream' law in managing day-to-day troubles:

> Many [Aborigines] regard the role of Australian law as helping to protect communities and people from disruptive influence, thereby ensuring the continuance of their own beliefs and practices. In other words, those aspects of Australian law which can help provide social control are regarded as no threat to Customary Law.[49]

It seems that the ALRC paid attention to submissions such as these. It is also notable that the ALRC report endorsed the principle of providing Aboriginal communities with by-law making powers in Western Australia, seeing these as an aspect of local autonomy and a means whereby communities could exercise control over law and order.[50] The ALRC made it clear that the *Aboriginal Communities Act 1979* (WA) and its associated schemes had 'never purported to be a recognition of "tribal law" or "tribal arbitration"', and that it covered a limited range of offences.[51]

In view of the caveats and precautionary approaches of the 1980s, it is remarkable that customary law is now persistently promoted – often by non-Indigenous people – as having a role in managing social disorder and alcohol and other drug abuse, when it has been unable to deal with these socially-embedded troubles over the last few decades. Many today, particularly in the legal or quasi-legal professions, still seem to hold out hopes that Indigenous customary law 'can rise like a phoenix from its own ashes and return to restore law and order among the people'.[52] This persistent enthusiasm may be because lawyers' knowledge about customary mechanisms of social control tends to be based on official *representations* of customary law matters, which make them appear to have more utility and to be more regularly and consistently applied than is usually the case. Anthropologist Peter Sutton wrote of this optimism, suggesting that one reason for the resurrection of the quest for customary law

was a persistent idealism: a hopeful but unrealistic response to high levels of disorder and crime, often proposed by 'legal cleanskins' who were rediscovering the wheel.[53]

## VII Conclusion

In this paper I have analysed a situation in which a Law Reform Commission of enquiry intended to elucidate the relationship between Aboriginal 'customary' laws and the laws of the state and that was well-meaning in its intentions, nevertheless proposed a strategy that met with vigorous disapproval from the Aboriginal people whose interests were ostensibly being considered – or that were *thought* to be in need of protection. In its enquiry the LRCWA failed to take account of the newly developed sense of autonomy among the Ngaanyatjarra and the extent of community ownership they felt towards the by-laws they had written. The Commission also ignored expressions of caution that had emanated from earlier legal enquiries, about what customary law might be expected to deliver in the management of social disorder in communities. The Commission sought to repeal the *Aboriginal Communities Act 1979* (WA) because it and its by-laws had 'no cultural basis' in Aboriginal custom and thus did not conform to the Commission's own ideals. Instead the Commission promulgated newly imagined and hopeful roles it thought Aboriginal people should pursue using custom, culture, and Elders justice groups.

However, in their defence of the *Act*, the Ngaanyatjarra took a pragmatic approach based on their lived experience. They reiterated the necessity for enforceable by-laws as a form of legal back-up to help them manage troublemakers and other problems in community contexts where custom, kinship and cultural norms of non-interference make local remedies by local people difficult. Their defence of the *Act* was eventually accepted by the LRCWA. The Indigenous contributors to the Ngaanyatjarra Council's submission showed no lingering idealisation of the role that customary social sanctions might have in curbing drunkenness and violence, nor in assisting them to deal with other peoples' families. As the chairman of the community of Cosmo Newberry explained:

Because of the influence of white ways of doing things, we as Aboriginal people are using part of the white system now to fill in the gaps. It's our law in that we requested it for the protection of our well-being. We're using their system to make it work for us. That's what it is.[54]

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1 Christine Fletcher, *Aboriginal Politics*: *Intergovernmental Relations* (Melbourne University Press, 1992) 83.

2 Maggie Brady, *Heavy Metal: The Social Meaning of Petrol Sniffing in Australia (*Aboriginal Studies Press, 1992).

3 C Kaelan, C Harper, B I Vieira, 'Acute Encephalopathy and Death Due to Petrol Sniffing: Neuropathological Findings' (1986) 16 *Australian and New Zealand Journal of Medicine* 804. The substitution of non-sniffable Opal fuel has helped to curb the practice. See Peter d'Abbs and Sarah MacLean, 'Volatile Substance Misuse: A Review of Interventions' (National Drug Strategy Monograph Series 65, 2008) 118.

4 Brady, above n 2, 60.

5 Personal Communication, John Damian McLean, 12 May 2013.

6 In 1983 the Human Rights Commission (now Australian Human Rights Commission) examined by-laws on Aboriginal Reserves to ensure their compliance with the *International Covenant on Civil and Political Rights*, with human rights and with racial discrimination legislation. See Human Rights Commission, 'Aboriginal Reserves By-Laws and Human Rights' (Occasional Paper No 5, 1983).

7 As it turned out the Aboriginal justice of the peace scheme was not successful. Lack of back-up enforcement hampered the role of local wardens. See Brady, above n 2.

8 John B Hedges, *Community Justice Systems and Alcohol Control: Recommendations Relating to the Aboriginal Communities Act and Dry Area Legislation in Western Australia* (Minister with Special Responsibility for Aboriginal Affairs, 1986) 2.

9 There was debate about the administration of the *Aboriginal Communities Act 1979* (WA), the associated Aboriginal justice of the peace scheme and the impact of both on so-called 'tribal laws'. See Swami Gyanraj, '"Autonomy" for Aboriginal Communities (Courtesy WA Government)' (1979) 4 *Legal Service Bulletin* 234; Annie Hoddinott, 'Aboriginal Justices of the Peace and "Public Law"' in Kayleen M Hazlehurst (ed), *Justice Programs for Aboriginal and Other Indigenous Communities: Australia, New Zealand, Canada, Fiji and Papua New Guinea* (Australian Institute of Criminology, 1985) 173; Terence Syddall, 'Aboriginals and the Courts I and II' in Kayleen M Hazlehurst (ed), *Justice Programs for Aboriginal and Other Indigenous Communities:*

*Australia, New Zealand, Canada, Fiji and Papua New Guinea* (Australian Institute of Criminology, 1985) 157; Kayleen M Hazlehurst, *Reflections on the Syddall/Hoddinott Western Australia Aboriginal Justice of the Peace Debate: A Submission to the Australian Law Reform Commission* (Australian Institute of Criminology, 1985); Hedges, above n 8, 97.

10 Hoddinott, above n 9, 176.

11 Gyanraj, above n 9, 235.

12 Hilary Rumley, 'Aborigines, Local Government and Incorporated Associations in Western Australia' (Discussion Paper No 13, Human Rights Commission, 1986) 113.

13 In recent years however, 'reforms' to the *Sentencing Act 1995* (WA) have curtailed the range of sentencing options for breaches of the *Aboriginal Communities Act 1979* (WA) by-laws and undermined the wishes of local communities. In 1995 short custodial sentences of up to three months were abolished along with small fines. Short sentences had been used to send violent juvenile offenders and petrol sniffers away for a few weeks to a remote substance abuse centre on the lands. In 2003 the *Sentencing Act 1995* (WA) was amended again raising minimum custodial sentences to six months, further affecting local management of drunk and disorderly individuals: University of New South Wales Council for Civil Liberties, Submission to the NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less*, 3 November 2003, 10; Personal Communication, John Damian McLean, 20 May 2013.

14 Fletcher, above n 1, 20.

15 Ibid.

16 Ibid. The National Aboriginal Consultative Committee ('NACC') was established in 1973 and replaced by the National Aboriginal Conference ('NAC)' in 1977. Charles Rowley had strongly encouraged the establishment of Aboriginal corporate bodies allowing for the devolution of decision-making to the local level. See Rumley, above n 12, 109. Charles Rowley's three books were *The Destruction of Aboriginal Society* (Australian National University Press, 1970); *Outcasts in White Australia* (Penguin Books, 1972); and *The Remote Aborigines* (Penguin Books, 1971).

17 Inge Kral, *Writing Words – Right Way! Literacy and Social Practice in the Ngaanyatjarra World* (PhD Thesis, The Australian National University, 2007); Phillip Toyne and Daniel Vachon, *Growing Up the Country: The Pitjantjatjara Struggle for Their Land* (McPhee Gribble, 1984).

18 'Joshua', cited in Kral, above n 17, 144.

19 Kral, above n 17, 142. Non-ratepayers were given the right to vote in local elections following amendments to the *Local Government Act 1960* (WA) in 1984. See Fletcher above n 1, 22.

20 Kral, above n 17, fig 4.9.

21 LRCWA, *Aboriginal Customary Laws*, Discussion Paper (2005).

22 Ibid 121.

23 Ibid 114.

24 Ibid 17, 140, 160.

25 LRCWA, *Aboriginal Customary Laws Project: Alcohol and Substance Abuse* (2006); LRCWA, *Aboriginal Customary Laws Project: Community Justice Groups* (2006).

26 Tatum L Hands, 'Teaching a New Dog Old Tricks: Recognition of Aboriginal Customary Law in Western Australia' (2006) 6(17) *Indigenous Law Bulletin* 12.

27 LRCWA, Discussion Paper, above n 21, 431.

28 LRCWA, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture*, Final Report (2006) 114.

29 The author wrote a letter in support of the Ngaanyatjarra Council submission.

30 Ngaanyatjarra Council (Aboriginal Corporation), Submission to the Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (2006).

31 Brady, above n 2; Kral, above n 17; Fred R Myers, *Pintupi Country, Pintupi Self: Sentiment, Place and Politics Among Western Desert Aborigines* (Smithsonian Institution Press, 1986); David Martin, *Autonomy and Relatedness: An Ethnography of Wik People of Aurukun, Western Cape York Peninsula* (PhD Thesis, Australian National University, 1993).

32 Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Octopus Publishing Group, 1992). The 'ethic of non interference' is an expression coined in 1990 by a Canadian First Nations psychiatrist, Clare Brandt.

33 Fred R Myers, 'Emotions and the Self: A Theory of Personhood and Political Order among Pintupi Aborigines' (1979) 7 *Ethos* 343, 367.

34 Myers, 'Emotions and the Self', above n 33, 360.

35 Maggie Brady, *Indigenous Australia and Alcohol Policy* (University of New South Wales Press, 2004) 114–17.

36 Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001).

37 Transcript of Ngaanyatjarra Council meeting, 23 October 1985 in Hedges, above n 8, app D1, 126.

38 Hedges, above n 8, 52. While police and other commentators often suggest that Aboriginal communities should, in effect, resort to self-help in dealing with serious matters of social disorder, these demands are never made of other sections of the Australian community.

39 LRCWA, Final Report, above n 28, 115.

40 See Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008) 196.

41 Another regulatory (and non-customary) avenue for managing alcohol became available in Western Australia in 2007 when s 175

was added to the *Liquor Control Act 1988* (WA). This allows for a declaration of no consumption, sale or possession of alcohol in a designated restricted area. Since the first community decided to opt into the scheme in 2008, 14 more have had s 175 declarations made at their request. So far the Ngaanyatjarra have not taken up this option.

42 Kral, above n 17, 145.

43 Syddall, above n 9, 161.

44 Hedges, above n 8, 97. Cf Hoddinott, above n 9.

45 ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986); Mary W Daunton-Fear & Arie Freiberg, 'Minority Groups and the Criminal Justice System' in Duncan Chappell and Paul Wilson (eds), *The Australian Criminal Justice System* (Butterworths, 2nd ed, 1977) 45; Kenneth Maddock, 'Aboriginal Customary Law' in Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (George Allen & Unwin, 1984) 212.

46 Cf ALRC, above n 45, vol 1, 283.

47 ALRC, above n 45, vol 1, 86.

48 Ibid vol 1, 283.

49 Ibid vol 1, 143 (Daniel Vachon).

50 Ibid vol 2, 77.

51 Ibid vol 2, 42–7.

52 Peter Sutton, *The Politics of Suffering: Indigenous Australia and the End of the Liberal Consensus* (Melbourne University Press, 2009) 157; Peter Sutton, 'Customs Not in Common: Cultural Relativism and Customary Law Recognition in Australia' (2006) 6 *Macquarie Law Journal* 161, 171. See also Hands, above n 26; Blagg, above n 40.

53 Sutton, *The Politics of Suffering*, above n 52, 154.

54 Ngaanyatjarra Council (Aboriginal Corporation), above n 30, 17.