

background paper 4

Family law and customary law

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Introduction

Aborigines inhabited the state of Western Australia for well in excess of 30,000 years prior to European settlement and for at least 31,000 years in the south west of Western Australia prior to Captain Stirling's arrival.¹ In the traditional Aboriginal society that existed prior to European settlement—and which continues for many Aboriginal families today—children had a special place in the extended family network developed on kinship lines.² This was unlike European-British society at the time of settlement, in which a father was generally the guardian of his children and so held parental legal power. Despite this legal arrangement, in most cases the mother undertook the role of nurturing and caring for children. The pattern of the biological family being predominantly responsible (both legally and in fact) for child-rearing remains the norm in contemporary non-Aboriginal Australian families. In contrast, in traditional Aboriginal society child-rearing was, and is, the responsibility of the extended family or other members of the tribe. However, the fact that, at some particular stage, someone other than the biological parents may undertake the primary care of a child does not mean that parental ties are severed or that the parents have relinquished their parental rights or love for that child. Another key cultural difference in family life is that Aboriginal children have traditionally been allowed greater freedom of movement than in non-Aboriginal families and less attention is placed on material comfort, discipline and training.³

Likewise 'customary' marriage between Aborigines (also often referred to as 'traditional' or 'tribal' marriage) is significantly different to the form of 'legal' marriage that has developed through the dominant legal-political system in Australia. The actual forms—and the underlying importance—of marriage in Aboriginal society differ from that reflected in current Australian law. The Australian and Western Australian laws dealing with marriage reflect an ethos of marriage that is underpinned by freedom of choice of intending partners, as if this is vital for marital stability. Yet in Aboriginal society, marriage is viewed more along utilitarian lines – that is, regard is had to the contribution marriage makes to the Aboriginal 'social structure rather than as a form of individual autonomy and self-expression'.⁴

Traditional customs and arrangements in Aboriginal communities often exist without the imprimatur of the Australian legal system. At times, this disjuncture can create serious legal disadvantages for Aboriginal people. An obvious historical example in respect of family law was the adverse consequences of illegitimacy for children of parents married under traditional Aboriginal custom.

Further, a lack of understanding of traditional Aboriginal family life has prompted inappropriate government action. For example, the relative freedom that the child in a traditional Aboriginal society is granted and the lack of emphasis on 'western style' training has led to perceptions that Aboriginal children are often neglected. Sadly, this failure of European Australia to understand the kinship family arrangements, child-rearing traditions and learning methods of traditional Aboriginal society has been the cause of intense state intervention in the welfare of Aboriginal children.⁵

Traditionally, Aboriginal children are not educated in a structured school situation; rather, they learn by observing adults and elders and by participating in particular activities. Also, the passing of knowledge from adults to children in traditional Aboriginal society is governed by strict tribal rules as to who is to do the passing and who is to receive the knowledge. Depending on factors such as clan, sex and age, some children receive more or different information or knowledge than other children. The knowledge that is passed to children in relation to their beliefs, language, culture and law is crucial for the survival of Aboriginal culture as children are the key ingredient in maintaining and preserving cultural integrity and identity.⁶ Indeed, it is the right of all parents and families to pass such knowledge on to children, as they form the next generation of any particular racial or ethnic group. This right is violated when another group or institution interferes with the traditional process of transferring the societal or group norms, knowledge and culture to the next generation.⁷

1. Howard MC, *Aboriginal Politics in South-Western Australia* (Perth: University of Western Australia Press, 1981).
2. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Aboriginal Customary Law: Child Custody, Fostering and Adoption*, Research Paper No 4 (1985) 1.
3. EommerladE, 'Aboriginal Children Belong in the Aboriginal Community: Changing Practices in Adoption' (1977) 12 *Australian Journal of Social Issues* 167; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (Vol 1, 1986) [344]; Australian Law Reform Commission, *Aboriginal Customary Law: Child Custody, Fostering and Adoption*, *ibid* 1–2.
4. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Promised Marriage in Aboriginal Society*, Research Paper No 1 (1985) v.
5. This has been well documented in recent years and these children have become known as the 'stolen generations'. A national inquiry into the practice of separating Aboriginal children from their families was held in the mid 1990s resulting in the publication of a comprehensive report: Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).
6. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Aboriginal Customary Law: Child Custody, Fostering and Adoption*, above n 2, 1.
7. Brandl M, 'The Aboriginal Children and Families Heritage Project' (1980) 5 *Australian Child and Family Welfare* 20, 20.

Traditional Aboriginal society was deeply alien to the British settlers that established the Swan River colony. The misunderstandings that followed have, in varying degrees, continued to the present day, none more so than in the area of child welfare and child-rearing. The political and economic power so quickly seized by the European settlers left the original inhabitants of Western Australia extremely vulnerable to interference in their way of life. This vulnerability was exploited through the legislation, policies and practices of successive governments from the time the Swan River was settled by the British in 1829, though the intensity of intervention into, and interference with, traditional Aboriginal society by the state (and other European institutions such as the Christian churches) varied over time. Thus, in family law, like other areas, it is the current legislation, policies and practices that require re-evaluation by processes such as that currently being undertaken by the Law Reform Commission of Western Australia ('the Commission').

This Background Paper is presented in three parts. The first part seeks to provide an overview of customary Aboriginal family law. Here we examine issues such as customary marriage, child-rearing, custody, fostering and adoption. The second part of the paper reviews family law, practice and policy in Western Australia, and the extent to which that law, practice and policy does, or might, accommodate customary Aboriginal family law. The final part investigates proposals for reform in these areas in other jurisdictions, specifically Canada and New Zealand.

As non-Aboriginal lawyers and academics, we do not profess to have extensive first-hand knowledge of Aboriginal customary family law; however, we do possess considerable expertise in the areas of general family law and child welfare law. We also have had extensive experience in relation to Aboriginal child welfare law and policy in Western Australia.⁸

Part I: A brief overview of customary Aboriginal 'family law'

To begin thinking about how Aboriginal customary law might be accommodated in the non-Aboriginal legal system it is useful to remind oneself of the core features of Aboriginal customary law in so far as they relate to what we know as 'family law' in Australia. Those features have been well documented elsewhere and it is not the intention of this Background Paper to cover this topic in detail yet again. The aim is simply to provide a brief description of these key features to place in context the discussion in Part II of this Background Paper. Thus, the discussion of how the nature of Aboriginal customary family law sits with non-Aboriginal family law is left to Part II.

1. Marriage in Aboriginal social organisation

As in non-Aboriginal society, the basic social unit in Aboriginal society is the family. In addition to this unit there is a 'band', which is made up of a group of families. A group of bands makes a tribe.⁹ There is also the clan, which is a descent group, membership of which is determined at birth.

Traditional Aboriginal society is also characterised by kin relationships, which transcend bands and tribes.¹⁰ Kin relationships extend beyond familial blood groups. Kin relationships are crucial to Aboriginal society as they provide the basic core of all social relationships: '[i]t is the anatomy and physiology of Aboriginal society and must be understood if the behaviour of Aborigines as social beings is to be understood'.¹¹ As John Toohey has observed: '[t]he kinship system is critical to an understanding of so much of Aboriginal society, including law'.¹² This applies equally in the area of 'family law' as rules of kinship govern many obligations and relationships, such as marriage.

The concept and practice of marriage are tenets central to traditional Aboriginal societies.¹³ However, customary Aboriginal marriage is not something that necessarily develops according to the free choice of the individuals concerned. Freedom of marriage in traditional Aboriginal society is restricted by rules that prohibit marriage of certain close relatives and by the 'rule of exogamy', which prohibits marriage outside one's clan.¹⁴ In Aboriginal society, it is important

8. The discussion and conclusions that follow have been informed by the extensive literature review conducted by the authors. This includes the wealth of information provided by the Australian Law Reform Commission's 1980s reference on Aboriginal customary law. In researching this paper the authors had discussions with a number of Aboriginal groups and individuals. The authors have also relied upon the notes of the Commission's extensive consultations with Aboriginal communities throughout Western Australia.

9. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Aboriginal Australians and the Law* (Sydney: Cavendish Publishing (Australia) Pty Ltd, 1997) 81, 83.

10. *Ibid.*

11. Elkin AP, *The Australian Aborigines* (Sydney: Angus and Robertson, 1976) 114.

12. Toohey J, 'Understanding Aboriginal Law' (unpublished paper, 1999), reproduced below pp 186–212, 197.

13. Berndt RM & Berndt CH, *The World of the First Australians* (Canberra: Aboriginal Studies Press, 1988) 196–197.

14. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, 166.

that the 'right' marriages take place so that the offspring of marriage are the product of the correct family groups and affiliations.¹⁵ This was consistent with the information gathered in the Thematic Summary for the Commission's consultations in Kalgoorlie.¹⁶

Other factors also affect marriage arrangements. The issues of connection to land, attending to sites and traditional rituals, and inheritance of land can affect whether two Aboriginal people are considered to be appropriate marriage partners. Thus one can see that individual choice in selecting a marriage partner assumes a subsidiary role to the importance given to the various groupings and affiliations of any particular traditional society.¹⁷ In its 1986 report on *The Recognition of Aboriginal Customary Laws* the Australian Law Reform Commission ('the ALRC') noted the comments of Dr Bell (an expert witness):

Perhaps the most important difference between Aboriginal marriage patterns and those of white Australia is that marriage is not seen as a contract between individuals but rather as one which implicates both kin and country men of the parties involved. If we explore the web of relations which surround an arranged marriage entered into at the time of initiation of a young male, we find at least three generations are implicated.¹⁸

2. Customary Aboriginal marriages

In defining traditional or customary Aboriginal marriages, Professor RM Berndt offers the following:

1. The couple are eligible to marry according to local rules which define preferred and acceptable alternative kin relationships between which marriages may be contracted.
2. The two kin groups concerned (husband's and wife's) have come to acceptable betrothal arrangements, which may have involved the exchange of gifts.
3. Although betrothal shades into marriage, actual marriage is involved when the couple live together publicly, both attending to their marital obligations including sexual relations.
4. The birth of the first child strengthens the union.¹⁹

The above definition shows that customary Aboriginal marriage involves a number of stages. Firstly there is the consideration of eligibility for marriage, then the negotiation of the betrothal. Only then can consenting couples proceed to the marriage stage. Clearly, whilst living together may constitute evidence of a customary marriage, not all cohabiting couples are married.²⁰

However, one has to be careful when attempting to identify the existence of a customary marriage. There are no precise Aboriginal translations of European notions of 'custom' or 'tradition' or 'tribal' or 'husband' or 'wife'. Likewise the term wife may also include a wife's sister.²¹ As Peter Sutton warns, '[s]imply asking an Aboriginal person if a certain marriage was 'traditional' or 'tribal' is not an adequate method of investigating the issue at hand'.²²

The issue of divorce is often neglected when discussing Aboriginal customary law. Under customary law, divorce can only take place with the mutual consent of the parties to the marriage and the affirmation of that consent by the parents of the husband and wife.²³ The Aboriginal community recognises the divorce upon the termination of cohabitation.

If a divorce takes place it is not unusual for the parties to remarry another person. In fact this is also the case in relation to widows and widowers. The ALRC has noted that:

[i]n Aboriginal societies it was usual for a person to be married a number of times over a lifetime, and it was uncommon to find unmarried widows, widowers or divorcees. Under the kinship system there was always a second or third alternative partner available.²⁴

15. Berndt CH & Berndt RM, *Pioneers and Settlers* (Melbourne: Pitman Australia., 1978) 51.

16. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 3.

17. Elkin AP, *The Australian Aborigines* (Sydney: Angus and Robertson, revised ed, 1979) 155; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, 166.

18. Australian Law Reform Commission, *ibid.*

19. Berndt RM 'Tribal Marriage in a Changing Social Order' (1962) 5 *University of Western Australia Law Review* 326, 338–339.

20. Sutton P, 'Aboriginal Customary Marriage – Determination and Definition' (1985) 1(12) *Aboriginal Law Bulletin* 13, 13.

21. On the problem of translation see: Australian Law Reform Commission, *Reference on Aboriginal Customary Law – The Recognition of Aboriginal Customary or Tribal Marriage*, Research Paper No 2 (1982) 4.

22. *Ibid.*

23. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, 167.

24. *Ibid* 200 (footnote omitted).

The ALRC also notes that the extended family network system provides a readily available support when a marriage comes to an end through divorce or where one of the partners dies. This is of particular importance in relation to a female who is left with the burden of supporting her children. The extended family traditionally provides assistance. This was stated by a number of Aboriginal people who were involved in the Commission's community consultations. For example, in the Thematic Summary of consultations held in the Pilbara region, reference was made to the role the extended family may play, 'even though they may not be blood relations'.²⁵ It was also commented that:

Often children are brought up by grandmother, uncle or aunty who may live in a different region, town or different community and may not be blood related but are skin related. They are away from mother or father and are being cared for by the relation on either the father's or mother's side by blood or skin-related way.²⁶

Types of Aboriginal marriages

Aboriginal societies recognise a number of types of Aboriginal marriages. One form of marriage is where one or both potential spouses are selected while still infants or, in some cases, even before birth. This is known as a promised marriage (or betrothal) and it formed an important part of traditional Aboriginal society.²⁷ Nearly all promised marriages are settled before the girl reaches puberty, many much earlier. The promise remains in existence with continuing family agreement from both sides and is regulated through kinship rules. The ALRC has remarked that these rules 'ensured, in the small communities of hunter-gatherers, the genetic integrity and survival of the people'.²⁸

Even though promised marriages are governed by a complex network of social relationships and rules, there is some flexibility that permits marriages which do not comply strictly with the rules. For example, in some cases it is possible for a couple that have eloped (in order to avoid a promised marriage for one of the pair) to become married or be considered married under traditional Aboriginal custom. Also, in promised marriage relationships, there may be some tolerance of extra-marital sexual relationships. It is this flexibility that has allowed for the survival of promised marriages in traditional Aboriginal society.²⁹

It should be noted that it is possible for a young girl to live with, and be the wife of, her promised husband without there also being a sexual relationship. Arguably, in such cases there is no customary marriage in its fullest sense. Conversely, there may be a sexual relationship between the promised spouse and the future husband before there is a public cohabiting relationship, which under traditional or customary law means the couple are not 'properly married'.³⁰

However, most marriages in traditional Aboriginal communities today are not of the promise or betrothal type.³¹ Such marriages have declined over time. The more typical customary marriage is one which has its genesis in a non-marital union that is eventually accepted over time as marriage by the relevant kin. However, a marriage which involves children will in general have greater customary status than a childless marriage.³² This would appear to be based on the concern to preserve the kin and the survival of the group.

Customary Aboriginal law allows for the practice of polygamy but the authors have no evidence that such practice is encouraged in traditional societies. The incidence of polygamous marriages (where a man marries more than one woman) in traditional Aboriginal societies in Western Australia is unclear. The ALRC has noted that 'pressures have been placed on Aboriginal marriage practices by government policy and the activities of missionaries'.³³ However, Sutton points out that it is not unheard of for second and third marriages to be concealed from the relevant authorities.³⁴

It is possible that a polygamous marriage may include an Aboriginal customary marriage and another 'legal' marriage to a non-Aboriginal spouse. This raises two questions: firstly, does the first customary marriage retain its status in the Aboriginal community; and secondly, can an Aboriginal/non-Aboriginal marriage be recognised under Aboriginal customary law? The answers to these questions are unclear and are likely to vary between regions. Writing in 1962, Berndt commented:

25. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 5.

26. *Ibid.*

27. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Promised Marriage in Aboriginal Society*, above n 4, 1.

28. *Ibid.*

29. *Ibid.*

30. Warner WL, *A Black Civilization: A Study of an Australian Tribe* (Chicago: Harper and Brothers, 1958) 75.

31. Sutton, above n 20.

32. Warner, above n 30, 77; Berndt RM 'Tribal Marriage in a Changing Social Order', above n 19, 335; Berndt RM & Berndt CH, *The World of the First Australians* (Aboriginal Studies Press: Canberra, 1988) 200.

33. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, 168.

34. Sutton, above n 20, 14.

In 'outback' areas, in fact, in many cases a quasi-polyandrous (polyandrous = woman with more than one husband) situation developed. An aboriginal woman might be the mistress of a 'white' station manager, stockman, drover, etc., attracted to him partly at least by the material goods he could offer her – which meant, in such circumstances, prestige as well. At the same time her aboriginal husband was forced to accept the situation or relinquish her altogether, since he was powerless to take action.

...the assumption is that a 'tribal' marriage holds good only when it does not conflict with European interests, and that an aboriginal husband (or wife, although this situation is less likely to arise) has no rights in regard to his wife should a 'white' man take a fancy to her.³⁵

Another type of customary Aboriginal marriage is marriage based on inheritance; that is, inheritance of a spouse. Examples of this include sororate marriages and levirate marriages. The former involves marrying a deceased wife's sister; the latter involves marrying a deceased husband's brother.³⁶

Who decides?

As noted above, under Aboriginal traditional or customary law, the Western focus on the individuality of marriage is usurped by the community and kinship importance of marriage. Thus, an Aboriginal couple's respective families play a major role in the formation of marriage. Sutton writes that, irrespective of the type of marriage, 'it seems that approximately the same members of the respective families are involved'.³⁷ He adds:

There are distinct regional traditions as to who these people should be (those who have a customary primary jural status in recognising marriages), and there is also likely to be incomplete overlap of this set of people with those whose views actually count in the real process of recognition. The available generalisations about whose views count in recognising marriages are mostly guarded, suggesting that each case or each area requires specific investigations before one can make detailed statements on the subject.³⁸

It has been said that in the North-West of Australia, the views that count 'would, generally, be the parents, mothers' brothers, and fathers' sisters of each [partner], the girl's brothers and her male cross-cousins and parallel cousins'.³⁹ In other regions, the mother had the predominant role in bestowing a woman in marriage and would consult with other family members in making her decision.⁴⁰ Even accounting for regional differences, what is common is that in deciding whether a couple should marry under Aboriginal customary law, the opinion of more than one person or one gender is involved.⁴¹ But in general it can be said that it is the views of the families of the two individuals that are most important to the recognition of a customary law marriage.⁴²

3. Child custody, fostering and adoption

As noted in the introduction to this Background Paper, the historical systematic removal of Aboriginal children from their families has had enduring consequences for Aboriginal society. When the ALRC conducted public hearings for its customary law reference in the early 1980s, it became aware of the myriad problems resulting from Aboriginal children being removed from their families and placed in the care of non-Aboriginal families and institutions.⁴³ Of course, Aboriginal children are still being separated from their families at a greater rate than non-Aboriginal children.⁴⁴ The National Inquiry into the Separation of Aboriginal and Torres Strait Children from their Families recognised the harmful effects of family child separations.⁴⁵

The importance of Aboriginal children retaining a connection to their culture has been recognised by the Full Court of the Family Court of Australia in the case *In the Marriage of B and R*:

35. Berndt RM 'Tribal Marriage in a Changing Social Order', above n 19, 342–343.

36. Berndt RM & Berndt CH, *The World of the First Australians*, above n 13, 199. Historically there were also other forms of marriage that are no longer in existence. These included marriages resulting from the abduction of a woman in the same group or capture of a woman after a successful inter-tribal skirmish.

37. Sutton, above n 20, 14.

38. Ibid.

39. Berndt RM, 'Tribal Marriage in a Changing Social Order', above n 19, 334.

40. Hiatt LR, *Kinship and Conflict: A Study of an Aboriginal Community in Northern Arnhem Land* (Canberra: ANU Press, 1965) 41–44; see also Hamilton A, 'The role of women in Aboriginal marriage arrangements' in Gale F (ed), *Women's Role in Aboriginal Society* (Canberra: Australian Institute of Aboriginal Society, 1978) 31.

41. Sutton, above n 20, 14.

42. Ibid; and Bell D & Ditton P, *Law: The Old and the New – Aboriginal Women in Central Australia Speak Out* (Canberra: Aboriginal Legal Aid Service, 1980) 92.

43. Australian Law Reform Commission, *Aboriginal Customary Law – Marriage, Children and the Distribution of Property*, Discussion Paper No 18 (1982) 11.

44. Lynch P, 'Keeping Them Home: The Best Interests of Aboriginal Children and Communities in Canada and Australia' (2001) 23 *Sydney Law Review* 501, 504.

45. Human Rights and Equal Opportunity Commission, above n 5, 13.

The history of Aboriginal Australians is a unique one, as is their current position in Australian life. The struggles which they face in a predominantly white culture are...unique. Evidence which makes reference to these types of experiences and struggles travels well beyond any broad 'right to know one's culture' assertion. It addresses the reality of Aboriginal experience, relevant as that experience is to any consideration of the welfare of the child.

...

The first step in the admissibility of this type of evidence is, we think, now beyond controversy. This is the devastating long term effect on thousands of Aboriginal children arising from their removal from their Aboriginal family and their subsequent upbringing within a white environment.⁴⁶

The Court identified constant themes which are raised in the now considerable body of literature on Aboriginal history and welfare issues:

The constant themes from the writings referred to...and from daily Aboriginal experiences include the following:

- A. In Australia a child whose ancestry is wholly or partly Aboriginal is treated by the dominant white society as 'black', a circumstance which carries with it widely accepted connotations of an inferior social position. Racism still remains a marked aspect of Australian society. Daily references in the media demonstrate this. Aboriginal people are often treated as inferior members of the Australian society and regularly face discriminatory conduct and behaviour as part of their daily life. This is likely to permeate their existence from the time they commence direct exposure to the outside community and continues through experiences such as commencing school, reaching adolescence, forming relationships, and seeking employment and housing.
- B. The removal of an Aboriginal child from his/her environment to a white environment is likely to have a devastating effect upon that child, particularly if it is coupled with a long term upbringing in that environment, and especially if it results in exclusion from contact with his/her family and culture.
- C. Generally an Aboriginal child is better able to cope with that discrimination from within the Aboriginal community because usually that community actively reinforces identity, self-esteem and appropriate responses. Racism is a factor which Aboriginal children may confront every day. Because non-Aboriginals are largely oblivious of that, they are less able to deal with it or prepare Aboriginal children for it.
- D. Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances which deny or belittle their Aboriginality. This is likely to have a significant impact upon their self-esteem and self-identity into adult life.⁴⁷

Similarly, in the case *Re CP*⁴⁸ the Family Court of Australia took judicial notice of the spiritual and emotional disadvantage to an Aboriginal child resulting from the child's severance from its community. The Court said:

[T]he loss of relations with a vast range of kin who will perform a wide variety of roles associated with social relations, emotional and physical support, educative knowledge, economic interactions and spiritual training...loss of knowledge which stems from the social interactions, mentioned above; ambiguities in or loss of identity with one's own kin and country, features I understand as essential to identity from an Aboriginal point of view.⁴⁹

Aboriginal children, like non-Aboriginal children, are born into a biological family. They are also born into a kinship group or band.⁵⁰ Lynch claims that '[i]t is the extended family that can give true shape to the First Nations or Aboriginal child's character and identity, both as an individual and as part of a community'.⁵¹ Both Lynch and the National Inquiry into the Separation of Aboriginal and Torres Strait Children from their Families noted that 'there is nothing more vital to their [Aboriginal communities'] dignity, integrity and continued existence than their children'.⁵²

Child care and custody of children

It is understandable, given the past history of removing Aboriginal children from their families, that Aboriginal people are sensitive and concerned about government action and intervention in areas of child care and custody. In order for the dominant political and legal institutions of the state to ease these concerns it is imperative that they understand the extended family network involved in the care and custody of Aboriginal children. Traditional or customary child-

46. (1995) 19 Fam LR 594, 602.

47. (1995) 19 Fam LR 594, 604-605.

48. (1997) 21 Fam LR 486.

49. (1997) 21 Fam LR 486, 502.

50. Lynch, above n 44, 510. This is also true in relation to Aboriginal in other countries. Refer to Uthe LK, 'The Best Interests of Indian Children in Minnesota' (1992) 17 *American Indian Law Review* 237, 252.

51. Lynch, *ibid*. First Nations is common usage to describe the Aboriginal peoples of Canada, although it does not encompass the totality of the Aboriginal population of Canada.

52. *Ibid* 519; Human Rights and Equal Opportunity Commission, above n 5, 212-221.

rearing arrangements in Aboriginal society are governed by kinship groupings and rules in relation to gender roles and responsibilities.

It is important to keep these family arrangements intact in order to pass on cultural traditions from one generation to the next. For example, '[f]rom one's father and father's father come the rights and responsibilities of kirda (or mingirringi). Through one's mother and mother's father come those of *kurdungurla* (or *djunggayi*)'.⁵³

Children, in traditional Aboriginal society, are seen as an 'essential "community resource"'.⁵⁴ It is therefore not surprising that the extended family has an important role in the upbringing of the child in traditional Aboriginal society. In this regard the ALRC noted that:

The concept of the family in...[non-Aboriginal Australian society]...is generally based on the nuclear family, i.e. father, mother and their own children. In Aboriginal society, on the other hand, the role of the extended family, based on the often complex system of kinship relationships and obligations, is of fundamental importance in bringing up children.⁵⁵

This extended family responsibility for children has not always been understood by non-Aboriginal society and has led to misunderstandings as to the quality of care being provided in Aboriginal families. In non-Aboriginal society, one focuses on the parents of the child to determine the quality of parenting and care being provided. Applying the same focus to traditional Aboriginal society may provide a distorted or false impression. It is possible that at any particular time the child may not be in the immediate care of his or her biological parents. But this does not necessarily equate to negligent care as the child may be under the care of someone else in the extended family. In fact, the child may drift in and out of different care arrangements.

In order that we avoid reproducing the mistakes of history, it is imperative that in considering any reforms in the area of family law, greater weight be given to the particular child care and custody arrangements of traditional Aboriginal society. Further, if an Aboriginal child must be removed from its family—which should always be a measure of last resort—the Aboriginal Child Placement Principle⁵⁶ must be complied with. Some Aboriginal people still fear welfare agencies⁵⁷ and the possibility of another 'stolen generations' scenario.⁵⁸ Among some Aboriginal communities there is strong support for the Aboriginal Child Placement Principle.⁵⁹

The Aboriginal Child Placement Principle is made up of two components. The first is a set of preferences in relation to placing an Aboriginal child outside his or her family. If circumstances permit, that preference is given to placement with an Aboriginal family or carer. The second component relates to the process in deciding the placement. Under the principle 'decisions about the placement of Indigenous children should be made by, or in consultation with, appropriate Indigenous people or organisations'.⁶⁰

Adoption

Retired Chief Justice of the Family Court of Australia, Justice Alistair Nicholson, has noted that 'Aboriginal custom did not recognise a concept of adoption as it is understood in the white community'.⁶¹ It is necessary to seek out the views of Aboriginal people in relation to adoption issues. For example, in the Thematic Summary of the Commission's

53. Toohey, above n 12, 24. Writing on the 'Top End' and desert regions Toohey commented (at 19–20): 'In what is usually referred to as the Top End, the local descent group responsible for an area of land generally comprises *mingirringi* and *djunggayi*. The *mingirringi* are those whose descent is traced patronymically. The *djunggayi* for an estate in land are the children of the female members of the patronymic clan. Questions have arisen during the hearing of land claims under the *Land Rights Act* whether *djunggayi* and *mingirringi*, or *mingirringi* alone, should be identified as the traditional Aboriginal owners of the land being claimed. It is the *djunggayi* who control ceremonies and it is they who have the ultimate responsibility to ensure that knowledge is maintained for the benefit of the *mingirringi*. In desert areas, and again I am generalising, there is a similar relationship. The terms used are *kirda* and *kurdungurla*, the first equating with *mingirringi* and the second with *djunggayi*. The *kurdungurla* are the sons and daughters of the female members of the patriline and they are *kurdungurla* for the country of the patriline. In the desert they are sometimes referred to as managers; this points up their responsibility for the land and the ceremonies performed on it and the knowledge which goes with it, though they may not answer the description of traditional owners in terms of the *Land Rights Act*.

54. Australian Law Reform Commission, *Aboriginal Customary Law – Child Custody, Fostering and Adoption*, above n 2, 1.

55. *Ibid.*

56. Chisholm R, 'Destined Children: Aboriginal Child Welfare in Australia: Directions of Change in Law and Policy' (1985) 14 *Aboriginal Law Bulletin* 6; D'Souza N, 'Aboriginal Child Welfare: Framework for a National Policy' (1993) 35 *Family Matters* 40; Wilkinson D, 'Aboriginal Child Placement Principle' (1994) 3 (71) *Aboriginal Law Bulletin* 13; New South Wales Law Reform Commission, *The Aboriginal Child Placement Principle*, Report No 7 (1997) app 1.

57. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 6.

58. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 23.

59. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 4.

60. Chisholm R, 'Placement of Indigenous Children: Changing the Law' (1998) 21 *University of New South Wales Law Journal* 208, 210. Also refer to New South Wales Law Reform Commission, *ibid.*

61. Nicholson A, 'Customary Law and Family Law' (1995) 42 *Family Matters* 25, 27.

consultations in the Pilbara region, the local community remarked that the judiciary must be aware of how Aboriginal people deal with adoption issues.⁶² Prominent Aboriginal activist and commentator Brian Butler has further remarked:

Adoption is alien to our way of life. It is a legal status which has the effect of artificially and suddenly severing all that is part of a child with itself. To us this is something that cannot happen even though it has been done.⁶³

Given the status of the child in traditional Aboriginal society, to allow adoption, particularly outside the child's community, is to deplete severely the resources of the community as well as the immediate family. The incompatibility of the Western notion of adoption with Aboriginal culture should not be underestimated. Moreover, the ramifications for the child and its parents and family are even greater if the Aboriginal child is adopted by non-Aboriginal parents.

Part II: The legal recognition of Aboriginal customary family law

This Part is divided into two sections. The first sets out the limits of the Western Australian Parliament's powers to make changes in the area of family law. This section essentially defines what family law matters are open to consideration by the Commission. The second section outlines the core matters covered by Australian family law and discusses, within each of those areas, the extent to which Western Australian family law, practice and policy have accommodated customary Aboriginal law or the needs of Aboriginal families in general.

Space constraints have meant this Background Paper cannot cover the area of state regulated adoptions as a separate topic. However, the resolution of parenting disputes can often involve outcomes not dissimilar to an adoption and this is discussed below.

1. The scope of Western Australia's legislative power in relation to family law

Terminological considerations

The term 'family law' is generally given a specific and narrow legal content in Australian law, though there is no necessary reason for this. This term does not generally mean all legal matters that might affect a family. In Australia, it is usually used to refer to the laws that govern marriage (both legal and de facto) and the laws which can be accessed to resolve disputes when a couple—either in a legal or de facto marriage—separate. The latter broad area includes division of property, spousal and child support, parenting disputes and matters directly related to these things.

Aboriginal customary law, based as it is on different social structures and historical considerations, does not package these matters together in the same way. However, given the authors' areas of expertise and the necessary limits on what can be achieved in a paper such as this, this Background Paper focuses on the extent to which Aboriginal customary law has been, or could be, accommodated in those areas traditionally designated as 'family law'.

Introduction to the constitutional legislative context

Family law is one of the matters where the Australian Commonwealth Parliament has constitutional power to legislate.⁶⁴ However, because of the wording of the relevant sections of the Constitution, the Commonwealth's legislative powers are limited to relationships that have a connection to marriage.

As the federal government has chosen to legislate on various matters having a connection to marriage, and as it has 'covered the field' in those areas, those matters do not fall within the Western Australian government's legislative power. The areas of federal legislative coverage are:

- marriage;
- divorce; and
- all disputes of couples who at some time have been married to one another and which involve children, division of property, spousal maintenance, adult child maintenance and child support.

⁶² Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 5.

⁶³ Butler B, 'Adopting an Aboriginal Approach' (1989) 13(2) *Adoption and Fostering* 28, 28.

⁶⁴ Under the marriage and divorce powers contained in s 51(xx) and (xxii) of the Australian Constitution.

All of the above matters have been the subject of consideration by the ALRC in relation to Aboriginal customary law.⁶⁵ This Background Paper does not address the issues directly covered by the ALRC except to the extent that there are legislative implications for Western Australia.

The family law matters that remain within the Western Australian government's legislative domain are therefore:

- parenting disputes involving ex-nuptial children;⁶⁶
- de facto marriage financial disputes; and
- child support in respect of ex-nuptial children.

Unlike other Australian states and territories, Western Australia has not conceded its powers to the Commonwealth in relation to these matters. All other states and territories have referred to the Commonwealth their legislative powers in respect of parenting disputes involving ex-nuptial children. New South Wales has also referred its powers in respect of de facto marriage property disputes⁶⁷ and other states and territories—except Western Australia—are expected to follow suit. The Commonwealth government has made it clear that in relation to de facto property disputes it will only accept a reference in respect of heterosexual couples. Under the New South Wales legislation, two separate references exist in relation to same-sex and opposite-sex couples⁶⁸ and s 5 of the referring Act permits the revocation of any reference. Thus, it is likely that if the federal government does legislate in this area, different laws will apply in respect of heterosexual and homosexual de facto property disputes.

One of the obvious consequences of these jurisdictional issues is that changes to the law in Western Australia create the potential for different laws within Western Australia for married and unmarried couples and that the laws for unmarried Western Australian couples will be different to the laws applying to such couples in other states and territories.

The Commission's community consultations have identified the problems this creates for providing any effective solution to the problems of Aboriginal people as a whole. For example, the notes of the Manguri consultation meeting conducted in November 2002 express the concerns of Aboriginal people in that area, including that:

- any attempt to address areas without reconsideration of national laws, including the Commonwealth Constitution, would be superficial; and
- limitations arising out of state border boundaries would be artificial as the issues in questions arise across Australia as they are about 'total dreaming'.

Thus, a key issue for the Commission is the extent to which it wishes to recommend changes that will result in a patchwork of different laws for communities separated by state and territory boundaries and according to their marital customs. This Background Paper will now turn to look in more detail at each of the legislative powers of the Western Australian Parliament in the family law area.

Parenting disputes involving ex-nuptial children

As previously indicated, all states and territories except Western Australia have referred to the Commonwealth their legislative power over parenting disputes concerning ex-nuptial children. Therefore, the *Family Law Act 1975* (Cth) ('the FLA') applies to parenting disputes involving ex-nuptial children in all other Australian jurisdictions. In contrast, in Western Australia parenting disputes concerning ex-nuptial children are governed by the *Family Court Act 1997* (WA) ('the FCA'). The provisions governing the resolution of a dispute concerning an ex-nuptial child under the FCA⁶⁹ are substantially similar to those governing parenting disputes concerning nuptial children under the FLA.⁷⁰ Thus, the case law interpreting the provisions of Part VII of the FLA—which deals with parenting disputes—is generally applicable to ex-nuptial child disputes in Western Australia.

While the Western Australian parliament is free to amend the provisions of the FCA in this area, it would result in ex-nuptial and nuptial children (the subject of parenting disputes) being treated differently within Western Australia.

65. See generally Part III of Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (Vol 1, 1986).

66. That is, children of parents who have never been married to each other.

67. *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW).

68. *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) s 4.

69. See *Family Court Act 1997* (WA) Part 5.

70. See *Family Law Act 1975* (Cth) Part VII.

Further, ex-nuptial children in Western Australia would be treated differently from all children in other Australian jurisdictions.

De facto marriage property disputes

Until December 2002 Western Australia had no laws specifically governing the resolution of property and spousal maintenance disputes between de facto spouses. Therefore, matters had to be resolved in the Supreme Court of Western Australia utilising predominantly equitable remedies.⁷¹

This was changed with the enactment of Part 5A of the FCA, which saw the introduction of de facto relationship legislation similar to, but not the same as, that found in other Australian jurisdictions. Now, where couples have separated after 1 December 2002 (and the other criteria referred to below are met), parties may⁷² seek any remedy under Part 5A of the FCA. Part 5A of the FCA essentially replicates the equivalent provisions of the FLA⁷³ in so far as it regulates the division of property and awards of spousal maintenance.

For those having separated after the relevant date, there are a number of further pre-requisites to the application of Part 5A. Firstly, there is a required geographical nexus.⁷⁴ At least one party must be resident in Western Australia on the day the application is filed, *and* both parties must have lived in Western Australia for at least one-third the duration of the de facto relationship *or* the applicant must have made substantial contributions in this state.⁷⁵ Secondly, the court is only entitled to make an order where:

- the de facto relationship has been in existence for more than two years;⁷⁶ or
- the parties have a minor child and it would cause the carer parent hardship not to make the order; or
- the applicant has made substantial contributions and it would result in serious injustice to them if no order were made.⁷⁷

Finally, the parties must have been in a recognised 'de facto relationship'. This term is defined in s 13A of the *Interpretation Act 1984* (WA) to be a relationship, other than a legal marriage, between two persons who live together in a marriage-like relationship. Section 13A(2) then sets out indicators of a de facto relationship, none of which are essential, but all of which are relevant. These indicators are:

- the length of the relationship;
- the fact of cohabitation;
- the existence of a sexual relationship;
- the degree of financial dependence/interdependence and any agreements for financial support between the parties;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life;
- whether the parties care for and support children; and
- the reputation of the parties and public aspects of their relationship.

Accordingly, in Western Australia, property/spousal maintenance disputes of married couples must be dealt with under the FLA and property/spousal maintenance disputes of unmarried couples must be dealt with under the FCA (where that Act applies). Where neither the FCA nor the FLA applies, then the parties' only resort remains equitable remedies in the Supreme Court.

As a consequence of these recent amendments to the FCA, most separating de facto spouses in Western Australia now have remedies similar to those for married couples. This is not necessarily true in other Australian jurisdictions where there is considerable variation in the laws in force. Thus, if de facto relationship laws in Western Australia were changed in relation to Aboriginal de facto spouses, those de facto spouses would be treated differently from Aboriginal

71. Constructive trusts, promissory estoppel and resulting trusts were the key remedies utilised.

72. *Family Court Act 1997* (WA) s 205V.

73. See *Family Law Act 1975* (Cth) Part VIII.

74. *Family Court Act 1997* (WA) s 205X.

75. The contributions referred to here are substantially similar to the contributions considered under s 79 of the *Family Law Act 1975* (Cth); see *Family Court Act 1997* (WA) ss 205ZG(4)(a), (b) and (c).

76. See *Family Court Act 1997* (WA) s 205Z(2) regarding breaks in the relationship.

77. *Family Court Act 1997* (WA) s 205Z.

spouses that were legally married. However, the issue of different treatment from other de facto Aboriginal spouses in other Australian jurisdictions seems less problematic given the variation in these laws across the country. The difference in treatment between married and unmarried couples is arguably of greater concern.

Child support for ex-nuptial children

Western Australian ex-nuptial children are the subject of the Commonwealth administrative scheme of child support assessment by virtue of the *Child Support (Adoption of Laws) Act 1990* (WA) which adopts the *Child Support (Assessment) Act 1989* (Cth). However, the Western Australia Parliament can terminate that adoption.⁷⁸ Therefore, if changes were made for ex-nuptial Aboriginal children, then we would again see such children treated differently according to the marital status of their parents.

Courts exercising family law jurisdiction in Western Australia

In considering whether to make changes to family law within Western Australia, one also has to keep in mind which courts are exercising the relevant powers. The FLA created a federal family court – the Family Court of Australia. Section 43 of the FLA entitles the states and territories to set up their own family courts. Western Australia is the only jurisdiction that has elected to do this, and through the FCA created the Family Court of Western Australia ('the FCWA').

The FCWA exercises dual jurisdiction under both the FLA (in respect of matters involving parties who are or have been married to each other) and the FCA (in respect of parties who have never been married to each other). As a result of the FCWA's extended jurisdiction, the Federal Magistrates' Service in Western Australia was not given jurisdiction to hear family law matters (as it does in other states and territories).

Magistrates' courts in Western Australia also have jurisdiction to hear simple family law matters. Inside the Perth metropolitan area, only the Court of Petty Sessions situated at 150 Terrace Road (which is the same location as the FCWA) can exercise this jurisdiction. The magistrates of that court hold dual commissions as Registrars of the Family Court of Western Australia. Thus, those officers perform all lower level decision-making in family law matters in the Perth metropolitan area.

Outside of the metropolitan area general magistrates' courts have some family law jurisdiction. However, the magistrates attached to the FCWA conduct three circuits each year to Albany, Kalgoorlie, Geraldton and the North West (Karratha, Port Hedland and Broome) and 10 circuits each year to Bunbury. Each circuit is about a week in duration. The country magistrates generally only exercise their family law jurisdiction in relation to interim or procedural matters and then order the transfer of the matter to the appropriate FCWA circuit. The magistrates on circuit from the FCWA therefore hear the remaining interim hearings, summary applications and conduct conciliations and pre-trial conferences.⁷⁹ Thus, despite the complex jurisdictional web created by the co-existence of state and Commonwealth laws in this area, nearly all matters are heard by registrars or judges of the FCWA.

2. Core areas covered by existing family law legislation⁸⁰

The narrow content of the term family law has been referred to above. Family law legislation in Australia, and therefore Western Australia, deals predominantly with the following matters:

- marriage, nullity⁸¹ and divorce;
- parenting disputes;
- division of property; and
- spousal maintenance and child support.

Given that the Western Australian Parliament possesses legislative power in each of these areas, this section of the Background Paper will consider in relation to each of these areas, the extent to which Aboriginal customary family law is, or might be, accommodated.

78. *Child Support (Adoption of Laws) Act 1990* (WA) s.7.

79. Acting Principal Registrar David Monaghan, Family Court of Western Australia, email to Lisa Young, 24 February 2004.

80. In addition to the legislation mentioned above, the key piece of legislation in this area is the *Marriage Act 1961* (Cth).

81. Nullity proceedings are the process by which a void marriage is declared to be void (eg, for lack of consent, fraud or because a party is underage): see *Marriage Act 1961* (Cth) s 23B.

Marriage

It has been explained above that marriage, nullity and divorce are matters within the Commonwealth legislative domain and are matters about which the federal government has already legislated. It appears that this federal legislative power does not include deciding what amounts to marriage. In other words, it is not clear that even the Commonwealth Parliament could legislate to create a new kind of marriage – such as marriage of same-sex couples or permitted polygamy. Anthony Dickey QC has noted that the latter issue is hardly academic, especially in light of the ALRC's inquiry into the matter.⁸²

However, the question remains as to the proper treatment of customary Aboriginal marriage under state laws for unmarried couples. There are two reasons why this issue is significant. Firstly, there is the question of the appropriateness of the recognition of customary marriage in this way, regardless of the consequences that flow from that recognition. In other words, there is an issue as to whether this aspect of Aboriginal culture should be legally recognised as at least equivalent to a de facto marriage, so that the status of customary marriage is formally acknowledged or whether to do so would in fact downgrade the status of customary marriage. Secondly, there is the question of ensuring that customary marriage is covered in these laws to guarantee access to legal remedies when a customary marriage breaks down.

By way of background, the ALRC did not recommend that Aboriginal customary marriage be recognised as equivalent to marriage under the *Marriage Act 1961* (Cth). However, it did recommend that there be selective functional recognition—that is, recognition where appropriate in particular legislative contexts—and it set out the areas where it thought this should apply. The ALRC went on to make recommendations as to the treatment of certain aspects of Aboriginal customary marriage where there was to be recognition of those marriages.

The ALRC recommended that one of the areas of functional recognition should be the Family Court's jurisdiction with respect to principal and ancillary relief.⁸³ The terms 'principal and ancillary relief' cover the core areas of family law jurisdiction outlined above. However, in the ALRC's report the only specific contexts in which recognition of Aboriginal customary marriage was recommended were legitimacy of children and custody. The ALRC did not recommend that the areas of spousal maintenance and property settlement be amended to recognise customary marriage, instead leaving the matter to the common law or state or territory legislation.⁸⁴ Spousal maintenance and property settlement are considered below in the Western Australian context.

As selective functional recognition of marriage by the Western Australian Parliament is possible, the two areas singled out by the ALRC will be considered next.

Legitimacy

Unlike all other states and territories,⁸⁵ Western Australia has not enacted specific legislation dealing with the status of children. The equality of status legislation in other Australian jurisdictions has substantially removed legal disadvantages for illegitimate children. Western Australia instead made specific legislative amendments to eliminate any such disadvantage.⁸⁶

Two areas relating to legitimacy identified by the ALRC as problematic, despite these legislative reforms, were adoption and the registration of names. At the time of the ALRC's report, Western Australian adoption law did not require the consent of a father who had never been married to the child's mother, unless he happened to be a guardian of the child. Under state law at that time⁸⁷ fathers were not automatically guardians of their illegitimate children. Changes to both the adoption legislation⁸⁸ and the FCA⁸⁹ have ensured that the requirement for consent of a biological father to an adoption is now the same for both legitimate and illegitimate children. Thus, the specific concern of the ALRC in this regard has now been addressed.

82. A Dickey, *Family Law*, (Law Book Company: Sydney, 4th ed., 2002) 39–40.

83. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, [257].

84. *Ibid* [290].

85. It should be noted that the ALRC's statement (*ibid* [271]) that the Australian Capital Territory has not enacted such legislation is no longer correct: see *Birth (Equality of Status) Act 1988* (ACT).

86. Dickey, above n 82, 296.

87. *Family Court Act 1975* (WA) s 35.

88. *Adoption Act 1994* (WA) s 17.

89. *Family Court Act 1997* (WA) s 69.

A further concerning aspect of Western Australian adoption law highlighted by the ALRC was the provision, then in force, prohibiting adoption in favour of parents not legally married to each other.⁹⁰ Obviously this would exclude as potential adoptive parents an Aboriginal couple married under their customary law. Section 39 of the *Adoption Act 1994 (WA)* now stipulates that where a couple applies to become adoptive parents they must either have been married to, or have been in a de facto relationship with, each other for at least three years. As the term 'de facto relationship' is not defined in that Act, s 13A of the *Interpretation Act 1984 (WA)* would apply and the broad application of that provision has been discussed above. It would seem likely that most customary marriages of three years' duration would meet the test laid out in that section, given the common presence of cohabitation and other factors indicative of a de facto marriage. However, it is technically possible that a marriage recognised by Aboriginal custom may not be classified as a de facto marriage for these purposes. Thus, s 39 of the *Adoption Act 1994 (WA)* could be amended to include Aboriginal customary marriages to ensure that the question was beyond doubt.

The ALRC report does not indicate how illegitimacy affords any disadvantage in terms of the registration of names. On this point, the *Births, Deaths and Marriages Registration Act 1998 (WA)* provides that:

- both *parents* are jointly responsible for having a child's birth registered;⁹¹
- the birth registration statement must state the child's name;⁹² and
- both a child's parents must apply to change that name.⁹³

There is nothing presently in the provisions concerning the change of children's names that discriminates based on the marital status of the child's parents and therefore it does not appear that these provisions would discriminate against parents who are married according to Aboriginal custom.

Custody

The second family law area mentioned by the ALRC as possibly requiring functional recognition of marriage was custody. The ALRC said:

To the extent that State and Territory legislation imposes similar qualifications for child custody or fostering, based on marriage under the general law, or differentiates a traditional husband and father's rights from those of a *Marriage Act* father, the same recommendations apply.

Marriage is not identified as a relevant legislative factor in determining custody (now known as residence) under either the Commonwealth legislation (which applies to children of a marriage in Western Australia) or state legislation (which applies to ex-nuptial children). Both statutes refer instead to factors generally relevant to a child's best interests, including the relationship between the child in question and the adults seeking a parenting role and the effect of any separation of a child from another person.⁹⁴ However, a family court can consider *any* matter it thinks relevant when making a parenting decision.⁹⁵ There is nothing in these provisions that limits the consideration of customary marriage as a relevant circumstance and to the extent that a customary marriage was relevant to a parenting dispute it would presumably be considered. Although, in practice, the mere fact of marriage (whether customary or otherwise) is usually not a very significant circumstance in such decisions.

In summary, despite the ALRC's express concern, there does not appear to be any different treatment of parents in respect to custody depending on their marital status. The issue as to the significance of Aboriginality in the making of parenting orders is considered separately below.

De facto spousal maintenance and property settlement

The ALRC did not recommend functional recognition of customary marriage in the areas of de facto spousal maintenance and property settlement because, at the time of its report, these were solely matters of state and territory jurisdiction. That is no longer strictly the case; however, it remains to be seen how the Commonwealth will utilise its referred legislative powers in these areas.

90. *Adoption of Children Act 1896 (WA)* s 4.

91. *Births, Deaths and Marriages Registration Act 1998 (WA)* s 15(1).

92. *Births, Deaths and Marriages Registration Act 1998 (WA)* s 22(1).

93. *Births, Deaths and Marriages Registration Act 1998 (WA)* s 31.

94. See *Family Law Act 1975 (Cth)* ss 68F(2)(b) and (c); *Family Court Act 1997 (WA)* ss 166(2)(b) and (c).

95. See *Family Law Act 1975 (Cth)* s 68F(2)(l); *Family Court Act 1997 (WA)* s 166(2)(l).

The only specific form of relief that is available in Western Australia to separated unmarried couples is that found in the FCA – broadly, spousal maintenance and alteration of property interests. The FCA does not make any reference to customary marriage; therefore, technically, it does not recognise such marriages. The FCA could be amended to extend its relief to the parties to a customary Aboriginal marriage. However, it is doubtful that this would, in reality, substantially extend the FCWA's jurisdiction. This is because of the very broad definition of de facto relationship. The factors set out in s 13A of the *Interpretation Act 1984* (WA), though not particularly directed at customary marriage, would appear to cover the typical features of many such marriages. However, this section could be amended to explicitly include customary Aboriginal marriages. For example, it could specify in the context of Aboriginal and Torres Strait Islander people that recognition of marriage within one's community would be indicative of a de facto marriage.

More problematic is the requirement that, for any order to be made under Part 5A of the FCA, the de facto spouses need to have lived together for at least two years, have had a child or have made 'substantial contributions'. It seems likely that a childless couple, who had been in a customary marriage for less than two years prior to separation, may not be eligible to apply for relief under the FCA. However, if there have been no 'substantial contributions' (which would activate the FCA provisions) then there is likely to be little property to divide. Also, if there are no children, then the making of a spousal maintenance order is unlikely in any event as typically it is the care of a young child that qualifies a parent for spousal maintenance. Moreover, the introduction of the child support scheme has meant that those parents paying child support are unlikely to have any residual capacity to pay spousal maintenance.

Despite the small opportunity for extension of jurisdiction by including express reference to customary marriages in the context of de facto spouses, it could be argued that such an amendment is warranted because those few couples who have gone through a customary marriage and cannot access these provisions are being treated unfairly. Nonetheless, on a fundamental level the ALRC considered it undesirable to use de facto relationship legislation as a way of recognising customary marriage. This was because equating customary marriage to a form of non-legal marriage would be to deny its legal reality in customary law.⁹⁶ In any event, a key practical problem with extending the definition of de facto marriage to cover Aboriginal customary marriage is one of definition. This was a concern highlighted by the ALRC.⁹⁷

Moral considerations with the functional recognition of customary Aboriginal marriage

A further issue that is generally addressed when considering the recognition of customary marriage in any context is the extent to which this will sanction features of marriage that might be seen as somehow morally unacceptable. In particular, the issues of polygamy, the marriage of minors and consent to marriage have proved contentious in other jurisdictions.⁹⁸ Certainly, in Australia under the *Marriage Act 1961* (Cth) a marriage is void if:

- there is a lack of consent; or
- one of the parties is underage (18);⁹⁹ or
- either of the parties is already legally married.

Promised or betrothal marriages in particular raise complex and difficult issues when one is examining a recognition of such marriages by the 'mainstream' legal system. It is arguable that to recognise such marriages would run contrary to Australia's obligations under international human rights law and also the law of contract. For example, a combination of human rights treaties that Australia has ratified, such as the *International Covenant on Economic, Social and Cultural Rights 1966*,¹⁰⁰ the *International Covenant on Civil and Political Rights 1966*,¹⁰¹ the *International Covenant on the Elimination of all Forms of Discrimination 1966*¹⁰² and the *United Nations Convention on the Elimination*

96. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, above n 3, [245].

97. *Ibid* [243].

98. See for example the discussion in Chapters 4–6 (inclusive) of the South African Law Commission's *Customary Marriages*, Discussion Paper 74 (1998) prepared for the Commission's Project No 90, *The Harmonisation of the Common Law and the Indigenous Law*.

99. Unless court approval has been sought, and then it can only apply to one party and they must be over the age of 16: see *Marriage Act 1961* (Cth) s 12.

100. Article 10: 'The State Parties to the present Covenant recognise that: 1. ...Marriage must be entered into with the free consent of the intending spouses.'

101. Article 23: '2. The right of men and women of marriageable age to marry and to found a family shall be recognised. 3. No marriage shall be entered into without the free and full consent of the intending spouses.' Article 24: '1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.'

102. Article 5: '... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without discrimination as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (d) Other civil rights, in particular: ... (iv) The right to marriage and choice of spouse.'

of all Forms of Discrimination Against Women 1980¹⁰³ proscribe non-consensual marriages and discriminating practices against females.¹⁰⁴ Of course, these obligations have to be weighed against the desire to value and respect the 'social and cultural integrity of Aboriginal communities'.¹⁰⁵

It is not only Australia's obligations under international human rights law that present some difficulty in recognising promised or betrothal marriages. Such recognition would also require the reconsideration of other domestic laws. For example, under Australian law, promises to marry and marriage itself for a girl below the marriageable age as prescribed in the *Marriage Act 1961* (Cth) are non-enforceable. Under contract law, apart from contracts for necessities¹⁰⁶ and beneficial contracts of an infant (such as apprenticeships),¹⁰⁷ contracts with minors are unenforceable.¹⁰⁸ Thus contracts to marry involving an infant are unenforceable.¹⁰⁹ Further, due to the doctrine of privity,¹¹⁰ a contract of promise to marry made by adults in relation to an infant will not be enforceable against the infant. The only way a promise to marry involving an infant is enforceable is if the infant upon reaching majority enters into a new promise. Ratification of the old promise to marry will not suffice.¹¹¹ So, recognition of Aboriginal customary marriage would require a reconsideration of fundamental principles in other legal areas as well as family law.

The question of polygamous marriages is equally difficult. There are two legal possibilities: to recognise only the first marriage or to recognise equally all subsequent marriages. The former approach would clearly discriminate against the second and subsequent spouses. Dr James Crawford, the Commissioner in Charge of the ALRC inquiry into the recognition of Aboriginal customary law, states:

It is suggested that selectivity, in the context of functional recognition of [Aboriginal customary] marriage, is both arbitrary and unnecessary. What is being recognised here are the consequences of marriage, in particular in areas of compensation for death and injury, devolution of property, etc. To the extent that these consequences involve drawing upon the husband's property or rights, it is arbitrary and unfair to exclude a second wife.¹¹²

However, concerns of this nature (that is, moral concerns about the recognition of such marriages) hold little force in the context of an amendment to Part 5A of the FCA. The provisions of Part 5A do not exclude the possibility of multiple de facto marriages, the parties to each being eligible for relief under those provisions. Nor is the application of those provisions affected by the age at which cohabitation commenced or indeed the reason for the commencement of cohabitation. Theoretically this makes sense, as these provisions are quite clearly not designed to give any formal recognition to de facto relationships as marriages – rather, they are aimed at providing relief to couples cohabiting in a *marriage-like* relationship, which by definition is not a legal marriage. Indeed, even under the FLA, 'spousal' maintenance is available to parties to a void marriage.¹¹³ The ACT and NSW have gone one step further by providing this type of relief to persons in 'domestic relationships', which category is much broader than a de facto marriage.¹¹⁴

Summary

The Commission could, therefore, consider an amendment to the FCA and/or the *Interpretation Act* which had the effect of expressly including Aboriginal customary marriages as de facto relationships. The question would be whether the potentially small practical advantages of such an amendment outweigh the possibly negative implications of essentially downgrading customary marriage to the equivalent of a de facto marriage.

103. Article 5: 'States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either or the sexes or on stereotyped roles for men and women. Article 16: '1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) the same right to enter into marriages; (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent; 2. The betrothal and the marriage of a child shall have no legal effect, and necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official register compulsory.'

104. It should also be noted that many provisions of the *Convention on the Rights of Children 1989*, would prohibit non-consensual marriages where at least one of the parties is a child. The whole convention is geared to the protection of the welfare of children.

105. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Promised Marriage in Aboriginal Society*, above n 4, 1.

106. Seddon NC & Ellinghaus MP, *Cheshire and Fifoot's Law of Contract*, (Sydney: LexisNexis Butterworths, 8th ed., 2002) 798–805.

107. *Hamilton v Lethbridge* (1912) 14 CLR 236.

108. A contract whereby an infant enjoys a permanent interest in property is valid unless the infant repudiates the contract while an infant or within a reasonable time after reaching majority (at 18 years of age).

109. *Coxhead v Mullis* (1878) 3 CPD 439.

110. *Dunlop Pneumatic Tyre Co Ltd v Selfridge Co Ltd* [1915] AC 847; *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460.

111. *Watson v Campbell (No 2)* [1920] VLR 347; also refer to Australian Law Reform Commission, *Reference on Aboriginal Customary Law – Promised Marriage in Aboriginal Society*, above n 4, 9.

112. Australian Law Reform Commission, *Reference on Aboriginal Customary Law – The Recognition of Aboriginal Customary or Tribal Marriage*, above n 21, 15.

113. See *Family Law Act 1975* (Cth) s 71. A void marriage is one which offends the provisions of s 23B of the *Marriage Act 1961* (Cth): eg, in circumstances of a party to the marriage being underage, fraud, lack of consent, or a prohibited relationship.

114. See *Domestic Relationships Act 1994* (ACT) and *Property (Relationships) Act 1984* (NSW).

Nullity and divorce

The areas of nullity and divorce are arguably irrelevant where there is no formal legal recognition of customary marriage. Nullity concerns the conditions under which a legal marriage is not valid from the outset (that is, void). Divorce concerns the circumstances under which a legal marriage can be ended. If a customary marriage is not legally recognised then of course its validity or dissolution can be dealt with under Aboriginal customary law.

Thus, unless the Commission were to consider a reform that involved some formal legal recognition of customary marriages (as opposed to functional recognition), then it would not need to address nullity and divorce. Given that it appears that the Western Australian Parliament presently has no power to give formal legal recognition to customary Aboriginal marriages, the question of the validity and ending of such marriages is not one that needs to be addressed.

Parenting disputes

The term 'parenting dispute' is adopted in this Paper as referring to disputes over 'parental responsibility' in respect of a child. Parental responsibility is defined in the FLA and FCA as all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.¹¹⁵ When a dispute is brought before the FCWA, which can hear parenting disputes in relation to nuptial and ex-nuptial children, it has the power to make *whatever* order¹¹⁶ it considers is in the best interests of the child concerned.¹¹⁷

Whilst the FCWA is commonly asked to decide with whom a child should live, or who may have contact with a child, its powers are much broader and it can make nearly any order relating to the welfare of the child. The main exception is that matters arising under the child welfare legislation are not within its jurisdiction. As well, it is generally thought to be the case that the passage of the FLA and FCA has extinguished the Supreme Court's *parens patriae* jurisdiction in respect of minors.¹¹⁸

In the making of any order, the FCWA must have as its paramount consideration the best interests of the child concerned. In determining what is in a child's best interests, the Court must have regard to the various matters set out in what is commonly referred to as the 'best interests' checklist.¹¹⁹ That list includes, amongst other things:

- s 68F(2)(b) – the nature of the relationship of the child with each of the child's parents and with other persons;
- s 68F(2)(c) – the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
- s 68F(2)(e) – the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- s 68F(f) – the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the Court thinks are relevant.

There would seem to be three key questions for the Commission in relation to customary law and the making of parenting orders:

1. Should Aboriginal Western Australians be given the opportunity to resolve parenting disputes in an alternative forum that applies their customary law?
2. If Aboriginal Western Australians are to continue having to use the FCWA as the arbiter of last resort, are the principles being applied by that decision-making body appropriate given Aboriginal customary law and are Court processes sensitive to the particular needs of Aboriginal clients?
3. What alternative resources might be provided by the government to assist Aboriginal Western Australians resolve parenting disagreements?

115. *Family Law Act 1975* (Cth) s 61B and *Family Court Act 1997* (WA) s 68.

116. *Family Law Act 1975* (Cth) s 65D and *Family Court Act 1997* (WA) s 89.

117. *Family Law Act 1975* (Cth) s 65E and *Family Court Act 1997* (WA) s 90.

118. See Dickey, above n 82, 395.

119. *Family Law Act 1975* (Cth) s 68F(2) and *Family Court Act 1997* (WA) s 166(2).

Problems with non-access to present family law remedies

Before examining each of these issues in turn, it is important to note that the FCWA has not kept statistics on the extent to which Aboriginal people access the family court system. There is certainly a perception—which may or may not be accurate—that Aboriginal families do not access this system to the same degree as non-Aboriginal members of the community. If that perception is correct, then the question arises as to whether Aboriginal families suffer any disadvantage as a result. This is of particular concern if the reason for not accessing the system is the belief that it does not cater to the needs of Aboriginal families.

Many non-Aboriginal people resolve parenting matters without resort to the family law system. It is likely that in most such cases it would be the child's parents who would share, in one way or another, parental responsibility for the child. As the FLA and FCA already enshrine that principle,¹²⁰ the way in which parental responsibility is divided between parents would not normally create any practical difficulties for those parents. If the parents wished to formalise their particular arrangement with court orders, they could do that by consent.

Aboriginal families, on the other hand, may well resolve on someone other than one of the biological parents to be the primary carer of a child from time-to-time. If, for some reason, the parties concerned wanted to have this formalised by obtaining court orders, they would not as easily be able to do this by consent. This is because the FLA s 65G and the FCA s 92 provide that the court cannot make such an order unless:

- the parties to the proceedings have attended a conference with a family and child counsellor or a welfare officer to discuss the matter to be determined by the proposed order; and
- the court has considered a report prepared by the counsellor or officer about that matter; or
- the court is satisfied that there are circumstances that make it appropriate to make the proposed order even though the conditions in paragraph (a) are not satisfied.

The obvious intent of this section is to avoid de facto 'adoptions' using consent parenting orders. This raises a fundamental terminological issue. By adoption, one normally means giving to a non-parent the status of legal parent of a particular child. In Western Australia this is done through the Department of Community Development's Adoption Department, applying the *Adoption Act 1994* (WA). There are considerable constraints on the adoption process, aimed primarily at maximising the welfare of the child concerned.

In the case of Aboriginal families, there is no concept equivalent to adoption. Although it is common for family members other than a child's biological parent to perform the role of primary carer from time-to-time, as has been indicated in Part I, this is not equivalent to an adoption. Therefore, the current legislative division of parental responsibility between biological parents does not readily accommodate Aboriginal family life and these sections create unnecessary hurdles for Aboriginal families wishing to formalise arrangements typical to Aboriginal family life. That is not to say, of course, that a consent order would not be made once the necessary steps were taken. Rather, the question is whether it is appropriate to require Aboriginal families to jump through these technical hoops, when they are not appropriate to Aboriginal family life. Also, it may be that the legislative division of parental responsibility between biological parents creates practical difficulties for Aboriginal carers of children who are not their biological parents, when they need to engage with some formal process but are not legally authorised to do so.

It seems these are not just hypothetical problems. In the Thematic Summary for the Commission's consultations in Kalgoorlie, reference was made to the case of a grandmother caring for her grandchildren. Though the particular circumstances of the case are not clear from the Summary, it was noted that the grandmother '...was not supported by the law and was, in fact, punished by it. This produced family breakdown and delinquency'.¹²¹ In the Thematic Summary of the Commission's consultations in Laverton, mention was made of the need for the system to automatically recognise the care of a child by an extended family member, as happened in Aboriginal custom.¹²²

A similar problem might arise on the death of the parents. In the Thematic Summary for the Commission's consultations in Kalgoorlie, the Aboriginal custom of a maternal uncle taking over the care of nieces or nephews on the death of their

120. *Family Law Act 1975* (Cth) s 61C and *Family Court Act 1997* (WA) s 69.

121. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 4.

122. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 6. Further supporting comments are found in the Commission's consultations in the Pilbara region, see: Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 5 & 22.

parents was noted.¹²³ This relative would have no standing nor legal rights as a carer in mainstream family law in the absence of a parenting or adoption order. That is, his customary guardianship would not be recognised unless he sought orders to formalise it.

An alternative forum

If, as appears to be the case, Aboriginal people are not accessing the remedies available in the current family court system, the question arises as to whether an alternative forum for Aboriginal family disputes should be instituted. As the Canadian Report of the Royal Commission on Aboriginal Peoples has noted,¹²⁴ if government were to devolve to the Aboriginal community limited rights to self-determination, then family law would be a perfect candidate.¹²⁵ Accordingly, if the Commission were to consider a separate court system in Western Australia for Aboriginal customary law, then family law would seem to be an appropriate subject matter to be dealt with by such a court.

All the usual considerations would then apply as to the relationship between that court and the law it administered and other court systems applying family law legislation. A particular issue would arise where the disputants were not both of Aboriginal descent. However, the key stumbling block to a separate court system for family law would be the complex jurisdictional web this would create due to the division of powers in this area between the state and the Commonwealth. Indeed, the authors suggest that such a step would create undue complexity in the area of family law. A more appropriate solution might be to consider culturally sensitive mechanisms of primary dispute resolution. Where parties resolve matters out of the official court system then questions of jurisdiction fall away.

Culturally sensitive substance and process in the family law system

If parenting disputes for Aboriginal families continue to be decided by the family court system, one must consider whether decisions made in that system are culturally appropriate for Aboriginal families and whether the processes of that court system are adapted to meet their particular needs.

In relation to decision-making in the area of parental disputes, the main historical areas of concern have been:

- the extent to which the Family Court discriminates against Aboriginal parents due to a lack of understanding of Aboriginal society; and
- the failure by the Family Court to appreciate the importance of maintaining an Aboriginal child's ties to its cultural heritage.

As has been said, the child's best interests are the paramount consideration in the making of any parenting order. In determining what is in a child's best interests, family courts are now required to take account of the need to 'maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders'.¹²⁶ In addition to this specific legislative injunction, recent decision-making by the Family Court shows increasing sensitivity to cultural issues facing Aboriginal families and in particular the importance of placing Aboriginal children in the care of Aboriginal families. These developments are set out in more detail in Part III of the Commission's earlier Background Paper, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*.¹²⁷

Despite improvements in Family Court decision-making in these areas, the notes of the Manguri consultation meeting point to a perception that 'the court is "not listening" and does not seem to understand the dynamics of Aboriginal families'.¹²⁸ This comment was recorded in relation to parenting disputes and mediation services and therefore could apply to both decision-making and service provision. Service provision is discussed further below.

The federal government's Family Law Pathways Advisory Group was established to advise the government on how to achieve an integrated family law system. The Group's report, *Out of the Maze – Pathways to the Future for Families Experiencing Separation ('Out of the Maze')*, was launched in August 2001. In that report it was observed that:

123. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 3.

124. *Report of the Royal Commission on Aboriginal Peoples* (Canada, 1996) vol 3, ch 2, [4].

125. This option has also been considered by the New Zealand Law Commission. The work in this area in both jurisdictions is considered below; although, it is important to note that neither jurisdiction has yet legislated in this area.

126. FLA s 68F(2)(f) and FCA s 166(2)(f).

127. Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', Background Paper No 1, above pp 176.

128. Law Reform Commission of Western Australia, *Thematic Summaries of Consultation – Manguri*, 4 November 2002, 3. The notes of the Commission's Consultation Meetings are available online at <<http://www.lrc.justice.wa.gov.au>>.

At present the *Family Law Act* does not explicitly recognise child-rearing obligations or parenting responsibilities of family members other than parents. Meaningful consideration needs to be given to amending the *Family Law Act* to incorporate indigenous child-rearing practices. The *Family Law Act* needs to offer guidance as to the importance placed on a child's cultural identity. This is imperative when determining the best interests of indigenous children.¹²⁹

Thus, it was recommended that the FLA be amended so that:

- a section 61 should acknowledge unique kinship obligations and child-rearing practices of indigenous culture;
- b section 60B(2) (which relates to principles underlying a child's right to adequate and proper parenting) should include a new paragraph stating that children of indigenous origins have a right, in community with other members of their group, to enjoy their own culture, profess and practice their own religion, and use their own language; and
- c in section 68F(2)(f) the phrase 'any need' should be replaced by 'the need of every indigenous child'.¹³⁰

Similar amendments could be made to the equivalent provisions of the FCA, however, that would result in different provisions for nuptial and ex-nuptial children unless and until the FLA was amended.

The first of these recommendations is particularly interesting in light of a related matter raised in the Commission's consultations. Many of the notes of the consultation meetings referred to the way non-Aboriginal law views children's rights and, in that context, disciplinary practices within Aboriginal families.¹³¹ Where a parenting dispute is between two Aboriginal parents then it is hard to imagine that either party could effectively use a claim of excessive child discipline against the other party, so long as the disciplinary practices in question were acceptable in Aboriginal society. The issue might be more contentious where the dispute is between an Aboriginal parent and a non-Aboriginal parent. There is little in the reported case law to assist on this issue, save for general statements to the effect that cultural or religious practices should not disadvantage any parent, provided that those practices are not inimical to the welfare of the child.¹³²

Of course, many non-Aboriginal parents also physically discipline their children and this is not generally considered to be a disqualifying factor in terms of either residence or contact. Obviously, if there are other issues of violence it is more likely that it will feature as a relevant consideration. However, the best interests principle is sufficiently undemanding that a decision-maker *might* place inappropriate negative weight on family practices that are culturally appropriate within Aboriginal families, without that being explicit in the decision. What this issue highlights is the *potential* for discriminatory, or culturally inappropriate, decision-making in relation to Aboriginal families. There may well be other examples of this. One case that was brought to the authors' attention involved an order prohibiting a child's contact to its extended paternal relatives, because the father had killed the child's mother. The cultural implications of such an order in an Aboriginal family might be quite different from a non-Aboriginal family. In the authors' views, further research would be necessary to consider the extent to which this occurs and that would require more than empirical surveys of case outcomes.¹³³

In any event, if it is the case that a matter such as Aboriginal disciplining practices is impacting on family court decision-making, then an amendment such as that suggested in Recommendation 22 (a) of *Out of the Maze* would force a court to face the issue directly in the context of Aboriginal culture. Presumably it would make it more difficult for the decision-maker to draw an adverse inference from a culturally appropriate form of disciplining a child.

In relation to court processes, it is clear from the notes of the Commission's consultation meetings that Aboriginal families have concerns about the way the family law system operates. For example, the notes of the Mirrabooka consultation meeting express the need to accept oral, as well as written testimony.¹³⁴ This is particularly important in a family law context where most evidence is given by affidavit, and this is accentuated in interim hearings.¹³⁵ As most matters do not proceed to a final hearing, the process for interim hearings is extremely important.

The Thematic Summary for the Commission's consultation in the Pilbara region identifies another potential issue: in the Family Court, primary evidence at trial is given by affidavit, but of course there is still cross-examination. Aboriginal

129. Family Law Pathways Advisory Group, 'Out of the Maze: Pathways to the Future for Families Experiencing Separation' (August 2001) 89.

130. *Ibid*, Recommendation 22.

131. See, Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 3; *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 4; *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 4; *Thematic Summaries of Consultations – Albany*, 18 November 2003, 3.

132. See for example *Firth v Firth* (1988) FLC ¶91-971 [77025]. Although this case relates to religious practices, the principle clearly applies generally.

133. Empirical data alone will not give a full picture of decision-making where something as flexible as the best interests test is being applied: see generally Eastale P, Behrens J & Young L, 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' (2000) 14 *Australian Journal of Family Law* 234.

134. Law Reform Commission of Western Australia, *Thematic Summaries of Consultation – Mirrabooka*, 18 November 2002, 6.

135. See for example *Family Law Rules 2004*, r 5.09.

protocols prohibit some people from being seated in the same room, such as mother-in-law and son-in-law.¹³⁶ In a parenting dispute it would not be uncommon for people with that blood relationship to be involved in the same case. Some accommodation might be needed to ensure that this protocol is observed, but at the same time allow for the rules of natural justice. For example, the party who is not permitted under traditional law to sit in the same room as a witness might hear the evidence electronically.

The notes of the Mirrabooka consultation meeting also highlight the issue of support during court processes for Aboriginal clients. It was suggested that there be a right to request an Aboriginal elder/lawperson as 'significant other'/advocate where language or culture presents a barrier for a party.¹³⁷ Finally, attendees at the Mirrabooka consultation meeting made the point that family law issues are extremely complex for participants.¹³⁸ The new *Family Law Rules 2004 (WA)* are designed to lessen this problem, but their impact is obviously likely to be limited in this regard. The complexity of family court proceedings is exacerbated for the high percentage of self-represented litigants. However, as the Commission's consultation notes highlight, there is little research on the impact of the family law system on Aboriginal families. Certainly, the dearth of family law research directed at the problems facing Aboriginal families is striking. Indeed, until recently the FCWA has not recorded data on which cases before it involved Aboriginal families.

It is fair to say that, for a variety of reasons, the FCWA has not undertaken any major initiatives to deal with the specific problems faced by Aboriginal families using the Court. The authors were advised by the FCWA's Ethnic Liaison Officer that the Court had begun a process some years ago to develop a protocol. However, it appears that the process adopted did not attract significant interest from the stakeholders and so was abandoned. The FCWA has, however, very recently taken the opportunity to employ four Aboriginal trainees in the Court, arising out of the Department of Justice's program to provide such trainees to Western Australian courts. These young people¹³⁹ will gather experience working in the different parts of the Court, with the long-term goal of improving the Court's ability to provide culturally appropriate services to its Aboriginal clients. Moreover, the authors are advised that efforts will now be made to input into the FCWA's computer records identifying data as to ethnicity voluntarily supplied by Aboriginal users of the FCWA.¹⁴⁰

Despite these steps, there are notable shortcomings. For example, the Family Court Mediation and Counselling Service does not employ any Aboriginal counsellors. Moreover, the Department of Justice's Aboriginal Alternative Dispute Resolution Services are available only for criminal justice matters. The lack of appropriate counselling services provided in this arm of the justice system has recently been brought home to the FCWA. New rules of court were introduced on 29 March 2004.¹⁴¹ Barring some exempt cases (which includes those where violence is an issue),¹⁴² these Rules require the parties to undertake 'pre-action procedures' before they can file an application.¹⁴³ This means 'participating in primary dispute resolution, such as negotiation, conciliation, mediation, arbitration and counselling'.¹⁴⁴ To the extent it cannot fulfil such a need, the Family Court Mediation and Counselling Service would normally refer matters to organisations such as Relationships Australia, Centrecare and Anglicare. However, as a result of the new Rules, the Aboriginal Alternative Dispute Resolution Services has had a relative flood of requests for the provision of primary dispute resolution services to Aboriginal people. This is not their brief, and their mediators are not trained in this area; however, there is no alternative specialised service to accommodate these clients.

It may be that federal funding will be available in this area as the Commonwealth Department of Family and Community Services espouses a strong commitment to considering more appropriate ways of delivering services to Aboriginal families.¹⁴⁵ However, the specific needs of Western Australian Aboriginal families must be considered. Certainly, this is a serious and urgent matter that needs to be addressed by the Western Australian government. The key issue here is that Aboriginal users of the family court system are now *compelled* to access primary dispute resolution mechanisms before taking court action and those mechanisms need to understand and accommodate the needs of Aboriginal families. This raises issues as to staffing, education and the general conduct of these processes (for example, who will be allowed to participate).

136. Law Reform Commission of Western Australia, *Thematic Summaries of Consultation – Pilbara*, 6–11 April 2003, 4.

137. Law Reform Commission of Western Australia, *Thematic Summaries of Consultation – Mirrabooka*, 18 November 2002, 6.

138. *Ibid.*

139. They are aged between 17 and 21.

140. Katherine Thomas, FCWA Executive Officer, discussion with Lisa Young, 17 May 2004.

141. *Family Law Rules 2004 (WA)*.

142. *Family Law Rules 2004 (WA)* r 1.05(2).

143. *Family Law Rules 2004 (WA)* r 1.05 and schedule 1.

144. *Family Law Rules 2004 (WA)* schedule 1, part 1, 1.

145. See, Commonwealth Department of Family and Community Services, *Statement of Commitment to Aboriginal and Torres Strait Islander People: Indigenous Business is Everybody's Business* (2003).

The lack of appropriate primary dispute resolution services for Aboriginal families is very significant in terms of accommodating their customary law. Such processes are desirable for Aboriginal families precisely because they can take account of customary law in a way that is not possible in the current adversarial system. Providing appropriately structured and funded services that can deal with a wide range of family law matters also overcomes the complex jurisdictional problems referred to above.

The issues addressed above are not peculiar to Australia. In particular the recommendations made in March 2003 by the New Zealand Law Commission in its report on *Dispute Resolution in Family Court*,¹⁴⁶ resonate with the dilemmas faced by Aboriginal users of the family law system in that country.

A problem endemic to family law throughout Australia has been the lack of integration of services. This failing in the system was recently investigated by the federal government in *Out of the Maze*. Federal government funding is now being directed at initiatives that support the recommendations outlined in that report. Like other reports,¹⁴⁷ *Out of the Maze* specifically commented on the particular barriers facing Aboriginal users of the system. The following lengthy extract highlights the issues at stake and shows the greater attention able to be given to Aboriginal clients by the Family Court of Australia:

In the integrated family law system, service providers would be much better informed about customary lore and how family law processes can accommodate the relevant aspects, including child-rearing responsibilities in the wider indigenous family. The Advisory Group also recognises the unique position of indigenous Australians when interacting with the family law system. Historically, indigenous families have responded to the cultural inappropriateness of Australian family law by avoiding the court and dealing with family disputes informally, or under traditional lore. Customary lore, community negotiation/development and empowerment are fundamental in any interaction with indigenous Australians and the family law system.

...

There is also some concern that while the needs of indigenous people living in rural and remote communities are recognised, indigenous people living in urban communities may incorrectly be assumed to conform to the wider community's interaction with the family law system. Services which currently employ indigenous staff, such as the Indigenous Consultants in the Family Court of Australia, and services specifically for indigenous families (for example Aboriginal legal centres) are more likely to attract indigenous clients than others. As a result, the capacity of other services to help indigenous clients is limited.

The experience of the Family Court of Australia in developing appropriate services for Aboriginal and Torres Strait Islander communities through consultation provides a model for how other service providers in the system might proceed. The Family Court over the past six years has put in place a range of programs designed to ensure that the Court's services are accessible to indigenous peoples. The Court conducted an extensive consultative process with indigenous community groups, agencies and individuals, and one of the significant outcomes of the consultation process was the establishment of six indigenous workers, called 'Family Consultants', based in Darwin, Alice Springs and Cairns. As well, each registry of the Family Court has the responsibility to establish local networks with the appropriate indigenous communities and agencies in their area to ensure that their registry is providing services in a manner that is appropriate for indigenous clients. The Court has been explicit in stating that the programs in place are not designed to replace or undermine in any way resolution processes that may reside within the indigenous communities themselves to assist with family breakdown. Rather, the programs are to ensure that, if an indigenous person chooses or is required to attend the Family Court, there are no barriers to their accessing the services on the same terms as other members of the Australian community.

In the self-help pathway, support for family and community decision making would be improved by the provision of culturally appropriate information. In the supported pathway, services would be made more culturally appropriate through the employment of indigenous staff, cross-cultural education and wider availability of interpreters. Consideration of new services and interventions tailored specifically for indigenous families (for example narrative therapy and indigenous family law conferencing) needs to be ongoing. When litigation is appropriate, the community obligations of indigenous peoples would be fully considered in arriving at residency and custody decisions. As an alternative to litigation, a new pathway of indigenous family law conferencing needs to be developed, based on circle sentencing in criminal jurisdiction, the New South Wales.¹⁴⁸

The Group then made the following recommendation to government:

146. New Zealand Law Commission, *Dispute Resolution in Family Court*, Report No 82 (2003) ch 13.

147. *Services to Indigenous Peoples in the Town of Port Hedland, Mapping and Gap Analysis*, 24 December 2003, 17. This analysis was prepared by the Department of Indigenous Affairs for the Pilbara Government Managers Indigenous Forum.

148. Family Law Pathways Advisory Group, 'Out of the Maze - Pathways to the Future for Families Experiencing Separation' (August 2001) 89–91.

- 23.1 That culturally appropriate service delivery be expanded through:
- a all professionals of the Family Court of Australia (including counsellors, registrars and judges) and service providers involved in indigenous parenting issues receiving ongoing bicultural education. This education should include the history and effects of forcible removal of children and indigenous cultural values, particularly those related to child-rearing. Competency standards also need to be developed;
 - b development of an indigenous employment strategy in courts with family law jurisdiction. This would include retention and expansion of the Indigenous Consultant positions in the Family Court of Australia;
 - c provision of interpreters particularly, but not only, in courts; and
 - d sponsoring the establishment of local-level indigenous community networks, where local expertise and knowledge can be shared with non-indigenous service providers.
- 23.2 That new service types be developed and tested, in partnership with indigenous communities. Two interventions tailored specifically for indigenous families—narrative therapy and indigenous family law conferencing—need assessment for their applicability to family dispute resolution and as alternatives to litigation.
- 23.3 That a database be created to collect information about indigenous family law cases. This would require identification of indigenous cases and would facilitate research into the way customary lore is taken into account in determining the best interests of children.
- 23.4 That national standards for indigenous children be in accordance with the recommendations from the Bringing Them Home report.
- 23.5 That programs and initiatives be developed, owned and implemented by local indigenous communities, to help ensure best practice in working with indigenous people.¹⁴⁹

Initiatives of the Family Court of Australia are not automatically adopted in the FCWA and this explains the differences to be seen in the two courts in this area. Indeed, the Family Court of Australia's newly released National Cultural Diversity Plan, which defines the actions that will be implemented during 2004–05 and 2005–06, does not apply in Western Australia. Obviously, there are funding implications for implementing such initiatives in Western Australia.

In summary it can be said that initiatives to accommodate the needs of Aboriginal families in the FCWA have been limited to date. It is appropriate that the Western Australian government give consideration to those measures that have been effective in the Family Court of Australia and to the recommendations made for improving services in that court. In particular, the provision of appropriate primary dispute resolution mechanisms should be addressed as a matter of priority. Further, one of the barriers to improving family law delivery for Aboriginal families is a lack of relevant research; therefore, the Western Australian government should consider targeting funding to improve research resources in this area.

Child support

The shared nature of child-rearing in Aboriginal communities calls into question the utility to such communities of a child support system that is premised on the model of a non-Aboriginal nuclear family.¹⁵⁰ There are a number of ways that Aboriginal culture and customary law could potentially clash with the substance and delivery of the child support scheme. This Background Paper will consider the following matters:

- The child support formula and its application.
- The relationship between the payment of child support and the receipt of income tested government benefits.
- Service delivery.

The child support formula and its application

A consequence of shared child-rearing in Aboriginal communities is that financial responsibility for a child can move between family members. Accordingly, in Aboriginal families, it is *not* the case that biological parents are solely responsible for the financial support of their children. This is in direct conflict with state and federal family law, which provide that biological parents are primarily responsible for the financial support of their children.¹⁵¹ Thus, when an Aboriginal child is living with someone other than their biological parent, that carer is technically entitled to seek child support from one or both parents. However, in that situation, the non-parent carer is not obliged to seek child support.

149. Ibid Recommendation 23.

150. Family and Children Branch, Department of Family and Community Services WA, *Kids' Money: Better Outcomes for Indigenous Children* (January 2002) [2].

151. See *Family Law Act 1975* (Cth) s 66C and *Family Court Act 1997* (WA) s 115.

Therefore, the existence of the child support system need not create any problem for Aboriginal families who privately arrange the financial support of children in a manner different to that contemplated by the family law legislation and child support scheme.

There has been a very recent federal government review of some family law matters, which included child support.¹⁵² As a result of that inquiry, it is expected that the government will revisit the formula in the near future. It would seem that the issue most likely to impact directly on Aboriginal users of the child support scheme would be in relation to increasing the variations of the child support percentage according to the level of shared care. Presently, a parent who has less than 110 nights per year of contact still pays the full child support percentage. In other words, reductions in child support for substantial contact only kick in when there is more than 109 nights' contact per year. This feature of the formula has been the subject of ongoing criticism, not least from men's groups. The particular significance of this issue for Aboriginal families is self-evident as the failure to recognise the true cost of shared parenting is most likely to impact on families that share care. The Aboriginal Legal Service of Western Australia ('ALSWA') highlighted this in their submission to the federal government inquiry.¹⁵³

ALSWA raised another interesting issue in that submission. An unreported decision of a magistrate in Paraburdoo was cited which apparently had the effect of reducing a parent's liability to pay child support to his biological child because the magistrate found that the parent had a legal duty to support step-children in his care. Such a decision would be uncommon; although, it has long been the case that the family law legislation has permitted a legal duty to be created for the support of step-children.¹⁵⁴ The question of the extent to which the law should balance child support against the paying parent's obligations (whether moral or legal) to support a second family is a vexed one, and different approaches have been adopted in different jurisdictions. This is not, of course, an issue peculiar to Aboriginal families. Moreover, it must be remembered that when a parent paying child support partners someone with children, that new partner will lose the government benefits they have been entitled to as a single parent. Despite this, the new children are not, in the absence of a court order, the legal dependant of that payer parent. Therefore, the payer's liability to pay child support for their biological children will not diminish. Thus, in most cases, the reality is that the children of the second family are more likely to suffer financially under the law as it stands. As we have said, this is an issue that might face many Australian families.

One can envisage, however, particular examples of how this hierarchy of financial responsibility might not accommodate Aboriginal family life. Imagine a child comes into the family of an uncle for a period, where the uncle is paying child support for other children. The child support due to those other children would not recognise any legal responsibility on the part of the uncle for this child.

Given that the formula is likely to be reviewed by the federal government, it would seem prudent to ensure there is appropriate input as to the impact of any proposed changes on Aboriginal families. If Western Australia wished to act independently and change the formula in this regard, it would only be able to amend the provisions that applied to unmarried couples, again resulting in a dichotomy within the state depending on marital status.

Child support and government benefits

There are issues, other than the formula itself, of concern to the Aboriginal community. In particular, service delivery and integration of child support payments with Centrelink payments have been matters that have attracted some attention.

The Child Support Scheme has a deliberate interaction with the receipt by parents of income tested government benefits. One motive for introducing child support legislation was to reduce welfare payments. This legislation encourages the payment of maintenance for children, where that is appropriate, in preference to the parent with primary care relying on government benefits. One way of achieving this end, was to force parents receiving income tested parenting benefits to claim any entitlement to child support they might have from the other biological parent. The parenting benefits being received by the carer parent are then reduced according to the amount of child support received.

152. House of Representatives, Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (December, 2003).

153. Aboriginal Legal Service of Western Australia (Inc) Submissions in Relation to Inquiry into Child Custody Arrangements in the Event of Family Separation (20 February 2004) 8.

154. See *Family Law Act 1975* (Cth) s 66D and *Family Court Act 1997* (WA) s 116.

Government benefits provided to people who are parenting children (now known as Family Tax Benefits) have not always been shared amongst the various people caring for the children in question. It is now possible for carers who share the care of their children to divide their benefit according to their level of care. Nonetheless, this requires notification and a set way of receiving the benefits. This has not necessarily accommodated the needs of Aboriginal families. As a result, in 2000–01 Extended Family Care Pilots were run in Queensland and New South Wales. Although run in other states, this model would have similar application in Western Australia.

To accommodate traditional shared child-raising practices, families were encouraged to form family care groups. These groups agreed to share FTB resources for the children moving between carers. Agreements operated on honour and built on family obligation so that assistance in cash or goods in lieu...could be handed between carers for the children.¹⁵⁵

This pilot was extremely successful – 91 percent of participants found the arrangements 'positive' or 'very positive'.¹⁵⁶ However, as far as the authors are aware no further action has been taken to implement this pilot on a wider scale. Indeed, the Commission's consultations with Aboriginal communities have highlighted the fact that the problem is wider than just the issue of sharing benefits amongst carer family members. Comments were made in the Thematic Summaries for Laverton¹⁵⁷ and the Pilbara region¹⁵⁸ that extended family caring solely for children were not receiving the associated government benefits. Thus, even in less complex care arrangements notification issues seem to be a problem for Aboriginal families and may well reflect a system not designed for more flexible family arrangements.

The Extended Family Care Pilots are an example of a simple way to address one of the key policy issues faced in accommodating Aboriginal child-rearing practices, that is:

...how best to enable families to exercise choice in their child raising arrangements and the role of Government in providing safeguards around those choices.¹⁵⁹

The failure to take any further action, despite the success of the Pilots, might simply reflect the stretched resources of the two government agencies, both of which are under fairly constant attack from different sectors of the community. Funding of programs like this, which are known to be successful, would seem to be an efficient way to utilise resources and a fairly simple solution to a very real problem for Aboriginal families. Moreover, these Pilots highlight the need to engage directly with Aboriginal communities to ensure that problems specific to them are identified and where possible addressed.

Service delivery

In its submission to the federal government's Inquiry into Child Custody Arrangements in the Event of Family Separation, ALSWA has noted that many Aboriginal children are not in the care of their biological parents at times, and yet the carer parents have not been receiving child support.¹⁶⁰ ALSWA pointed to the need to ensure that culturally appropriate information about entitlements was made available to all Australians, including Aboriginal Australians.

It further appears that the Child Support Agency is not presently aware of how many of their clients live in remote communities, nor whether the child support scheme is successful in benefiting Australian children and families. The authors understand that despite efforts being made to address the particular concerns of Aboriginal clients, a lack of funding has precluded the adoption of tailored initiatives.

Conclusion

Whilst the first two Parts of the Background Paper have evidenced the tensions that exist between mainstream family law and customary Aboriginal family law, this Part has shown clearly that an obvious single solution to these tensions does not readily present itself, at least not without the participation of all Australian governments. Due to the complex jurisdictional web faced in the area of family law any legislative changes must necessarily be limited. However, it seems that real and positive changes might be effected through the provision of funding to address the delivery of

155. Department of Family and Community Services (Cth), Ministerial Submission No 1079 to Minister for Family and Community Services, (17 May 2002).

156. Ibid [9.2].

157. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 6.

158. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 22.

159. Department of Family and Community Services, Family and Children Branch, *Kids' Money: Better Outcomes for Indigenous Children* (January 2002) [12.1].

160. Aboriginal Legal Service of Western Australia (Inc) 'Submissions in Relation to Inquiry into Child Custody Arrangements in the Event of Family Separation' (20 February 2004) 8.

family law services to Aboriginal families. This could be directed at a number of areas, as discussed above. In particular in relation to parenting matters, as with non-Aboriginal families, a clear and directed focus on helping families resolve their disputes without access to judicial decision making would appear to be a desirable and achievable goal. Such an approach is further supported by the recent suggestions coming from the federal government that rather than creating a new layer of decision making in family law (as was suggested by the House of Representatives' Standing Committee on Family and Community Affairs¹⁶¹) it favours directing resources to early intervention options that offer separating couples education and mediation.¹⁶²

Part III: The international context

It is important to recognise that some of the issues raised by the Commission's Terms of Reference have been considered by law reform agencies in other jurisdictions. This Part sets out the reforms and proposals for reform in New Zealand and Canada, in so far as they relate to family law.

As a federation, Canada faces similar jurisdictional complexities to those found here in Australia. Like Australia, primary legislative power rests with the Federal Parliament¹⁶³ though there is residual provincial and territorial legislative power where a matter does not relate to a marriage or divorce. Additionally, '[i]n most Canadian provinces, several levels of court share the responsibility for resolving family disputes. Overlapping and fragmented jurisdictions are rife...'.¹⁶⁴ Unlike Australia and Canada, New Zealand is a unitary state with no constitution. Thus, the same family law applies throughout New Zealand.

In both of these jurisdictions the legislative framework for family law is similar to Australia, in the sense that the content of family law is broadly the same. For example, the 'best interests' principle applies in relation to decision making concerning children in all three jurisdictions. Equally, one can see similarities amongst the customs of the Indigenous peoples of these three countries. In New Zealand, for example, the practice of whangai involves a Maori child being raised by a member other than the biological parents, but not in the sense of adoption.¹⁶⁵ Indigenous Canadians have rules as to who may marry.¹⁶⁶ By and large, however, for the purposes of this Background Paper particular differences in customary or mainstream laws do not matter, as the significance of this brief review of these jurisdictions is to consider whether there are reforms or suggestions for change that might be transferable to the Australian context. We have noted below where suggested reforms would not translate to an Australian context.

New Zealand

In recent years, the New Zealand government has released three major reports that relate to the issues addressed in this Background Paper. The first of these papers was the New Zealand Law Commission's Maori Custom and Values in *New Zealand Law*.¹⁶⁷ The purpose of the Study Paper was to:

- Consider how Maori custom and values impact on the current law; and
- Consider ideas for future law reform projects by the commission to give effect to Maori values in the laws of New Zealand.¹⁶⁸

Family law is mentioned briefly in this Study Paper, which is largely descriptive. In relation to parenting disputes, where the family court system had been accessed, the Study Paper refers to two cases where the particularity of Maori culture had been recognised and accorded value in the general application of the best interests principle. In *Makiri v Roxhburg*¹⁶⁹ the court held that:

A custody order excluding one parent altogether from the possession and care of a Maori child is seen as imposing European values on an ancient and strongly reviving culture... Though the Family Court in dealing with a guardianship case does not make special rules for any segment of the New Zealand community it must and does recognise that

161. House of Representatives, Standing Committee on Family and Community Affairs, *Every Picture Tells a Story*, above n 152, recommendation 12.

162. Arndt B, 'Early Word for Happier Split', *The Australian*, 20 July 2004, 15.

163. *Constitution Act 1867* (Canada) s 91 (26).

164. Payne JD & Payne MA, *Introduction to Canadian Family Law* (Ontario: Carswell, 1994) 10.

165. New Zealand Law Commission, *Maori Customs and Values in New Zealand Law*, Study Paper No 9 (March 2001) [234].

166. *Delgamuukw v British Columbia* [1993] 5 CNLR (BCCA) 4.

167. New Zealand Law Commission, *Maori Customs and Values in New Zealand Law*, above n 165.

168. *Ibid* [1].

169. (1988) 5 NZLR 673.

each case involving the welfare of a child must be considered according to its own individual circumstances, important traditions and cultural values affecting the child being one such obvious factor...¹⁷⁰

This is not dissimilar to statements in Australian cases.¹⁷¹

In March 2003, the New Zealand Law Commission published its report on *Dispute Resolution in the Family Court*.¹⁷² In Chapter 13 of that Report—dealing with Maori Participation in the Family Court—the following relevant recommendations were made:

- Conciliation services should, as far as possible, be contracted to qualified Maori providers so that Maori clients can choose these services.
- Training needs for Maori psychologist and report writer providers should be assessed.
- Standardised introductory procedures complying with tikanga Maori should be introduced into the Family Court. Judges and other court staff should be trained in these procedures.
- Legislation should be amended so judges can, at their discretion, permit whanau¹⁷³ to attend Family Court settlement conferences and hearings.¹⁷⁴

The following points were also made by the Commission:

- Given the importance of familial relationships to Maori society, the role of the Family Court is of central importance to Maori.
- A Maori child is not just the responsibility of its biological parents, but of the entire whanau, and the child in turn is responsible to that whanau.
- Substantive family law that prescribes a narrow range of rights and responsibilities between biological parents and children excludes key figures in traditional Maori families.
- Extending the Maori Land Court's jurisdiction to cover family law is an option that should be considered.
- It was a matter for concern that community resources, particularly those of Maori providers, were not used before or instead of Family Court procedures. It was noted that it was better to resolve disputes without having to access Family Court.
- Providers of services to Family Court clients need to be familiar with Maori values and have professional knowledge in relevant areas (ie, necessary skills).
- Any procedural changes would need to ensure the safety of women and children.
- There is a need for a Maori Family Court conciliation service. Maori providers could also be contracted to provide information sessions, and parenting and children's programmes.

Finally, in March 2004, the New Zealand Law Commission published its Report, *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*.¹⁷⁵ This report considered,¹⁷⁶ but did not recommend, that the Maori Land Court be given concurrent jurisdiction over family 'marital' property disputes. The widespread consultation apparently generated little support for this proposal, with submissions focusing more on extensions of jurisdiction more directly in the area of native title.

The New Zealand Law Commission's work in this area shows that similar issues are being faced in that jurisdiction. Notably, there has been a distinct emphasis on trying to improve court processes, and this resonates with the discussion in Part II.¹⁷⁷ In particular, it continues to point to the pressing need to provide funding that will help to improve the culturally sensitive delivery of family law services to Indigenous families.

170. New Zealand Law Commission, *Maori Customs and Values in New Zealand Law*, above n 165, [242].

171. See for instance, *In the Marriage of MCL and MCL; Minister for Health and Community Services Intervening* (1989) 15 Fam LR 7; *In the Marriage of B and R* (1995) 19 Fam LR 594.

172. New Zealand Law Commission, *Dispute Resolution in the Family Court*, Report No 82 (March 2003).

173. Whanau means extended family.

174. New Zealand Law Commission, *Dispute Resolution in the Family Court*, above n 172, 'Summary of Recommendations', 225–26.

175. New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Report No 85 (March 2004).

176. *Ibid* [330].

177. *Ibid* 42–45.

Canada

The *Constitution Act 1982* has entrenched in Canadian law Aboriginal and treaty rights. Section 35(1) of that Act grants constitutional protection for 'existing Aboriginal and treaty rights'.¹⁷⁸ There remains considerable debate in Canada as to whether this provision has also entrenched a right to Aboriginal self-governance. Whilst there have been strong arguments made to this effect, case law following the introduction of this section has not supported this view. However, there has been recognition that in matters not covered by federal or provincial laws, Aboriginal 'self-government and self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity' is appropriate.¹⁷⁹ What this means in practical terms is that the Canadian Aboriginal community is permitted to regulate itself where that does not conflict with provincial or federal laws.

The Canadian Report of the Royal Commission on Aboriginal Peoples published in October 1996 ('the Royal Commission Report') addressed in detail the question whether family law for Aboriginal persons should be made a matter for their own self-government. It was surmised by the Royal Commission that '[f]amily matters, including marriage and divorce, adoption, custody of children, and protection of children's welfare will undoubtedly be among the first areas over which self-governing Aboriginal nations will assume jurisdiction'.¹⁸⁰ Leaving aside those areas that fall outside the scope of this Background Paper, the areas of concern were identified to be:

- recognising Aboriginal custom in adoption and custody matters;
- dividing property on marriage breakdown; and
- protecting the victim's civil interests in cases of family violence.

Unlike Australia, some limited aspects of customary family law in Canada survived colonisation, in particular customary laws on marriage, adoption and custody.¹⁸¹ However, as in Australia, statutory incursions have pre-empted other aspects of customary family law. This dichotomy is compounded by the uncertainty as to the right of self-government of Aboriginal people in Canada.

The Royal Commission's findings in respect of family law and children

In relation to the application of the best interests principle in a range of contexts, the Royal Commission Report noted the need for cultural awareness and sensitivity. It also referred to developments, similar to those in Australia, where such awareness and sensitivity is increasingly being reflected. It concluded that 'guiding principles cannot be premised on the values of a single culture; hence the maxim, "a prime function of law is to prevent one person's truth...from becoming another person's tyranny"'.¹⁸²

The Royal Commission clearly favoured the view that issues relating to parenting should be the subject of Aboriginal self-government:

With the advent of self-government, Aboriginal nations will be in a position to make their own family law. Indeed, they can proceed with initiatives in this area now, since family law falls within the core of Aboriginal self-governing jurisdiction. While their customary laws in some areas have continuing validity under section 35(1) of the constitution, in other areas they have been pre-empted by federal or provincial laws. It seems likely, therefore, in view of the fundamental importance of family and family relationships, that Aboriginal people will wish to have their own laws in place as soon as possible. There would seem to be particular urgency in this regard concerning laws and policies affecting children—laws on apprehension, custody and adoption, for example—as well as other areas with an impact on children, including their quality of life and personal security, parental responsibilities with regard to support and maintenance, protection from violence, and property and inheritance. As Aboriginal people have told us, their children are their future.¹⁸³

The Royal Commission's findings in respect of property

The issues raised in the context of property by the Royal Commission Report are not ones that would apply in Western Australia. Firstly, the loss of women's rights to property on separation is discussed; however, this has arisen in the context of reserve property which has no equivalent in Western Australia. Secondly, child support issues are considered.

178. Emphasis added.

179. *Delgamuukw v British Columbia* [1993] 5 CNLR (BCCA) 250.

180. *Report of the Royal Commission into Aboriginal Peoples* (Canada, 1996) vol 3, ch 2, 91.

181. *Ibid* 92.

182. *Ibid* 95.

183. *Ibid*.

Again, these arise out of peculiarities associated with the ownership of land on reserves.

Like issues relating to children, the Royal Commission Report concluded that distribution of property on the breakdown of a relationship is a matter that ought to be within the sphere of Aboriginal self-government.

In conclusion, the Royal Commission Report said:

Aboriginal nations have an opportunity to start from first principles in creating a family law regime that reflects their cultures, and we believe that they should be encouraged to do so. The courtroom is not a therapeutic institution, nor is law a sufficiently refined tool to define family relationships in culturally appropriate ways. Indeed, law and family do not walk easily hand in hand. As law professor Harry Arthurs has written:

'Law', at least in the formal sense, implies authority, conflict, and if necessary, coercion. 'Family' implies partnership, compromise and ultimately, love. 'Law' is general, applying to all citizens within a state. 'Family' is particular, and is shaped for each of us by our own individual personalities, and by the very different and complex interplay of religion, ethnicity, class and culture. 'Law' is form: due process, precision, predictability. 'Family' is substance: traditionally home, children and loyalty, or in a more modern idiom, sharing and caring.

It will require a great deal of planning and deliberation to devise laws that reflect the non-coercive cultures that Aboriginal people are determined to preserve and at the same time protect vulnerable people in an often troubled environment. Participation in a wage economy has introduced new ways of holding property and meeting obligations of family support. Aboriginal nations will undoubtedly seek a synthesis of traditions of sharing among kin networks and ways of enforcing the legitimate obligations and protecting the entitlements of individuals. In view of the legal vacuum that now exists with respect to many of these issues, we urge an early start on addressing the aspects of family law raised in this chapter.¹⁸⁴

The Royal Commission Report recommended that:

- 3.2.10 Federal, provincial and territorial governments promptly acknowledge that the field of family law is generally a core area of Aboriginal self-governing jurisdiction, in which Aboriginal nations can undertake self-starting initiatives without prior federal, provincial or territorial agreements.
- 3.2.11 Federal, provincial and territorial governments acknowledge the validity of Aboriginal customary law in areas of family law, such as marriage, divorce, child custody and adoption, and amend their legislation accordingly.
- 3.2.12 Aboriginal nations or organizations consult with federal, provincial and territorial governments on areas of family law with a view to
 - (a) making possible legislative amendments to resolve anomalies in the application of family law to Aboriginal people and to fill current gaps;
 - (b) working out appropriate mechanisms of transition to Aboriginal control under self-government; and
 - (c) settling issues of mutual interest on the recognition and enforcement of the decisions of their respective adjudicative bodies.
- 3.2.13 With a view to self-starting initiatives in the family law area or to self-government, Aboriginal nations or communities establish committees, with women as full participants, to study issues such as
 - (a) the interests of family members in family assets;
 - (b) the division of family assets on marriage breakdown;
 - (c) factors to be considered in relation to the best interests of the child, as the principle is applicable to Aboriginal custody and adoption;
 - (d) rights of inheritance pertaining to wills, estates or intestacy; and
 - (e) obligations of spousal and child support.

Since this Report, as far as the authors can ascertain, there have been no steps taken in Canada to move toward formal recognition of a right to self-government, nor a negotiation of the areas to which self-government would apply. It must be remembered that the Royal Commission Report's exhortation to self-governance is one that is made to '[f]ederal, provincial and territorial governments'.¹⁸⁵ Whilst the arguments in favour of Aboriginal self-government in the

184. Ibid 100–01 (footnote omitted).

185. See Royal Commission's Recommendation 3.2.11, above p 171.

area of family law, so eloquently put in the Report, apply equally to Aboriginal families in Western Australia, the authors would suggest the Western Australian government does not have sufficiently wide jurisdiction in this area to achieve a workable solution. The complex interaction of state and federal laws in Western Australia in all areas of family law makes the suggested Canadian solution one that would need—as in Canada—to be recommended at a federal level.

Conclusion

The authors are conscious that this Background Paper has a particular focus on what cannot be achieved in the area of family law and customary law in Western Australia. We do not mean to suggest by this that an integrated national approach to the recognition of Aboriginal customary law would not be a superior solution, nor that attempts should not be made to lobby for such change. However, to date there does not seem to have been much enthusiasm for this approach at a federal level. In light of that, this Background Paper seeks to highlight the areas in which the state government might effect some positive change. Possible minor statutory amendments have been canvassed. However, the authors hope this Background Paper identifies some areas in which significant steps could be taken without statutory intervention and yet which would have the effect of recognising Aboriginal 'family law' and the particular needs of Aboriginal families. The authors are hopeful that this Background Paper will stimulate further submissions on the matters raised so that concrete steps can be taken to address the particular needs of Aboriginal families in this complex and difficult area.