

Law Reform Commission of Western Australia

Aboriginal Customary Laws

Project 94

DISCUSSION PAPER

(December 2005)

The Law Reform Commission of Western Australia

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Terms of Reference

Recognising that all persons in Western Australia are subject to and protected by this state's legal system; and there may be a need to recognise the existence of, and take into account within this legal system, Aboriginal customary laws:

The Law Reform Commission of Western Australia is to enquire into and report upon Aboriginal customary laws in Western Australia other than in relation to Native Title and matters addressed under the *Aboriginal Heritage Act 1972 (WA)*.

Particular reference will be given to:

1. how those laws are ascertained, recognised, made, applied and altered in Western Australia;
2. who is bound by those laws and how they cease to be bound; and
3. whether those laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis, and in particular whether:
 - (a) the laws of Western Australia should give express recognition to Aboriginal customary laws, cultures and practices in the administration or enforcement of Western Australian law;
 - (b) the practices and procedures of the Western Australian courts should be modified to recognise Aboriginal customary laws;

- (c) the laws of Western Australia relating to the enforcement of criminal or civil law should be amended to recognise Aboriginal customary laws; and
- (d) whether other provisions should be made for the identification and application of Aboriginal customary laws.

For the purposes of carrying out this inquiry, the Commission is to have regard to:

- matters of Aboriginal customary law falling within state legislative jurisdiction including matters performing the function of or corresponding to criminal law (including domestic violence); civil law (including personal property law, contractual arrangements and torts); local government law; the law of domestic relations; inheritance law; law relating to spiritual matters; and the laws of evidence and procedure;
- relevant Commonwealth legislation and international obligations;
- relevant Aboriginal culture, spiritual, sacred and gender concerns and sensitivities;
- the views, aspirations and welfare of Aboriginal persons in Western Australia.

Peter Foss QC MLC
2 December 2000

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The Commission thanks its Executive Officer, Heather Kay, for her work in coordinating this reference and its publication designer, Cheryl MacFarlane, for her work in preparing this paper for publication. The Commission's research for this reference was aided by its dedicated research team: thanks to Jeff Atkinson, Olivia Barr, Dr Rebecca Collins, Julian Hosgood, Sophie Johnson, Yuki Kobayashi, Alana McCarthy, Suzie Ward, Carla Yazmadjan and, in particular, to the Commission's Executive Assistant, Sharne Cranston. In addition, the Commission acknowledges the assistance provided by the many individuals, organisations and agencies that were consulted in relation to specific parts of this reference.

The Commission wishes to acknowledge the efforts of past chairmen the Hon. Justice Ralph Simmonds and Wayne Martin QC, who guided the Commission's work on this reference during their incumbency. The Commission is particularly indebted to the work of the Special Indigenous Commissioners for this reference—Professor Michael Dodson and Mrs Beth Woods—and to the members of the Aboriginal Research Reference Council. A special vote of thanks is extended to Dr Harry Blagg and Professor Neil Morgan from the Crime Research Centre at the University of Western Australia for their assistance from 2001–2004 as Research Directors for this reference and to Ms Cheri Yavu-Kama-Harathunian for her work as Project Manager from 2001–2003.

Finally, the Commission wishes to thank the Indigenous people of Western Australia who were consulted for this reference and who entrusted their stories and their law to the Commission for the purposes of this project.

Background Papers

When referring to the background papers produced for the Aboriginal Customary Laws project, reference is made to the papers which were published individually throughout 2004–2005. The Commission has since produced one volume containing all of the 15 Papers. (For a complete list of the Background Papers, see below p 14.) The Commission wishes to thank each of the consultants who were commissioned to write the background papers.

Foreword

This project commenced in late 2000, upon receipt of the reference from the then Attorney-General, the Hon. Peter Foss QC and has been a major focus for the Commission since that time. The way in which we have gone about researching and developing the project is set out in the introduction and methodological overview which follow. They describe in detail our approach to our terms of reference, our concept of the task and the way in which we have gone about addressing it.

During the review of the civil and criminal justice system, new methods of law reform work were adopted, involving extensive community consultation. In this project, inquiring into Aboriginal customary laws in Western Australia, we have used and extended those methods in order to hear particularly from the Aboriginal people of this state.

It was obvious that an approach to research specific to and appropriate to Aboriginal people and the breadth of the project was required. The resulting methods are detailed in Part I. What was critical was to involve Aboriginal people throughout and to that end the Commission sought advice from respected Aboriginal sources and consulted widely from the outset. The result was a new and original process, involving setting up a 'Research Reference Council' of Aboriginal people, whose knowledge and connections spanned not only Western Australia, but also moved across the whole country. They were a source of advice, introductions and cautions. The Special Commissioners, Professor Michael Dodson and Mrs Beth Woods, brought further expertise and experience to the project. Their knowledge and connections have been crucial, particularly during the consultative visits to communities around the state. With their help, in discussions with the various communities, we elicited many views, stories and strong criticisms. These were then distilled into summaries by Research Directors Professor Neil Morgan and Dr Harry Blagg, respecting the confidentiality where appropriate, but rendering the themes raised by the people loud and clear. The results are published on the Commission's website.

The terms of reference for this project are broad, covering the existence and operation of Aboriginal

customary laws, the people affected by that law, whether it should be recognised and, if so, 'to what extent, in what manner and on what basis'. The terms of reference are not limited to obvious areas in which Western Australian law and customary laws have been known to clash. The Commission is required to have regard to 'the views aspirations and welfare of Aboriginal persons in Western Australia'. In this process, we have found that some topics generated as many questions as they did answers, calling us to research deeper into the operation of laws in the lives of Aboriginal people. It may be that this is a feature of committed law reform. This Discussion Paper is a reflection of that process. For all these reasons it has taken time to reach this point of publication.

In many ways, this project has been a humbling experience. We have seen the history of this state reflected in the conditions and life experiences of Aboriginal people today. To realise that these discoveries are nothing new, or necessarily unknown, tells us something else. The juxtaposition of separate worlds and different ways of life in our modern state remains astounding. This Discussion Paper will serve to illustrate features of those worlds and lives now in Western Australia. We have attempted to present it in sections that reflect the main areas of interaction between people and law in a general sense. It is, to a great extent, organised around western legal concepts. This is an unavoidable pragmatic approach to the breadth of the subject. It was not necessarily the way issues were presented in the consultations or discussions.

Aboriginal people in Western Australia today are relatively few in number. That in no way diminishes the importance of this reference for all Western Australians. The way in which Aboriginal people live within the wider framework of our society is a reflection upon the whole of that society. Whether and how we recognise their position and their law is a matter of equity. The hardships and injustices that arise because of lack of knowledge, lack of understanding, inflexibility of thought and simple prejudice are numerous, complex and difficult to address.

We have drawn upon many resources and people for their knowledge and experience as much as their academic work. Most importantly, we have attempted to seek out the views of the Aboriginal peoples concerned. There are varied and widely distributed Aboriginal communities in Western Australia. We are very conscious that we have not spoken to everybody. We have not been able to visit every community. Inevitably there will be things that have not been brought to our attention. The purpose of this Discussion Paper is to invite critical response. We need to be told where we have missed an important piece of information or point of view. We want to hear the arguments for and against the proposals at this stage and we encourage wide discussion on all topics in this Paper. On some specific questions, we have not been able to form a view, either for lack of specific material to date or from a consciousness that there are more issues that need to be articulated. We particularly welcome contributions on these questions.

This Discussion Paper has been structured and the format designed to enable and encourage people to find their way to sections of particular interest. It is not necessary to read the whole document to be able to respond. We would like readers to feel able to make specific comments on any proposal without any obligation to respond to the whole. This Discussion Paper, the background papers and thematic summaries

are available on our website and we welcome responses in electronic form.

My fellow Commissioners Ilse Petersen and Dr Chris Kendall and I are indebted to everybody who has contributed to the research, preparation and writing of this Discussion Paper. It has been an exciting and stimulating endeavour. Many talented individuals have contributed enthusiastically to the work. Our writers, Dr Tatum Hands, Victoria Williams and Danielle Davies have produced excellent material and have shown us all how to cooperate, often under difficult circumstances. I particularly want to thank our Executive Officer, Heather Kay, and our Executive Assistant, Sharne Cranston who have organised, coordinated and acted as a liaison point for so many people.

Our greatest thanks are due to all those people who came to our meetings, sometimes travelling considerable distances, and shared their views and experiences. The generosity of the Aboriginal people of this state, in their willingness to sit with us, talk to us and challenge us, cannot be overstated. Without them, the time they gave us and the tolerance they have shown, this work, in the form it now appears, would have been impossible.

AG Braddock SC
Chair
December 2005