

# Introduction

Between 1997 and 1999, the Law Reform Commission of Western Australia (the Commission) conducted a comprehensive review of the Western Australian justice system during which it received in excess of 1,600 public submissions.<sup>1</sup> A number of those submissions called for more equitable treatment of Indigenous Australians under the law. The Commission determined that the complex relationships between Indigenous peoples, their customary laws and the broader Western Australian justice system, as well as the cultural sensitivities involved in dealing with these issues, merited an entirely new reference.

The Commission approached the then Attorney-General, the Hon. Peter Foss QC, with the proposal for a new reference to investigate whether there may be a need to recognise the existence of Aboriginal customary laws and have regard to those laws within the Western Australian legal system. Following consultation with Aboriginal<sup>2</sup> groups and communities around the state the Attorney-General and the Commission settled the terms of reference and on 2 December 2000 the matter was formally referred to the Commission for investigation.<sup>3</sup>



## Scope of the Reference

The Attorney-General asked the Commission to 'inquire into and report upon Aboriginal customary laws in Western Australia'. The Commission's terms of reference for this project were wide-ranging, giving the Commission the freedom to investigate all areas of Aboriginal customary laws in Western Australia other than native title issues and matters addressed under the *Aboriginal Heritage Act 1972* (WA). In its research for this reference, the Commission was particularly directed to inquire into:

1. how Aboriginal customary laws are ascertained, recognised, made, applied and altered in Western Australia;
2. who is bound by Aboriginal customary laws and how they cease to be bound; and
3. whether Aboriginal customary 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.

---

1. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999).  
2. For the purpose of this paper, reference to Aboriginal people includes reference to Torres Strait Islander people; however, the Commission notes that, according to the 2001 Census, there are less than 900 Torres Strait Islanders currently residing in Western Australia.  
3. The Commission would also like to acknowledge the support of current Attorney-General, the Hon. Jim McGinty, in respect of this reference.



Whilst focusing primarily on matters of Aboriginal customary law falling within state legislative jurisdiction (including matters performing the function of, or corresponding to, criminal law; civil law; local government law; the law of domestic relations; inheritance law; law relating to spiritual matters; and the laws of evidence and procedure), the Commission was also to have regard to relevant Commonwealth legislation and international obligations. In its inquiry into these matters the Commission was further directed to have regard to relevant Aboriginal cultural, spiritual, sacred and gender concerns and sensitivities; and the views, aspirations and welfare of Aboriginal people in Western Australia.

It is important to note that, while the Commission must 'have regard to' the matters referred to in the previous paragraph, it is not required to report on each of those matters. In taking decisions about the areas of law upon which to concentrate its research efforts, the Commission took advice from key Indigenous advisors and its Indigenous Special Commissioners. The Commission was also guided by the concerns and issues raised by Aboriginal communities during its extensive public consultations throughout Western Australia. The consultations revealed certain matters not expressly specified in the Commission's terms of reference but which nonetheless fell within the Commission's mandate

as matters relevant to 'the views, aspirations and welfare of Aboriginal persons in Western Australia'. These matters are discussed in more detail in Part II below.

## Previous Inquiries

This is not the first inquiry on the recognition of Aboriginal customary laws undertaken by an Australian law reform agency. The current study was preceded by important inquiries undertaken by the Australian Law Reform Commission during the 1980s and, more recently, the Northern Territory Law Reform Committee. It is not the intention of the Commission to replicate the work of these inquiries or reproduce their findings in full here; however, where relevant, this Discussion Paper refers to the research and recommendations—and should generally be considered in the context—of these previous inquiries.

It is convenient here briefly to discuss these inquiries and set out their principal findings. A more detailed consideration of certain elements of these inquiries will be found in subsequent chapters.

## Australian Law Reform Commission

In February 1977, the Australian Law Reform Commission (ALRC) received a broad reference to 'inquire into and report upon whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only'.<sup>4</sup> Specifically, the ALRC was asked to report on:

- (a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;
- (b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and
- (c) any other related matter.

Although the scope of the inquiry was virtually unlimited, the ALRC decided to exclude consideration of cultural heritage and self-determination as well as the laws of real property and intellectual property. The ALRC began

4. Terms of reference given to the Australian Law Reform Commission (ALRC) by federal Attorney-General, Robert Ellicott, on 9 February 1977.  
5. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

what was to become a nine-year process of consultative fieldwork and research across Australia during which it published 15 research papers on specific areas of the reference. The ALRC's research work culminated in 1986 in a comprehensive two-volume report<sup>5</sup> containing numerous recommendations and draft legislation for the recognition of Aboriginal customary laws in Australia.

The principal findings of the ALRC were that:

- Aboriginal customary laws existed in traditional Aboriginal societies and, despite numerous changes, forms of these customary laws continue to exist.
- Aboriginal customary laws should be understood broadly rather than narrowly and need not be precisely defined.
- Aboriginal customary laws should be recognised, in appropriate ways, by the Australian legal system.
- The recognition of Aboriginal customary laws must occur against the background and within the framework of the general law.
- As far as possible, Aboriginal customary laws should be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures (unless the need for these is clearly demonstrated).
- The issues of the extent and method of recognising Aboriginal customary laws need to be considered separately from any arguments about the federal system.
- Recognition of Aboriginal customary laws may take different forms; however, as a general principle, codification or direct enforcement are not appropriate forms of recognition of Aboriginal customary laws.

The ALRC report made specific recommendations in relation to appropriate recognition of Aboriginal customary law in respect to: traditional marriages; distribution of property upon death; Aboriginal child custody, fostering and adoption; criminal law and sentencing; evidence and procedure; police

investigation and interrogation; local justice mechanisms for Aboriginal communities; and hunting, fishing and gathering rights. Volume Two of the report appended draft legislation for the recognition of Aboriginal customary laws in many of these areas.<sup>6</sup> The ALRC also recommended changes to state government policies in relation to prosecutorial discretion, local justice mechanisms and policing.

Despite strong support from Aboriginal organisations, there has been limited administrative and legislative implementation of the ALRC's recommendations in the decades since it published its report. In 1992 the Royal Commission into Aboriginal Deaths in Custody recommended that the federal government produce a progress report on the status of implementation of the ALRC's recommendations – a task which was completed by the Office of Indigenous Affairs in 1995.<sup>7</sup> That report indicated that there had been partial legislative implementation of some of the recommendations at the federal level, particularly in relation to the interrogation of Aboriginal offenders and the need for interpreters.<sup>8</sup> The progress report noted further administrative changes in various government departments which had implemented aspects of the ALRC's recommendations. At the state level the ALRC's recommendations have been given legislative form in some jurisdictions in respect to recognition of traditional marriages for the purposes of adoption<sup>9</sup> and the implementation of the Aboriginal child placement principle which was appended to the ALRC's draft Bill.<sup>10</sup>

It is important to note (as the Aboriginal and Torres Strait Islander Commission (ATSIC) did in its 1999 report to the United Nations) that 'to some extent the work of the ALRC has been overtaken by events'.<sup>11</sup> Of these events the High Court's 1992 decision in *Mabo v Queensland [No 2]*,<sup>12</sup> which recognised a limited right of communal native title to land consistent with the laws and customs of Indigenous peoples, and the subsequent passage of the *Native Title Act 1994* (Cth) have been the most significant. In light of these developments and the time elapsed since the publication of the ALRC report, ATSIC has noted the

6. Aboriginal Customary Laws (Recognition) Bill 1986.

7. Office of Indigenous Affairs of the Department of Prime Minister and Cabinet, *Aboriginal Customary Law: Report on Commonwealth implementation of the recommendations of the Australian Law Reform Commission* (1995).

8. See <<http://www.alrc.gov.au/inquiries/title/alrc31/implemntation.htm>>.

9. *Adoption of Children Act 1965* (NSW); *Adoption of Children Act 1964* (NT); *Adoption of Children Act 1988* (SA); *Adoption of Children Act 1984* (Vic). As discussed in Part VII, Western Australia was the last state to legislatively implement the Aboriginal child placement principle in 2002–2004. See below 'Aboriginal Child Custody Issues: Guiding Principles', below pp 341–42.

10. *Community Welfare Act 1983* (NT); *Children (Care and Protection Act) 1987* (NSW); *Adoption of Children Act 1988* (SA); *Children (Guardianship and Custody) Act 1984* (Vic); *Adoption of Children Act 1964* (Qld).

11. Aboriginal and Torres Strait Islander Commission (ATSIC), *Aboriginal and Torres Strait Islander Peoples and Australia's Obligations Under the Nations Convention on the Elimination of all Forms of Racial Discrimination* (February 1999).

12. (1992) 175 CLR 1 (hereafter cited as '*Mabo*').

importance of re-examining and progressing the ALRC's recommendations.<sup>13</sup>

## Northern Territory Law Reform Committee

In October 2002 the Northern Territory Law Reform Committee (NTLRC) was asked to 'inquire into the strength of Aboriginal customary law in the Northern Territory'<sup>14</sup> and, in particular:

To report and make recommendations on the capacity of Aboriginal customary law to provide benefits to the Northern Territory in areas including but not limited to governance, social well being, law and justice, economic independence, wildlife conservation, land management and scientific knowledge.<sup>15</sup>

The inquiry was co-chaired by the Hon. Austin Asche QC and Yananyumul Mununggurr; a sub-committee of eight Indigenous members and eight legal experts was convened to assist the inquiry. Because the NTLRC was given only eight months to conduct the inquiry and report to government, the inquiry was necessarily limited in its scope.

The NTLRC prepared a series of four background papers on general issues, including the recognition of Aboriginal customary law and the conduct of Aboriginal customary law in the Northern Territory. The NTLRC also consulted with a wide cross-section of the community and conducted consultative visits to a number of Aboriginal communities across the Territory. The primary findings of the NTLRC inquiry were:

- That 'Aboriginal customary law is a fact of life for most Aboriginal people in the Northern Territory'<sup>16</sup> and that it defines the identity of Aboriginal people, their rights, responsibilities and relationships to others.
- That the issues facing individual Aboriginal communities and the traditional laws of each Aboriginal community are different.<sup>17</sup>
- That Australian law cannot be completely excluded and that it should, where appropriate, work in conjunction with Aboriginal customary law.<sup>18</sup>

In making these findings the NTLRC acknowledged the difficulty of attempting to incorporate Aboriginal customary law into the Australian legal system by legislative means.<sup>19</sup> It suggested that customary law would be better left to the interpretation of Aboriginal people and that Aboriginal people should be empowered to conduct their communities according to their customary laws.<sup>20</sup> The NTLRC made 12 specific recommendations to assist this outcome including that government should

- adopt a whole-of-government approach to the recognition of Aboriginal customary laws such that services and programs support and complement each other;
- assist Aboriginal communities to develop law and justice plans to incorporate Aboriginal customary law into community governance;
- properly fund initiatives and pilot programs for the implementation of law and justice plans;
- establish separate consultative inquiries into the issues of promised marriages and 'payback'; and
- develop strategies to increase the participation of Aboriginal people in the justice system and allow for the input of communities in the sentencing of offenders.

It is perhaps too early to judge the success of implementation of the recommendations made in the



13. ATSIAC, *Aboriginal and Torres Strait Islander Peoples and Australia's Obligations Under the Nations Convention on the Elimination of all Forms of Racial Discrimination* (February 1999).

14. Terms of reference given to the Northern Territory Law Reform Committee (NTLRC) by Northern Territory Attorney-General Dr Peter Toyne on 16 October 2002.

15. *Ibid.*

16. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 13.

17. *Ibid.* 6.

18. *Ibid.* 15.

19. *Ibid.* 11.

20. *Ibid.* 12. Subject, of course, to the proviso that Aboriginal customary law should be recognised 'consistent with universally recognised human rights and fundamental freedoms'.

NTLRC report although a number of initiatives responding to the recommendations have been undertaken, particularly in relation to law and justice issues.<sup>21</sup> It is important to note that the recent NTLRC inquiry was preceded in that jurisdiction by a 1992 discussion paper of the Sessional Committee of the Northern Territory Legislative Assembly on Constitutional Development wherein the legal and constitutional recognition of Aboriginal customary laws was considered.<sup>22</sup> The Sessional Committee's final report on a draft Constitution for the Northern Territory recommended express recognition of 'Aboriginal customary law as a source of Northern Territory law on a par with the common law'.<sup>23</sup> Although little has yet been done of a formal nature<sup>24</sup> in respect of the recognition of Aboriginal customary laws in the Northern Territory, there has been a consistent willingness to review the question by successive governments.<sup>25</sup>

## Structure of this Discussion Paper

Whilst the Commission is mindful that the chosen structure of this Discussion Paper may reflect a more Western conception of law than is commonly found in Aboriginal society, the Commission's Terms of Reference require it to consider Aboriginal customary laws in the context of the current Western Australian legal system – a system which reflects this state's colonial heritage. To enhance the opportunities for recognition of Aboriginal customary law within that system, the Commission has chosen to structure this Discussion Paper in a way that legislators and government will more readily understand.

This Discussion Paper is presented in ten parts. Part I provides an overview of the Commission's research methodology and management of the reference. Part II provides some background and statistical information on Aboriginal peoples in Western Australia and introduces some general findings of the Commission

from its consultative visits to Western Australian Aboriginal communities. Part III addresses the question, 'What is customary law?' and discusses issues and methods of recognition of Aboriginal customary law in the Western Australian context. Part IV examines the concept of Aboriginal customary law in the international arena, including in the human rights context. Part V deals with the Commission's substantive investigation into the interaction of Aboriginal people and the criminal justice system and discusses the opportunities for recognition or expression of Aboriginal customary law within that system. The discussion in Part VI deals with Aboriginal customary law and the civil law system, while Part VII examines the significance of Aboriginal customary law in the family context. The recognition of customary law in relation to hunting, fishing and gathering, and associated land access issues is examined in Part VIII; while Part IX examines Aboriginal customary law in relation to rules of evidence and court practice and procedure. Part X explores Aboriginal community governance and discusses what is being done (and what more can be done) to maximise Aboriginal peoples' participation in the decision-making processes that affect their daily lives.

## Proposals for Reform

Throughout this Discussion Paper, the Commission makes a number of proposals for reform. As well as proposals for specific amendment of certain legislation, the Commission has made proposals relating to enhancement of service delivery to Aboriginal communities and improvement of the practices of government agencies, courts and public services. In cases where the State of Western Australia lacks legislative jurisdiction to make meaningful changes, the Commission has proposed that the government lend its support to the relevant recommendations of Commonwealth bodies and to the efforts of the Commonwealth government in respect of federal legislative change. The Commission has also invited

- 
21. Coates R, 'Towards Mutual Benefit: The inquiry into customary law in the Northern Territory of Australia and other initiatives' (Paper presented at the Australasian Law Reform Agencies Conference, Wellington, April 2004).
  22. Sessional Committee on Constitutional Development (NT), *Recognition of Aboriginal Customary Law*, Discussion Paper No 4 (August 1992).
  23. From *Foundations for a Common Future*, the Sessional Committee's commentary to the final draft Constitution (November 1996) cited in NTLRC, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 9.
  24. Although it is acknowledged that within its legislative mandate, the Northern Territory has provided for the recognition of traditional Aboriginal marriages for certain purposes, such as for adoption (*Adoption Act 1994* (NT) ss 8, 11) and distribution of property upon death (*Administration and Probate Act 1979* (NT) s 6). Further, the Northern Territory (through the Commonwealth government of the time) ostensibly 'led the way' in respect of the recognition of Aboriginal land rights in Australia. See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and *Aboriginal Land Act 1978* (NT). The source of law provision was put to referendum in 1998 along with a draft of the proposed Constitution of the new State of the Northern Territory. See discussion in Part III, 'Constitutional recognition of Aboriginal customary law as a distinct "source" of law', below pp 58–59.
  25. Consider, for instance, the efforts of former Attorney-General Steve Hatton MLA to develop substantive mechanisms for the recognition of Aboriginal customary law in the Northern Territory: Hatton S, 'The Recognition of Aboriginal Customary Law: A Concept Proposal for the Northern Territory' (Paper presented to the Standing Committee of Attorneys-General, March 1996). See also the work on Indigenous community governance undertaken by the Northern Territory Standing Committee on Legal and Constitutional Affairs (2002).

submissions on matters in which it feels, as yet, unable to make a firm proposal for reform. These are generally in areas where strong conflicting views may have been expressed by Aboriginal people during the Commission's consultations or where the Commission has received insufficient input from Aboriginal people or other stakeholders to reach a conclusion.

It is important to note that, although the Commission has attempted to do justice to Aboriginal customary law in all areas relevant to its Terms of Reference, there may be discrete areas of interaction between Aboriginal customary law and Western Australian law of which the Commission is yet unaware. There are also undoubtedly pertinent studies that have been undertaken by individuals, government departments or organisations but have not come to the attention of the Commission. In some cases, the Commission has been refused access to documents that have come to its attention for reasons of confidentiality or embargo. In other cases, relevant departmental reports had not been finalised at the time of writing and therefore could not be included in this Discussion Paper. The Commission will revisit each area prior to publishing its Final Report and invites submissions on matters that are not included in this paper or on relevant studies that may assist the Commission in this task.

## Submissions to the Law Reform Commission

The Commission invites interested parties to make submissions in respect of the proposals for reform contained in this paper. Submissions will assist the Commission in formulating its final recommendations to the Western Australian Parliament for reform of the law in this area. All submissions will be considered by the Commission in its Final Report on Project No 94.

Submissions may be made by telephone, fax, letter or email to the address below. Those who wish to request a face-to-face meeting with the Commission may telephone for an appointment.

Law Reform Commission of Western Australia  
Level 3, BGC Centre  
28 The Esplanade  
Perth WA 6000

Telephone: (08) 9321 4833  
Facsimile: (08) 9321 5833  
Email: [Ircwa@justice.wa.gov.au](mailto:Ircwa@justice.wa.gov.au)