

# PART III

---

## Recognition of Aboriginal Customary Law

# Contents

---

<b>What is Aboriginal Customary Law?</b>	47
Definitional Matters	47
'Aboriginal'	47
'Customary Law'	49
What is customary law?	49
Aboriginal customary law: Is it 'law'?	50
Does Aboriginal customary law still exist in Western Australia?	51
Is Aboriginal customary law 'frozen in time'?	52
Evidence and Parameters of Customary Law in Western Australia	52
What Constitutes Customary Law?	52
Who is Bound (and Who Should be Bound) by Customary Law?	53
<b>Recognition of Aboriginal Customary Law</b>	55
The Commission's Starting Point	55
Should Aboriginal Customary Law be Recognised?	55
How Should Aboriginal Customary Law be Recognised?	56
Jurisdictional Limitations	56
Constitutional Recognition	57
Constitutional acknowledgment of Aboriginal peoples as 'first Australians'	57
Constitutional recognition of Aboriginal customary law as a distinct 'source' of law	58
Constitutional recognition in Western Australia – the Commission's preliminary view	59
Common Law or Judicial Recognition	61
Codification	62
Statutory Recognition	62
Administrative Recognition	62
The Commission's View	64

# What is Aboriginal Customary Law?

## Definitional Matters

The Commission's Terms of Reference require it to investigate whether 'there may be a need to recognise the existence of, and take into account within [the Western Australian] legal system, Aboriginal customary laws'. For the purposes of the discussion that follows in this paper it is necessary to address certain definitional matters, in particular the terms 'Aboriginal' and 'customary law'.

These matters have been considered in the past by the ALRC and NTLRC in the context of similar references. In these circumstances, rather than duplicating the work of these agencies, the Commission has taken their reports as a starting point to the consideration of these definitional matters in the Western Australian context.

### 'Aboriginal'

From its earliest days the Western Australian Parliament has employed a definition of 'Aboriginal' in relevant legislation. Originally the term 'native' was used to describe an Aboriginal person;<sup>1</sup> but, as the category of 'full-blood' native began to break down with the infamous success of government removal policies, the definition of Aboriginal person became more and more inclusive moving from 'half-caste' (that is, the child of a 'full blood' Aboriginal mother and a non-Aboriginal father) to 'quadroon' (the grandchild of a 'full-blood' Aboriginal woman).<sup>2</sup> It is now clear that as a consequence of government policies, racial integration and the passage of time there are now significantly varying degrees of biological descent amongst people who identify as Aboriginal. Perhaps for this reason, contemporary definitions of the term 'Aboriginal' are

beginning to involve cultural factors which have the capacity to broaden the scope of those who may claim Aboriginality<sup>3</sup> and which give Aboriginal people some degree of control over who is accepted as Aboriginal.<sup>4</sup>

In 1985, a comprehensive survey of definitions of 'Aboriginal' or derivative terms in some 700 examples of Australian legislation noted that there were

no less than 67 identifiable classifications, descriptions or definitions [which] have been used from the time of white settlement to the present ... These classifications may be grouped under six broad headings: according to anthropometric or racial identification; territorial habituation, affiliation or attachment; blood or lineal grouping, including descent; subjective identification; exclusionary and other; and Torres Strait Islanders.<sup>5</sup>

In its report *The Recognition of Aboriginal Customary Laws*, published the following year, the ALRC concluded that it was

not necessary to spell out a detailed definition of who is an Aboriginal, and that there are distinct advantages in leaving the application of the definition to be worked out, so far as is necessary, on a case by case basis.<sup>6</sup>

The recent inquiry of the NTLRC expressly adopted the ALRC's view, considering it sufficient to accept the broad definition that:

An Aboriginal is a person of Aboriginal descent who identifies as an Aboriginal and is accepted as such by the community in which he lives.<sup>7</sup>

This view accords with the present judicial test of Aboriginality which is based on a combination of biological descent and cultural criteria.<sup>8</sup> The discussion in Part II above<sup>9</sup> addresses some of the concerns that face Aboriginal people in *proving* their Aboriginality for the

1. See for instance the *Aborigines Protection Act 1886* (WA).

2. The legislative history is laid out in some detail in: Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 2003, 5206 ff (Mr Derrick Tomlinson).

3. The Commission acknowledges and agrees with the point made by Christopher Anderson that to claim or 'assert "Aboriginality" is not to assume that Aborigines form a wholly coherent, unified body': Anderson C, 'On the Notion of Aboriginality' (1985) 15 *Mankind* 41, 42.

4. Nettheim G, 'Australian Aborigines and the Law' in *Law and Anthropology 2* (Vienna: VWGO, 1987) 371, 375.

5. McCorquodale J, 'The Legal Classification of Race in Australia' (1986) 10(1) *Aboriginal History* 7, as cited in Nettheim G, 'Australian Aborigines and the Law' in *Law and Anthropology 2* (Vienna: VWGO, 1987) 371, 373.

6. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [95].

7. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 10.

8. See eg, *Gibbs v Capewell* (1995) 128 ALR 577; *Shaw v Wolf* (1998) 163 ALR 205. This test is legislatively employed in many jurisdictions, most recently in Tasmania in the *Aboriginal Lands Amendment Act 2005* (Tas) s 3A.

9. See 'Aboriginality and Identity', above pp 30–31.

purposes of accessing government benefits and programs reserved for the exclusive benefit of Indigenous people. The question therefore arises whether a standard legislative definition of 'Aboriginal person' should be adopted for all purposes (legislative, administrative and judicial) in Western Australia.

There are a number of definitions of 'Aboriginal' found in current Western Australian legislation. For example, the *Aboriginal Affairs Planning Authority Act 1972* (WA) adopts, in s 4, the threefold test combining biological descent with the cultural criteria of self-identification and community acceptance mentioned above.<sup>10</sup> However, for the purposes of Part IV of that Act (which provides for the distribution of intestate Aboriginal estates) a different definition is adopted which employs the protection era terminology of 'full-blood' and quarter-blood descent.<sup>11</sup> The *Family Court Act 1997* (WA) and the *Fish Resources Management Act 1994* (WA) speak in terms of membership of 'the Aboriginal race' – a definition which undoubtedly springs from the Australian Constitution but which would fall foul of the arguments raised by de Plevitz and Croft as discussed in Part II above.<sup>12</sup>

In recent amendments to the *Adoption Act 1994* (WA) a definition of 'Aboriginal person' based on descent alone was adopted. One of the reasons that Parliament adopted the simple descent test in this case was because children, in particular infants, cannot 'self-identify' as required by the threefold test.<sup>13</sup> Another reason was that the government apparently believed that the 'three-tiered system [was] too rigorous and impose[d] limitations on people being able to legitimately claim their Aboriginality'.<sup>14</sup> It was acknowledged in this regard that '[a]ny attempt to resolve the definition will be imperfect'.<sup>15</sup>

The example of the *Adoption Act* debates appears to support the ALRC's view that the definition of 'Aboriginal' should be left sufficiently vague as to be able to be determined on a case-by-case basis; however, the application of legislation by government departments and administrative authorities requires a degree of

certainty in definition. This must be so to ensure that administrative and departmental discretions are not abused and that all applications of legislation to Aboriginal people are not required to be determined by costly judicial process. Taking into account the arguments discussed in Part II 'Aboriginality and Identity', above, and being deeply conscious of the concerns of Aboriginal people, it is the Commission's preliminary view that a standard definition of 'Aboriginal person' in terms of descent should be adopted for the purposes of all Western Australian legislation. In order to ensure that the standard definition of 'Aboriginal person' is not unduly restrictive the Commission proposes that the following factors may be of evidentiary or probative value in determining whether a person is wholly or partly descended<sup>16</sup> from the original inhabitants of Australia:

- genealogical evidence;
- evidence of genetic descent from a person who is an Aboriginal person;
- evidence that the person self-identifies as an Aboriginal person; or
- evidence that the person is accepted as an Aboriginal person in the community in which he or she lives.<sup>17</sup>

The Commission considers that a broad definition of this nature will remove the difficulties in some circumstances of having to satisfy all three tiers of the threefold test whilst allowing cultural criteria to be probative in determining Aboriginality.<sup>18</sup> The Commission believes that this could reduce the problems identified in Part II for those people who identify as Aboriginal but are unable to sufficiently prove their Aboriginality applying the threefold test whether for reasons of dislocation from their community or otherwise. The Commission stresses that the definition of Aboriginal person should be regarded as such only for the purposes of Western Australian legislation or application of government policy. The Commission recognises that identification as an Aboriginal person for social or cultural purposes must be determined by Aboriginal people alone.

10. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 4 reads: 'Aboriginal' means pertaining to the original inhabitants of Australia and to their descendants. *Person of Aboriginal descent* means any person living in Western Australia wholly or partly descended from the original inhabitants of Australia who claims to be an Aboriginal and who is accepted as such in the community in which he lives

11. *Ibid* s 33. See the discussion on succession in Part VI, below.

12. See Part II 'Aboriginality and Identity', above pp 30–31.

13. Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 2003, 5214 (Ms Giz Watson). However, the threefold test has been recognised in adoption legislation in other jurisdictions and it is enough, for instance in New South Wales, for one parent to identify the child as Aboriginal.

14. Western Australia, *Parliamentary Debates*, Legislative Council, 13 March 2003, 5308 (Ms Ljiljana Ravlich).

15. Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 2003, 5214 (Ms Giz Watson).

16. It should be noted that no fixed proportion of descent (or 'blood-quantum') is identified.

17. The weight to be given to each or any of these factors is a matter for the decision-maker and may vary from case to case.

18. The Commission also observes that adoption of a standard definition will once-and-for-all remove the archaic and potentially offensive terminology that still exists in some Western Australian legislation.

*It is the Commission's preliminary view that a standard definition of 'Aboriginal person' in terms of descent should be adopted for the purposes of all Western Australian legislation.*

### Proposal 3

That s 5 of the *Interpretation Act 1984* (WA) be amended to include the following standard definitions of 'Aboriginal person' and 'Torres Strait Islander person' for all written laws of Western Australia:

#### 5. Definitions applicable to written laws

'Aboriginal person' means any person who is wholly or partly descended from the original inhabitants of Australia.

In determining whether a person is an Aboriginal person the following factors are of probative value:

- (a) genealogical evidence;
- (b) evidence of genetic descent from a person who is an Aboriginal person;
- (c) evidence that the person self-identifies as an Aboriginal person; or
- (d) evidence that the person is accepted as an Aboriginal person in the community in which he or she lives.

'Torres Strait Islander person' means any person who is wholly or partly descended from the original inhabitants of the Torres Strait Islands.

In determining whether a person is a Torres Strait Islander person the following factors are of probative value:

- (a) genealogical evidence;
- (b) evidence of genetic descent from a person who is a Torres Strait Islander person;
- (c) evidence that the person self-identifies as a Torres Strait Islander person; or
- (d) evidence that the person is accepted as a Torres Strait Islander person in the community in which he or she lives.

For the purposes of Western Australian written laws the term 'Aboriginal person' is taken to include a Torres Strait Islander person.

## 'Customary Law'

Providing a working definition of 'customary law', as it applies to Australian Aboriginal peoples, has historically proven difficult.<sup>19</sup> Both the ALRC and the NTLRC reports refer to the difficulties that attach to the task and each appear to eschew a fixed definition, preferring instead to acknowledge that Aboriginal customary law exists but that it cannot be precisely delineated. With this the Commission broadly agrees. However, it is useful here to consider the question 'what is customary law?' with a view to achieving an understanding of the term in the Western Australian context.

### What is customary law?

*Black's Law Dictionary* defines 'customary law' as:

Law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.<sup>20</sup>

In its investigation of customary law in Aboriginal Australia the ALRC found that

there existed, in traditional Aboriginal societies, a body of rules, values, and traditions, more or less clearly defined, which were accepted as establishing standards or procedures to be followed and upheld.<sup>21</sup>

In its recent inquiry on the subject of Aboriginal customary law in the Northern Territory the NTLRC said:

Aboriginal members of the Committee and many others who have expressed their views, have emphasised Aboriginal [customary law] as an indivisible body of rules laid down over thousands of years and governing all aspects of life, with specific sanctions if disobeyed.<sup>22</sup>

...

Aboriginal customary law is a fact of life for most Aboriginal people in the Northern Territory, not just

19. See the discussion on this issue in Amankwah H, 'Post-Mabo: The Prospect of the Recognition of a Regime of Customary Indigenous Law in Australia' (1994) 18(1) *University of Queensland Law Journal* 15, 20–22. See also McKenzie J, 'Recognition of Aboriginal Customary Law' (1993) 31(5) *Law Society Journal (NSW)* 37.

20. Garner B (ed), *Black's Law Dictionary* (Minnesota: West Group, 7th ed., 1999).

21. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [99].

22. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 11.

those in Aboriginal communities. This is because it defines a person's rights and responsibilities, who a person is, and it defines a person's relationships to everybody else in the world.<sup>23</sup>

During the Commission's consultations with Western Australian Aboriginal communities, Aboriginal people emphasised that their traditional 'law' was a part of everything, was within everyone and governed all aspects of their lives. In other words, customary law cannot be readily divorced from Aboriginal society, culture and religion. The Commission found that Aboriginal customary law, as it is understood and practised in Western Australia, embraces many of the features typically associated with the Western conception of law in that it is a defined system of rules for the regulation of human behaviour which has developed over many years from a foundation of moral norms and which attracts specific sanctions for non-compliance. But it was also clear that, in the words of one Aboriginal respondent, Aboriginal customary law

connected people in a web of relationships with a diverse group of people; and with our ancestral spirits, the land, the sea and the universe; and our responsibility to the maintenance this order.<sup>24</sup>

So, whilst agreeing that the term 'customary law' cannot be (and on some arguments *should* not be) precisely or legalistically defined, the Commission favours an understanding of the term that encompasses the holistic nature of Aboriginal customary law which the Aboriginal peoples of Western Australia have shared with the Commission.

### Aboriginal customary law: Is it 'law'?

A common debate among lawyers and legal anthropologists is whether Aboriginal customary law is indeed 'law' in the Western understanding of the term. A principal difference between Aboriginal law and Australian law is that Aboriginal law stems from an oral tradition—the substance of which is passed from generation to generation—whilst Australian law is posited in various constitutions, treaties, statutes and judicial decisions.

During the ALRC inquiry, the issue was raised as to whether the unwritten rules, values, traditions and



customs that make up Aboriginal customary law actually constitute a system of 'legal' rules and procedures (common in Western societies) as opposed to mere rules of etiquette or religious belief. Without providing an unequivocal pronouncement on this issue, the ALRC pointed to several legal and anthropological sources that supported the understanding that Aboriginal customary law is a system of law and stressed that there was a need to avoid the assumption 'that the supposed characteristics of "advanced" legal systems are necessarily shared by other systems'.<sup>25</sup>

Another argument raised against treating customary law as law fixates upon the semantic definitions of each of these terms. In its recent report the NTLRC neatly encapsulated the debate as follows:

Under the general law, the term 'customary law' is a contradiction. 'Custom' and 'law' are regarded as two distinct concepts and never the twain shall meet unless and until 'custom' is converted into law by statute; in which case it ceases to be 'custom'. Certainly both 'custom' and 'law' have their sanctions but one is social and the other legal.<sup>26</sup>

For the purposes of this reference the Commission believes that any distinction between the terms 'custom' and 'law', when dealing with Aboriginal customary law, is unduly restrictive and somewhat artificial. As both the ALRC<sup>27</sup> and the NTLRC<sup>28</sup> have observed, it is also a distinction wholly unknown or alien to Aboriginal culture.

23. Ibid 13 (footnote omitted).

24. Participant at the Manguri consultation. See Law Reform Commission of Western Australia (LRCWA), Project No 94, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 3.

25. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [100].

26. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 11.

27. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [100] (with particular reference to Elizabeth Eggleston).

28. Ibid.

## Traditional 'law' [is] part of everything . . . customary law cannot be readily divorced from Aboriginal society, culture and religion.

These sentiments are echoed by John Toohey in his background paper to this reference. In that paper Toohey warns:

Comparisons and contrasts between Aboriginal law and Australian law assume that there is some common understanding of what is meant by 'law' ... It is not just a matter of semantics, it goes much deeper than that. But even at the level of semantics many Aboriginal words do not translate readily into English, at least not without failing to convey the full flavour of the Aboriginal language.<sup>29</sup>

Toohey argues that in the case of Aboriginal law the term 'law' should not be unduly coloured with Western concepts. The more acceptable approach in Toohey's estimation is to 'examine the society in question against the widest understanding of the term'.<sup>30</sup> To emphasise this point Toohey quotes Diane Bell and Pam Ditton:

In Aboriginal English the word 'law' is frequently used to encompass both the body of rules which are backed by religious sanctions and to explain the daily behaviour of peace abiding persons. *It is all the law.*<sup>31</sup>

This view sits comfortably with the Commission's understanding of Aboriginal customary law discussed above.

### Does Aboriginal customary law still exist in Western Australia?

Aboriginal law is the table, the solid structure underneath. Whitefella law is like the tablecloth that covers the table, so you can't see it, but the table is still there.<sup>32</sup>

Given the Commission's Terms of Reference, which expressly acknowledge the existence of Aboriginal

customary laws, the question 'does Aboriginal customary law still exist in Western Australia?' may appear somewhat redundant. However, there are those that might question the continuing existence of Aboriginal customary law in contemporary society, at least in its most potent pre-colonial form.

This emphasis on unbroken, continuing adherence to customary law most likely has its popular roots in the High Court's decision in *Mabo v Queensland [No 2]* where the court decided that the existence of Indigenous native title in land depended upon the claimants having

continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained ...<sup>33</sup>

However, although requiring the maintenance of a traditional connection with the land the subject of a native title dispute (a burden which is undoubtedly strengthened by evidence of unchanging practice of traditional law), the court in *Mabo* acknowledged the inevitability of change in the practice of Aboriginal laws and customs.<sup>34</sup> This acknowledgement that Aboriginal customary law is constantly evolving and developing echoes the findings of the ALRC in its nationwide investigation of Aboriginal customary laws during the 1980s.<sup>35</sup>

In the present investigation, the Commission found that the existence of Aboriginal customary law in Western Australia today is beyond doubt. It is, however, fair to say that traditional laws are more evidently in existence (or more overtly practised) in some Aboriginal

29. Toohey J, 'Understanding Aboriginal Law' (November 1999) 3 (footnote omitted). This previously unpublished paper is reproduced as an appendix to Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).

30. *Ibid.*

31. Bell D & Ditton P, *Law: The Old and New* (Canberra: Aboriginal History, 1980) 22 as cited in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) Appendix 1, 5 (emphasis added).

32. Taken from an address by William Tilmouth (General Manager, Tangentyere Council, Alice Springs) to the 2002 Australian Institute of Judicial Administration Conference appended to NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 38.

33. *Mabo v Queensland [No 2]* (1992) 107 ALR 1, 43 (per Brennan J).

34. See Amankwah H, 'Post-Mabo: The Prospect of the Recognition of a Regime of Customary Indigenous Law in Australia' (1994) 18 *University of Queensland Law Journal* 15, 16. So much is clear from the parenthetical statement in the excerpt from the *Mabo* decision above.

35. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [99].

communities than in others. For example, for some Aboriginal people, particularly those living in remote communities such as Warburton, Aboriginal customary law is clearly a daily reality and it is Aboriginal law, not Australian law, which provides the primary framework for people's lives, relationships and obligations. On the other hand, amongst urban Aboriginal communities, the existence of Aboriginal customary law is less immediately evident. Nonetheless the Commission found that traditional law is still strong in the hearts of urban Aboriginals. As Harry Blagg and Neil Morgan have written:

Urban Aboriginal people, whom many (mistakenly) believe have lost all connection with law, still hold on to elements of culture and law through patterns of family obligation, loyalty and reciprocity, as well as attachment to surviving knowledge about places of significance and stories.<sup>36</sup>

### Is Aboriginal customary law 'frozen in time'?

Having acknowledged the continuing existence of Aboriginal customary law in Western Australia the question arises: should the Commission consider only those Aboriginal laws that appear 'frozen in time'<sup>37</sup> or unchanged by European contact? In the context of the present reference, the answer to this question has obvious consequences for the potential of recognition of Aboriginal customary law in the Western Australian legal system.

The fact that many Aboriginal customary laws have been found to have developed and changed over time has been noted above. It is the Commission's view that evolution, both in the substance of these laws and in their practice, is inevitable. Such dynamism is apparent even in the interpretation of formally posited law; with Aboriginal law change is unavoidable, both as a result of its oral tradition as well as the reality of over 200 years of colonial occupation. The issue has been addressed in sufficient detail in Toohey's background paper for this reference and does not need repeating here. It is sufficient to say that the Commission respectfully agrees with Toohey's conclusion that there is 'nothing [in the Commission's Terms of Reference] that ties recognition only to customary laws that have remained unaltered since white settlement'.<sup>38</sup>

## Evidence and Parameters of Customary Law in Western Australia

### What Constitutes Customary Law?

Many non-Indigenous Australians associate Aboriginal customary law with 'payback' or traditional punishment that sometimes involves bodily harm; however, as will be clear from the preceding discussion Aboriginal customary law governs all aspects of Aboriginal life, establishing a person's rights and responsibilities to others as well as to the land and natural resources. For example, there are laws that define the nature of a person's relationship to others, including how or whether a person may speak to, or be in the same place as, another; laws that dictate who a person may marry; laws that define where a person may travel within his or her homelands; and laws that delimit the amount and type of cultural knowledge a person may possess. This list, of course, is not exhaustive.

As discussed in Part II of this paper, prior to significant European contact there were over 120 distinct tribes in existence in Western Australia, each possessing their own laws, customs and languages. Within regions, tribes tended to inter-marry and share resource agreements and understandings with neighbouring tribes leading to some similarity of laws. However, while there are common threads that unite Aboriginal laws across Western Australia, the diversity of laws (as with the diversity of Aboriginal peoples) must be stressed. Unlike Australian law, there is no single system of customary law that applies to all Aboriginal people.<sup>39</sup>

Because of the differences in the laws of different tribal groups and the complex application of rules within Aboriginal kinship systems it is an impossible task to attempt an exhaustive list of what constitutes the substance of Aboriginal customary law. As one Aboriginal commentator has said of this task:

[I]t would be the height of absurdity for anyone but an Aboriginal to attempt to understand the complexity of customary law: I know this as an Aboriginal ... For we are not talking about reams of parchment that hold the wisdom of a few hundred years of British justice but about a complex philosophical and religious way of

36. Blagg H & Morgan N, 'Aboriginal Law in Western Australia' (2004) 6(7) *Indigenous Law Bulletin* 16, 17.

37. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) 13.

38. *Ibid.*

39. McKenzie J, 'Recognition of Aboriginal Customary Law' (1993) 31(5) *Law Society Journal (NSW)* 37.

## *Aboriginal customary law governs all aspects of Aboriginal life, establishing a person's rights and responsibilities to others as well as to the land and natural resources.*

living that has been carefully preserved and passed down through countless generations.<sup>40</sup>

The impossibility of this task has also been recognised by others. In its recent inquiry into Aboriginal customary law in the Northern Territory the NTLRC concluded that the interpretation of what constitutes Aboriginal customary law is properly left to 'the Aboriginal people themselves who have had centuries of knowledge and practice behind them, of which others can have very little concept'.<sup>41</sup>

It is not the task of this Commission to exhaustively define the substance of Aboriginal customary law. Whilst Aboriginal people consulted for this reference have been very generous in sharing their traditional laws and cultural practices, the Commission recognises that there are many laws that are subject to strict secrecy rules

that prohibit their discussion. The Commission is therefore not in a position to identify with any precision the scope or substance of Aboriginal law in Western Australia. In these circumstances the Commission adopts the NTLRC's view that the issue of what constitutes Aboriginal customary law should be left to Aboriginal people themselves; in particular, those people in each Aboriginal community whose responsibility it is to pronounce upon and pass down the law to future generations.

### **Who is Bound (and Who Should be Bound) by Customary Law?**

The diversity of Aboriginal people and their geographical location in Western Australia necessarily impacts upon the application of Aboriginal customary laws to their daily lives. Some live in remote communities with little interaction with non-Indigenous Australians and where Australian law has much less influence than Aboriginal law. Others live in discrete Aboriginal communities near regional centres where the necessity of bridging two cultures and two laws presents significant challenges. And still others live and work in urbanised environments with constant interaction with non-Indigenous people and, whilst they undoubtedly take pride in their Aboriginal heritage, they accept Australian law as the primary framework for defining their legal rights and obligations. Because of this broad spectrum of Aboriginal realities the question 'who is bound (and who should be bound) by customary law?' is raised.

In the Commission's community consultations for this reference, responses to this question varied. Some suggested that being involved in Aboriginal law today is a choice for families based on their circumstances and their beliefs. However, the Commission was warned that



40. Riley R, 'Aboriginal Law and Its Importance for Aboriginal people: Observations on the task of the Australian Law Reform Commission' in Morse B & Woodman G (eds) *Indigenous Law and the State* (Dordrecht: Foris Publishing, 1988) 65, 68.

41. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 12.

Aboriginal people needed to be consistent about their choice – they should not simply be allowed to ‘opt in’ or ‘opt out’ of Aboriginal customary law when it was convenient to them. Others suggested that those Aboriginal people who did not live in the traditional way should not be subject to Aboriginal law at all; yet they stressed that this did not mean that those people do not have respect for Aboriginal law or that they opposed its recognition within the Western Australian legal system. There was also the suggestion that, when people who were not ordinarily subject to Aboriginal law visited traditional Aboriginal lands, they should consider themselves bound by the law practised there.

The NTLRC faced the same issue in its recent inquiry into Aboriginal customary law in the Northern Territory. Recognising the difficulties with the diversity of circumstances of Aboriginal people in that jurisdiction the Committee concluded:

There are some Aboriginal people who choose not to live their lives in accordance with traditional law, but do not fully live in accordance with Australian law. These people inevitably have to make a choice to live within the general law, or to live within the traditional law rules of their communities. Either choice will have its problems and it is not suggested that there is any role that the recognition of Aboriginal customary law, as recommended by the Committee, can play in respect to this issue. This may sound pessimistic but it is also, realistic.<sup>42</sup>

These comments suggest an ‘opt in/opt out’ approach. However, the NTLRC confined its recommendations almost solely to matters affecting discrete Aboriginal communities<sup>43</sup> with the objective of recognising and strengthening ‘the ability of traditional law to assist with law and justice issues’ on those communities.<sup>44</sup> In the Northern Territory where Aboriginal communities are more often located in remote areas, community boundaries are more clearly defined and there is overt ongoing practice of traditional law,<sup>45</sup> the problems presented by the ‘opt in/opt out’ approach will be less

than might be experienced by the majority of Aboriginal communities in Western Australia. In the words of the NTLRC:

It is emphasised that the whole concept must be based on voluntariness and no person should be forced into the [traditional law] compact against his or her will. On the other hand the communities have the right, which in many cases they already exercise, of expelling a person who does not wish to be bound by the compact or at least denying that person the advantages of belonging to the community. This is not as drastic as it sounds, because it appears that many Aboriginals in most communities would wish to conduct their affairs within the traditional law, and there is no reason why an Aboriginal person who does *not* wish to be so bound should expect to receive the rights and responsibilities under traditional law. There is a free choice and the option to merge into the more general society of the Territory should carry with it the responsibility of accepting that free choice. No doubt there will be some who will wish to move within both worlds and that should be a matter for the community to the extent to which they are prepared to accept such a situation.<sup>46</sup>

Although, in this Discussion Paper, the Commission has introduced proposals for reform and recognition of customary law that go much further than those made by the NTLRC, the Commission agrees with the NTLRC that voluntariness should be the guiding principle in application of customary law to individuals. Just as it is not the Commission’s place to determine the precise nature and content of customary law, it is not its place to dictate who should or should not be bound by that law. That is a matter for Aboriginal people: communities and individuals. The proposals for reform that follow will, if implemented, entrench in Western Australian laws a respect for the laws of Aboriginal peoples that preceded them. It is hoped that these reforms will benefit all Western Australian Aboriginal people regardless of their place of residence, their way of living or their degree of connection to Aboriginal customary law.

---

42. Ibid 14.

43. Ibid.

44. Ibid 18. It should be noted here that the ALRC had significant reservations about restricting the application of Aboriginal customary law (in so far as its recommendations for recognition proposed) to certain geographical boundaries, such as the boundaries of a particular Aboriginal community. Such restrictions, it argued, could render the recognition of Aboriginal customary laws ineffective. There was also evidence that many Aboriginal people still considered themselves bound by Aboriginal customary law outside of their communities. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [124].

45. Indeed the NTLRC reports that ‘[t]wo thirds of all Aboriginal people in the Northern Territory live outside urban areas in small communities on Aboriginal land or special purpose leases or on pastoral leases’. NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 6.

46. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 20.

# Recognition of Aboriginal Customary Law

## The Commission's Starting Point

The Terms of Reference require the Commission to consider whether 'there may be a need to recognise the existence of, and take into account within [the Western Australian] legal system, Aboriginal customary laws'. This means that the starting point for the Commission's consideration of the potential for recognition of Aboriginal customary law must be the current Western Australian (and Australian) legal system. As Toohey has aptly observed:

No doubt the language [of the Commission's Terms of Reference] was carefully chosen to make it clear that the framework within which the Commission is to operate does not include recognition of customary laws as a legal system operating independently of the State's legal system but rather as dependent upon recognition *within* that system.<sup>1</sup>

Whilst this may appear to curtail the Commission's investigation, this has not proven to be the case. The Commission's consultations with Aboriginal people in Western Australia have shown a clear consensus against the operation of two separate systems of law, which many considered would be an unnecessarily divisive outcome. Many Aboriginal people have emphasised the need for striking a balance between Aboriginal and non-Aboriginal law and facilitating a harmonious relationship between Indigenous and non-Indigenous Western Australians.

It should be noted that the ALRC (which was ostensibly under no such restriction and considered the matter in detail) came to the conclusion that separate formal systems of law should be avoided. This was a conclusion that the NTLRC also shared. Indeed, there are persuasive reasons why Aboriginal customary law cannot be recognised to the exclusion of Australian law as a separate formal system. As the NTLRC has observed:

Australian law deals with many things that traditional law does not (eg: consumer protection laws relating to

unsafe toys or faulty motor vehicles; workers' compensation law; sale of goods, commercial contracts and so on) – so, for practical purposes, the option of *only* traditional law applying in an Aboriginal community denies some legal rights to Aboriginal people.<sup>2</sup>

The need to ensure that all Australian citizens enjoy the full protection of Australian law and the rights and obligations that such law confers is a matter that the Commission believes to be of paramount importance in the present reference.

## Should Aboriginal Customary Law be Recognised?

The ALRC's 1986 report *The Recognition of Aboriginal Customary Laws* included a chapter on the subject of recognition in which arguments in favour of and against recognition of Aboriginal customary laws were noted. In a background paper to its 2003 report, the NTLRC conveniently summarised these arguments as follows:

The ALRC noted a number of arguments in favour of greater recognition of Aboriginal customary law:

- recognition would advance the process of reconciliation between Aboriginal and non-Aboriginal [people]
- non-recognition can lead to injustice in specific situations where traditional law governs a person's conduct
- the present legal system has failed to deal effectively with many Aboriginal disputes and there are disproportionately high levels of Aboriginal contact with the justice system
- traditional authority may be more efficient in maintaining order with Aboriginal communities, and thus be more cost-effective
- courts are recognising Aboriginal customary law within their discretionary powers, and more formal recognition would clarify the law
- non-recognition is consistent with principles of 'assimilation' and 'integration', whereas principles

1. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) 2 (emphasis added).  
2. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 15.

of 'self-management' or 'self-determination' are more appropriate

- Australia's international standing and reputation would benefit from its giving recognition to the laws and traditions of its indigenous peoples.

The ALRC Report identified a number of arguments against recognition:

- customary law may incorporate rules and punishments that are unacceptable to the wider Australian society
- some aspects of customary law are secret, and disclosure on a confidential basis is inconsistent with the judicial function within our legal system
- Aboriginal people may lose control over customary law if it were incorporated within the general legal system
- customary law may not adequately protect Aboriginal women
- recognition of customary law might create 'two laws' within our society
- Aboriginal customary law may no longer be relevant to some Aboriginal people, and some may prefer the present legal system
- recognition should be restricted to those Aborigines living in a strictly traditional manner.<sup>3</sup>

The arguments proffered against recognition of Aboriginal customary law encompass several themes, including: the different philosophical bases of Aboriginal law and Australian law (for example, communitarianism versus individualism and spiritual religious versus secular);<sup>4</sup> the requirement of equality before the law (that is, the problems posed by the operation of two distinct and separate systems of law in Australia); the regional variation of Aboriginal law and the diversity of peoples to whom it applies; the issue of reconciling certain traditional punishments and offences with fundamental international human rights norms; the problem of codifying or writing down laws that historically exist in unwritten form; and the problem of establishing the nature and scope of Aboriginal law in the face of secrecy and other prohibitions to knowledge. These matters are discussed in some detail by Greg McIntyre in his background paper<sup>5</sup> to this reference; it is therefore unnecessary to repeat them here.

Following careful consideration of the arguments listed above the ALRC concluded that there was a strong case for recognition of Aboriginal customary laws 'to avoid injustice and to acknowledge the reality of Aboriginal traditions and ways of life'.<sup>6</sup> Although, as discussed in the Introduction to this paper, there has been very little done by governments to formally implement the ALRC's recommendations for recognition, much has happened in the intervening period to raise expectations of fuller recognition of Aboriginal customary laws in Australia.

Instances of common law recognition of Aboriginal customary laws in Australia in the past two decades are discussed below;<sup>7</sup> as well, there is increasing evidence of 'willingness by governments to legislatively recognise the reality of customary laws for many Aboriginal people, whether actively practised or seen as an integral part of their culture'.<sup>8</sup> This willingness has undoubtedly gained momentum from the Commonwealth government's statutory recognition of native title following the *Mabo* case, in which the strength of customary laws in the Meriam community of Murray Island played an important part. The Terms of Reference given to the NTLRC and to this Commission also demonstrate the willingness of some governments to address this issue. In these circumstances and after consideration of the arguments in favour of and against recognition of Aboriginal customary laws in the Western Australian context, the Commission concurs with the views of the ALRC and NTLRC that Aboriginal customary law should be appropriately recognised.

## How Should Aboriginal Customary Law be Recognised?

### Jurisdictional Limitations

Having reached the conclusion that Aboriginal customary law should be recognised in Western Australia, the question arises, 'How should this be achieved?' In considering this question it is important to understand that there are jurisdictional limitations upon the capacity of the State of Western Australia to recognise Aboriginal customary law. Thus, as Toohey has noted:

---

3. NTLRC, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 6 (footnote omitted).  
4. See McLaughlin R, 'Some Problems and Issues in the Recognition of indig Customary Law' (1996) 3(82) *Aboriginal Law Bulletin* 4.  
5. McIntyre G, *Aboriginal Customary law: Can it be recognised?*, LRCWA, Project No 94, Background Paper No 9 (December 2004).  
6. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [194].  
7. See below, 'Common law or judicial recognition'. See also Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003).  
8. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) Appendix 1, 3.

*Many Aboriginal people believed that amendments to laws and policies were not as meaningful without the fundamental respect for Aboriginal peoples and their laws that could be brought about by constitutional change.*

The notion of a treaty or an agreement between indigenous and non-indigenous Australians or, as it is sometimes put, between the two peoples of this country, is not part of the Commission's remit.<sup>9</sup>

There are other jurisdictional restrictions on Western Australia pertaining to particular areas of law within the Commonwealth domain and these are discussed in the Parts following. Australia also has obligations under international covenants ratified by the Commonwealth to which the Commission must have regard in considering the recognition of Aboriginal customary law in Western Australia. That is a matter taken up in detail in Part IV – 'Aboriginal Customary Law in the International Law Context'. For now, it is the Commission's preliminary view that recognition of Aboriginal customary law can, and should, take different forms in the Western Australian context. The potential forms of recognition within the Western Australian legal system are dealt with below.

## Constitutional Recognition

Respect for [Aboriginal customary law] is like the Constitution: it is right at the bottom of law.<sup>10</sup>

From its consultations with Aboriginal peoples across Western Australia it became apparent to the Commission that many Aboriginal people believed that amendments to laws and policies were not as meaningful without the fundamental respect for Aboriginal peoples and their laws that could be brought about by constitutional change. A participant at the Manguri consultation in metropolitan Perth put it plainly, saying that: 'Until we deal with the foundations, it is only whitewashing'.<sup>11</sup>

## Constitutional acknowledgment of Aboriginal peoples as 'first Australians'

Calls for constitutional recognition of Aboriginal people are not new in Australia. Most calls for constitutional change seek to redress the injustices of the past by acknowledging Aboriginal peoples as the 'original occupants and custodians of the land'<sup>12</sup> and by recognising that this cultural connection continues today.<sup>13</sup> Constitutional change of this type has been mooted in recent years in Queensland and Victoria, as well as at the Commonwealth level.

Recognition of Aboriginal peoples in the Queensland and Commonwealth examples was subsumed into proposed constitutional preambles addressing such things as equality of citizens; government by Rule of Law; tolerance of and respect for others; and upholding freedom. The proposed preamble to the Queensland Constitution was subject to a long consultative process, with a parliamentary committee ultimately recommending against its adoption.<sup>14</sup> The committee cited reasons such as insufficient public support; uncertainty as to whether or how the preamble should affect interpretation of the Constitution; and lack of consistency between the content of the Queensland Constitution and the aspirational elements of the proposed preamble.<sup>15</sup> The proposed preamble to the Australian Constitution was put to national referendum on 6 November 1999, along with the question whether Australia should become a republic. The referendum was defeated on both issues. In relation to the preamble question the 'no' vote gained a 60 per cent national majority with Western Australia having the second highest 'no' vote at 65.27 per cent.<sup>16</sup>

9. Ibid.

10. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 3.

11. LRCWA, Project No 94, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 2.

12. See for example, the proposed preamble to the Queensland Constitution: Legislative Assembly of Queensland, Legal Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46 (November 2004) 1.

13. See for example, the proposed preamble to the Australian Constitution contained in the schedule to the Constitution Alteration (Preamble) Bill 1999 (Cth) and put to national referendum on 6 November 1999.

14. Legislative Assembly of Queensland, Legal Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46 (November 2004) 23.

15. Ibid.

16. See the Australian Electoral Commission, <[www.aec.gov.au/-content/how/newsfiles/news87.htm](http://www.aec.gov.au/-content/how/newsfiles/news87.htm)>.

Victoria is currently the only Australian jurisdiction that specifically acknowledges the unique status of Aboriginal people as 'first Australians'. The section, which was inserted by the *Constitution (Recognition of Aboriginal People) Act 2004* (Vic), is worth setting out in full.

1A. Recognition of Aboriginal people

- (1) The Parliament acknowledges that events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.
- (2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established—
  - (a) have a unique status as the descendants of Australia's first people; and
  - (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
  - (c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.
- (3) The Parliament does not intend by this section—
  - (a) to create in any person any legal right or give rise to any civil cause of action; or
  - (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.

The provision is insured against arbitrary repeal or alteration by the requirement of a special majority of three-fifths of both Houses of Parliament before any variance to the provision can be lawfully presented to the Governor for Royal Assent. The Victorian constitutional amendment was welcomed by the Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma who said:

The Victorian Government and opposition parties are to be congratulated for making Victoria the first state in Australia to recognise Indigenous people in its constitution. While legal rights are not conferred by the amendment, it is nevertheless important to Indigenous people that their unique status as the original owners of the land is recognised at the constitutional level ... The amendment to Victoria's constitution can be more than the simple recognition of an historical truth. It can provide an opportunity to learn from the past and ensure that the original custodians continue to play a significant role in contemporary society.<sup>17</sup>

## Constitutional recognition of Aboriginal customary law as a distinct 'source' of law

The other type of constitutional change relevant to this reference is the recognition of Aboriginal customary law as a distinct 'source' of law in the state Constitution. Steven Churches' background paper to this reference canvasses some of the advantages and disadvantages of 'source of law recognition' in the Western Australian Constitution. While the Commission does not intend to reproduce these arguments here, it is pertinent to note, as Churches does, that 'some aspects of Aboriginal customary law are too contrary to mainstream legal culture' and for this reason they 'cannot be invested in the Constitution'.<sup>18</sup> He suggests that constitutional recognition would be viable only by limitation of the recognition of customary law to matters of:

- (i) familial and social relationships;
- (ii) land management and associated intellectual property rights and conservation regimes under customary law; and
- (iii) Aboriginal community governance.<sup>19</sup>

In Churches' opinion, the scope and applicability of customary laws relating to these matters, should further be 'entrench[ed] in discrete legislation'.<sup>20</sup> Churches believes that any inconsistency arising between Aboriginal customary law and mainstream legal culture can be managed, but ostensibly only by subjecting customary law to some degree of codification. For the reasons expressed below under the heading 'Codification', the Commission believes that this is not a desirable course.

The question of constitutional recognition of Aboriginal customary law as a source of law has also been investigated by the Northern Territory's Sessional Committee on Constitutional Development as an aspect of the Northern Territory's 1990s bid to move to statehood. After a very thorough consultative process (commencing with a discussion paper in 1992 and ending with a draft constitution in 1998) the sessional committee recommended that Aboriginal customary law be recognised as a distinct source of law in the Northern Territory. The draft constitution that emerged from the Statehood Convention in 1998 and was put

17. Calma T, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Commissioner Welcomes Constitutional Recognition for Historical Truth* (Media Statement, 5 November 2004).

18. Churches S, *Aboriginal Customary Law in the Context of Western Australian Constitutional Law*, LRCWA, Project No 94, Background Paper No 14 (April 2005) 15.

19. *Ibid* 27.

20. *Ibid* 16, 27.

to the people at a referendum the same year provided that:

### 6.3 Customary Law

(1) Aboriginal customary law is recognised as a source of law in the State to be enacted as the written law of the State (within 5 years of the commencement date or such further period as Parliament determines) by the Parliament passing laws in substantial accordance with the results of negotiations and consultations between the State government and representatives of the traditional Aboriginal structures of law and governance of the Aboriginal peoples of the Northern Territory providing for the harmonisation of the customary law with other laws in force in the State, including the common law.

The intention of this section was that Aboriginal customary law be recognised 'as a source of Northern Territory law on a par with the common law. Both would be subject to any legislation'.<sup>21</sup> However, as Ken Brown has pointed out, the section 'bestows no automatic recognition on customary law', 'it subjects the process to political control', and 'it imposes an open-ended negotiation and consultation procedure designed toward harmonisation not applicability'.<sup>22</sup> Moreover, Brown observes that in this context 'harmonisation' must mean the process of ensuring that Aboriginal customary law conforms in every way with every other form or source of law including, presumably, the common law.<sup>23</sup> There is a danger that this may set up a hierarchy of sources of law which may have the unwelcome effect of demeaning customary law.<sup>24</sup>

Although harmonisation of laws is a necessary and desirable outcome of the recognition process, the Commission has concerns (also expressed earlier in relation to Churches' study) with the apparent requirement that customary law be codified, or at least in some way 'discovered' and accepted by the powers that be in order to effect source of law recognition. The Commission notes that concerns about the

problems inherent in codification of Aboriginal customary laws were also shared by the ALRC and the NTLRC.<sup>25</sup> Nevertheless, the NTLRC renewed the call for source of law recognition in recommendation 11 of its recent inquiry into Aboriginal customary laws.<sup>26</sup> Unfortunately, there is nothing in the NTLRC's report to indicate how this might more effectively be realised; although it is noted that a new constitutional statehood process is currently underway and that the further consideration of constitutional recognition of Aboriginal customary law will be a part of that process.<sup>27</sup>

### Constitutional recognition in Western Australia – the Commission's preliminary view

The Western Australian Constitution is a typical 19th century constitutional document focusing, as George Winterton has observed, 'almost entirely on the machinery of government'.<sup>28</sup> It has no comment on the social or political values of the peoples of Western Australia or allusion to their aspirations. This, perhaps, is fitting of a constitutional document, but nonetheless is very different to national constitutions like those of the United States, South Africa, Ireland and India which each assert in their preambles the ambitions of such things as freedom, equality, liberty and justice for all peoples. The present Attorney-General, Jim McGinty, has suggested that the Western Australian Constitution is in need of a comprehensive overhaul to, amongst other things: institute electoral equality; remove obsolete and spent provisions; set out more completely the powers and responsibilities of the Governor, the Premier, Cabinet and Ministers; and insert a Bill of Rights.<sup>29</sup> McGinty envisages the introduction of a preamble 'expressly recognising and reaffirming the position of Indigenous people as occupants and inhabitants of this state prior to and after European settlement'<sup>30</sup> as part of this constitutional reform. Although plans for wider constitutional reform were put on hold in July 2004,<sup>31</sup> the Minister for Indigenous

- 
21. *Foundations for a Common Future: The report on paragraph 1(a) of the Sessional Committee on Constitutional Development's terms of reference on a final draft Constitution for the Northern Territory* (Vol 1, 1996) [5-6] as cited in NTLRC, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 10.
  22. Brown K, 'Paper Promises: The constitutional prescription of customary law in the Northern Territory' (1999) 24(5) *Alternative Law Journal* 221, 223.
  23. *Ibid.*
  24. Such observation has earlier been made by Brown, *ibid* 232.
  25. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [202], [208]; NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) [3.10]–[3.11].
  26. NTLRC, *ibid* [10.1]–[10.7].
  27. *Ibid* [10.2].
  28. Winterton G, 'Submission No 104' cited in Legislative Assembly of Queensland, Legal Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46 (November 2004) 4.
  29. McGinty J, Attorney General of Western Australia, *Speech to the Constitution at Large Conference* (22 March 2003).
  30. *Ibid* 4.
  31. Electoral change has, however, been achieved by the *Constitution and Electoral Amendment Act 2005* and the *One Vote One Value Act 2005*.

Affairs announced that the government would nevertheless 'push ahead with plans to change the WA Constitution to recognise Aboriginal people as the first inhabitants'.<sup>32</sup> At the time of writing, no Bill to amend the Constitution for this purpose had been introduced to Parliament.

It is the Commission's opinion that Western Australia requires a form of constitutional recognition of Aboriginal peoples which celebrates their unique status; acknowledges their prior occupation of Western Australia and their continuing connection to the land; and encourages their continuing cultural contribution to this state. The Commission calls this 'reconciliatory recognition'. However, rather than recognition through the means of a preamble to the Western Australian Constitution, the Commission prefers the Victorian precedent of enacting the acknowledgement as a foundational provision of the Constitution.<sup>33</sup> This path is preferred for a number of reasons. First, the Commission is concerned that a preamble will be seen as a mere aspirational statement: an add-on rather than a genuine provision of the Constitution. Second, as the Commonwealth and Queensland examples show, constitutional preambles are likely to include references to other matters germane to the polity, such as equality, freedom and government by Rule of Law. The Commission considers that constitutional recognition of the unique status of Aboriginal peoples must be done with due respect and that, if it is to be taken as a serious reconciliatory gesture, it must be dealt with by a dedicated provision. Finally, the Commission notes that there is currently no s 1 to the Western Australian Constitution, it having been repealed in 1998.<sup>34</sup> The Commission believes that this provides a clear and immediate opportunity for constitutional acknowledgment of Aboriginal peoples by foundational provision in the manner of the Victorian amendment.

Although some may see reconciliatory recognition as a 'weaker' form of constitutional recognition than source of law recognition, the Commission believes that, in the context of the pragmatic and extensive proposals for the recognition of Aboriginal customary law contained in this document, this is the best path for

Western Australia. Significantly, it avoids the problems with constitutional recognition of customary law, described earlier, such as the need to ascertain the law, to codify it, to limit its scope by reference to other sources of law and, ultimately, to control it. It is this last point that will most likely offend Aboriginal culture and potentially diminish customary law. It is the Commission's opinion that any method of recognition that involves unnecessary state interference with Aboriginal customary law should be avoided. As Brown has observed, '[c]ustomary law will remain significant to its adherents whether or not it receives formal endorsement in a constitution'.<sup>35</sup>

In the Commission's view, the proposals for reform that are mooted throughout this Discussion Paper achieve the intent of statutory and administrative recognition of Aboriginal customary law whilst allowing Aboriginal control over the content and application of that law to remain. Most importantly, however, the Commission understands this to be the desire of the Aboriginal peoples it consulted for this reference who relevantly observed that constitutional acknowledgment of Western Australian Indigenous *peoples*—rather than Indigenous *laws*—was a necessary foundation for effective governance.

#### Proposal 4

That, at the earliest opportunity, the Western Australian government introduce into Parliament a Bill to amend the Constitution to effect, in s 1, the recognition of the unique status of Aboriginal peoples as the descendants of the original inhabitants of Western Australia. The provision should also acknowledge Aboriginal peoples as the original custodians of the land, acknowledge their continuing spiritual, social, cultural and economic relationship with lands and waters in Western Australia, and acknowledge the special contribution that Aboriginal peoples have made to Western Australia.

The Commission commends the provisions of s 1A of the *Victorian Constitution Act 1975* as precedent for the drafting of a similar provision for Western Australia's Constitution.

32. Pryer W, 'Constitution Change to be Pushed Ahead', *The West Australian*, 16 July 2004, 12.

33. There is currently no s 1 in the *Western Australian Constitution Act 1889*.

34. *Statutes (Repeals and Minor Amendments) Act [No. 2] 1998* (WA), No 100 of 1998.

35. Brown K, 'Paper Promises: The constitutional prescription of customary law in the Northern Territory' (1999) 24(5) *Alternative Law Journal* 221, 223.

*The Commission considers that constitutional recognition of the unique status of Aboriginal peoples must be done with due respect and . . . must be dealt with by a dedicated provision.*

## Common Law or Judicial Recognition

The judicial system has been at the forefront of recognition of Aboriginal customary law in Australia. Even in the absence of legislation directing courts to take account of customary law for certain purposes, judges have employed their judicial discretion to give weight to arguments based in Aboriginal customary law.

As Victoria Williams shows in her background paper<sup>36</sup> to this reference, there are a significant number of instances in the past two decades where Aboriginal customary law has been recognised as an important factor in informing the courts of circumstances surrounding relevant cases. This judicial recognition of Aboriginal customary law has featured in a broad range of cases in different areas of law. In some cases Aboriginal customary law has been taken into account in the consideration of defences and in the mitigation of sentence for criminal offences. The courts have also taken customary law into account in: determining applications for bail; coronial and burial matters; claims of native title rights to land; alleged breaches of Indigenous cultural copyright (particularly in respect of artworks); offences against laws controlling the right to hunt, fish and gather native foods; and in determining cases regarding the custody of children.

The common law is clearly one way in which Aboriginal customary law is recognised in the Western Australian legal system and evidently many judicial officers feel obliged to consider arguments based in Aboriginal customary law in relevant cases. However, there are undoubtedly cases where Aboriginal customary law may have informed a court in its determination but where rules of evidence prohibited its introduction; where counsel failed to raise (or the court failed to consider) relevant customary law issues; or where inadequate or unreliable evidence of relevant customary laws was

introduced.<sup>37</sup> Moreover, in the absence of legislative obligation the judicial recognition of Aboriginal customary law will only ever be on an ad hoc basis. The common law therefore cannot be expected to provide a coordinated, consistent recognition of Aboriginal customary law.

In its 1986 report the ALRC concluded that 'the common law does not provide an appropriate *general* basis for the incorporation or recognition of Aboriginal customary laws'.<sup>38</sup> In view of the discussion above the Commission agrees with this conclusion. The Commission also notes the remarks of Patrick Dodson in his *Regional Report of Inquiry into Underlying Issues in Western Australia* for the RCIADIC where he said that:

[T]he failure to enshrine customary law in legislation ... has reduced Aboriginal people to reliance upon the patronage of police and judicial officers. The position of Aboriginal people in respect of the legal system remains precarious. Aboriginal people have for too long been dependent on the use of 'discretions'. In my Commission's view, they should not have to approach police and courts as supplicants for recognition of their customary law.<sup>39</sup>

For these reasons, while the important role of courts and the judiciary in the recognition of Aboriginal customary law is acknowledged, it is the Commission's view that the preferred course would be for the government of Western Australia to legislate directing the courts to have regard to Aboriginal customary laws in relevant cases. The Commission appreciates that legislative direction of this nature must be in sufficiently general terms so as not to unduly restrict judicial officers in their determination of cases, particularly in respect to the exercise of judicial discretion in determining the weight to be given to such matters. However, there may be a need to enumerate certain principles to guide

36. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003).

37. Such was the case in *Munugurr v R* (1994) 4 NTLR 63 (Northern Territory Court of Appeal).

38. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [69] (emphasis in original).

39. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol 1, 1991) [5.11].

judicial officers and legal counsel in relation to the production and relevance of evidence of Aboriginal customary laws in a court and other, mostly procedural, matters. The form and content of proposed legislative provisions will be discussed in the following Parts.

## Codification

Both the ALRC and the NTLRC recommended against the codification of Aboriginal customary law. The Commission shares this view for the following reasons:

- the difficulty of precisely defining what constitutes Aboriginal customary law;<sup>40</sup>
- the varying content and practice of Aboriginal customary law in Western Australia;
- the need for flexibility in the interpretation of Aboriginal customary law, particularly in respect of its interaction with Australian law;
- the removal of Aboriginal autonomy over the content, application and interpretation of Aboriginal customary law;
- the fact that courts would become the 'primary agencies for the application of customary law';<sup>41</sup> and
- the potential for distortion of customary laws that may follow from application of customary law by non-Indigenous people and agencies.<sup>42</sup>

Importantly, codification of Aboriginal customary law may lead to the further disempowerment of Aboriginal people in Western Australia – a concern that is at the heart of this reference. Codification would also significantly erode the authority structures of traditional Aboriginal society by transferring power over the interpretation and application of Aboriginal customary law to courts and other government agencies. According to the Aboriginal communities that were consulted for this reference, the erosion of traditional authority and lack of respect for Elders is a problem that has already impacted upon Aboriginal communities as a consequence of non-recognition of customary law. The Commission considers that it would be irresponsible to propose a form of recognition that would ultimately exacerbate that problem.

## Statutory Recognition

In its 1986 report the ALRC proposed a draft Bill for the recognition of Aboriginal customary laws in certain areas such as family law, criminal law, and hunting, fishing and gathering rights. It was the ALRC's intention that the Commonwealth 'cover the field' in these areas or enter into cooperative agreements with the states to ensure that any legislation affecting the welfare of Aboriginal people have nationwide coverage (in the manner of the now defunct cross-vesting legislation). Although discussions ensued over the next decade with the Standing Committee of Attorneys-General, no cooperative agreement with the states was reached and the ALRC's draft Bill was never introduced into federal Parliament.

The Commonwealth and some states did, however, introduce legislative amendments to recognise traditional Aboriginal marriages for particular purposes (such as adoption and compensation or as equivalent to de facto marriages) and a number of states enshrined the ALRC's 'child placement principle' in legislation.<sup>43</sup> Notably, Western Australia was not among those states. Indeed, as will become clear from the discussion in the following Parts of this paper, there are very few existing instances of statutory recognition of Aboriginal customary laws in Western Australia.

Whilst the Commission does not seek to remedy this by introducing the concept of codification of Aboriginal customary laws—an outcome that is neither possible nor desirable for the reasons referred to above—it does acknowledge the potential of legislation to effect practical recognition of Aboriginal customary law in the Western Australian legal system. Therefore, certain of the Commission's proposals in the following Parts, refer to the need for statutory change in Western Australia.

## Administrative Recognition

There are numerous state government agencies that make daily decisions affecting the lives of Aboriginal people in Western Australia. As will be clear from Part II, many of these agencies have policies and programs in place for the better delivery of services to their Indigenous clients. Whilst these policies and programs

---

40. Particularly because Aboriginal customary law is unwritten and, in many instances, guarded by secrecy.

41. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [202].

42. See *ibid* 147–48; NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 11.

43. See *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).

*Codification would significantly erode the authority structures of traditional Aboriginal society by transferring power over the interpretation and application of Aboriginal customary law to courts and other government agencies.*

consider the statistical measures of Indigenous disadvantage relevant to particular agencies, they often fail to consider the impact of customary law upon their Indigenous client base. As can be seen from examples in Part II above, customary law can significantly inform agencies in the enhancement of their programs and policies for the betterment of Indigenous people in this state.

As Toohey has noted in his background paper for this reference, recognition of Aboriginal customary law by administrative means affords a flexibility to adapt to changing circumstances – something that is rarely achievable by statutory recognition.<sup>44</sup> Nonetheless, as the ALRC has noted, there are some disadvantages to non-statutory methods of recognition, particularly those that rely upon administrative discretions:

Administrative discretions may be applied in a spasmodic or inconsistent way. Not all law-enforcement officials are equally aware of or sympathetic to the needs of Aboriginal people. Aborigines involved in such situations are, in the absence of clear guidelines, much less able to challenge adverse decisions: they have no right to recognition.<sup>45</sup>

The need for formalised recognition in these circumstances is a point also acknowledged by Toohey.<sup>46</sup> Without some posited, if not binding, direction regarding the consideration of Aboriginal customary law in relevant circumstances, its recognition is meaningless. Although, in the passage above, the ALRC refers only to 'law-enforcement officials' the observation applies equally to any government officials, including, for instance, those that make decisions about the allocation of public housing or the delivery of health services.

Toohey also observes in his background paper that very often the complaints made about the legal system by Indigenous people are directed to the administration of that system rather than to the content or substance

of laws.<sup>47</sup> This observation was borne out by the Commission's consultations with Aboriginal communities across Western Australia in which the procedures and practices of prison authorities, the police service, courts, health services and other agencies were criticised for failure to recognise customary laws and cultural practices of Indigenous clients. In some instances, this failure can result in significant injustice for the Aboriginal people involved.

It is within the administrative realm that the Commission believes the appropriate recognition of Aboriginal customary law will most likely be seen to make a real difference to the daily lives of Indigenous people in Western Australia. Administrative recognition could take the form of simple changes to procedures to accord proper respect to customary laws on a regional basis (such as that outlined in respect of delivery of health services in Part II above). However, to overcome the



44. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) Appendix 1, 16.

45. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [207].

46. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) Appendix 1, 16.

47. *Ibid* 17. An observation also earlier made by the ALRC: ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [209].

disadvantages mentioned by the ALRC, the success of this form of non-statutory recognition would depend upon the proper monitoring of behavioural and real outcomes in service delivery and ongoing accountability. Another, more binding, form of non-statutory recognition involves the establishment of formal guiding principles to which administrative decision-makers must have regard in making decisions or exercising discretions that affect Indigenous clients. But in order to achieve meaningful recognition, such guidelines must be accessible to the public and their processes of application must be transparent. For this reason the Commission has preferred statutory recognition where circumstances permit and there is no threat of codification of customary law (particularly in relation to the creation of rights or expectations).<sup>48</sup>

## The Commission's View

It is the Commission's view that the continuing existence and practice of Aboriginal customary laws in Western Australia should be recognised. However, such recognition must work within the existing framework of the Western Australian legal system. For reasons expressed above, the Commission opposes the codification of Aboriginal customary law, although it supports the legislative recognition of Aboriginal customary law in certain circumstances.<sup>49</sup>

Although the Commission's proposals cover a much broader area than those of the ALRC, the Commission supports the ALRC's approach of 'functional recognition'; that is, recognition of Aboriginal customary law for particular purposes in defined areas of law. This approach allows for a variety of methods of recognition resulting in proposals for recognition that fall broadly into two categories: affirmative and reconciliatory.

In the affirmative category, the objectives of the Commission's proposals are the empowerment of Aboriginal people, the reduction of Indigenous disadvantage, and the resolution of problems and injustice caused by the non-recognition of Aboriginal customary law in the Western Australian legal system. This would be achieved by such changes as the

introduction of statutory provisions and guidelines requiring courts and government agencies to take account of Aboriginal customary law in the exercise of their discretions where circumstances require; the adoption of a whole-of-government approach to service delivery for Indigenous Western Australians; the introduction of models of self-governance for Aboriginal communities; the functional recognition of traditional Aboriginal marriage; and the empowerment of Aboriginal Elders and other respected community members to play an active role in the administration of justice.

In the reconciliatory category, the objectives of the Commission's proposals are the promotion of reconciliation between Indigenous and non-Indigenous Western Australians and of pride in Aboriginal cultural heritage and identity. This would primarily be encouraged by the amendment of the state Constitution in the manner described above under the heading 'Constitutional Recognition'.<sup>50</sup> The Commission considers constitutional change to be vital in the achievement of meaningful recognition of Aboriginal customary law and culture – a belief supported by the many Aboriginal respondents consulted for this reference.

Addressing a forum at Parliament House, Canberra in 1995, Lowitja O'Donoghue said:

[T]he long standing absence of meaningful recognition of Aboriginal customary law has had a detrimental effect on all facets of Aboriginal community development and ... has substantially contributed to many of the social problems and varying degrees of lawlessness present today ... The failure of successive governments to recognise customary law has resulted in the erosion of Aboriginal cultures.<sup>51</sup>

The proposals for affirmative and reconciliatory recognition of Aboriginal law and culture contained in this Discussion Paper are more than simply symbolic gestures. These proposals are the first step towards the institution of meaningful recognition of Aboriginal law and culture in Western Australia and, it is hoped, towards a more harmonious and respectful relationship between its Indigenous and non-Indigenous peoples.

48. The Commission notes the comment of the former president of the ALRC that 'too much reliance has been so far placed on the existence of administrative arrangements as a method of recognition' and that such arrangements should be careful not to reflect a pre-*Mabo* philosophy or social welfare approach. Rose A, 'Recognition of Indigenous Customary Law: The way ahead' (Paper presented at the Forum on Indigenous Customary Law, Canberra, 18 October 1995) 9.

49. To be discussed in the Parts following.

50. However, other reconciliatory proposals, such as the introduction of protocols to protect Indigenous cultural and intellectual property, are also made in this Discussion Paper.

51. O'Donoghue L, 'Customary Law as a Vehicle for Community Development' (Paper presented to the Forum on Indigenous Customary Law, Canberra, 18 October 1995) 3, as cited in Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 1.