

PART V

Aboriginal Customary Law and the Criminal Justice System

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Introduction

This part examines the need for recognition of Aboriginal customary law in the criminal justice system. There is no clear guidance from Western Australian courts about the circumstances and manner in which customary law can be taken into account. Because of the absence of any legislative direction requiring Aboriginal customary law to be considered, any recognition has been reliant upon the individual views of people who work in the criminal justice system and also upon the extent of their knowledge of all relevant aspects of customary law. Judicial recognition of Aboriginal customary law has for the most part been limited to cases involving traditional punishment. The Commission's consultations with Aboriginal people across the state, and the extensive research undertaken for this project, supports the view that Aboriginal customary law should be acknowledged in its broadest sense.

The Commission makes extensive proposals with the aim of providing more consistent and reliable recognition of Aboriginal customary law. Although judicial officers, police officers and other agencies within the criminal justice system will retain discretion about whether and how Aboriginal customary law will be recognised in any particular case, the proposals aim to ensure that criminal justice agencies are required to consider the issue.

Any discussion about Aboriginal people and the criminal justice system cannot and should not ignore the issue of over-representation of Aboriginal people within the system. Many of the Commission's proposals aim to reduce the level of over-representation of Aboriginal people in the criminal justice system. A significant reduction in the rate of imprisonment of Aboriginal people is required not only because it is necessary for the welfare and aspirations of Aboriginal people but also because the 'mass incarceration' of Aboriginal people in this state is 'destructive of Aboriginal law and culture'.¹

The Western Australian criminal justice system is failing Aboriginal people and it is time for a new approach. Aboriginal customary law may well provide a solution to the unacceptable and disproportionate rate of Aboriginal imprisonment and detention. Customary law processes have the potential to reduce the level of over-representation by invoking more effective and appropriate ways to address law and order issues in Aboriginal communities.

The extent to which Aboriginal people practice and observe Aboriginal customary law varies from place to place. In some communities traditional law has broken down as a consequence of colonisation. During the Commission's consultations the need to revitalise aspects of customary law, in particular the cultural authority of Aboriginal Elders, was emphasised.² For example, in Broome it was stated that Aboriginal people 'needed to reclaim community values existing before the white man came, so as to "get comfort for our people in mind and heart"'.³ Underlying many of the Commission's proposals is the need to enhance the cultural authority of Elders. One way to accomplish this is to provide an opportunity for Elders to take an active role in the criminal justice system. In addition, Aboriginal communities and Elders need to be empowered to determine their own solutions to social and justice issues and the Western Australian justice system must provide a space for Aboriginal customary law processes to develop.

The Commission acknowledges that from an Aboriginal perspective, although the recognition of customary law is paramount, many practical issues were also at the forefront of the consultations. Wherever possible the Commission has suggested practical improvements to the administration of criminal justice and provided ways in which Aboriginal people can become directly involved in decisions that are likely to impact on them and on their communities.

1. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 7 (December 2004) 7. See also LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5 where it was stated that all 'teaching gets left behind when people are going through the law but then get sent to prison – they miss out on law and knowledge'.
2. LRCWA, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 7; LRCWA, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 3.
3. LRCWA, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 21.