

# Chapter Four

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## Recognition of Aboriginal Customary Law

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# What is Aboriginal Customary Law?

## Definitional Matters

The Terms of Reference asked the Commission 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’. In order to facilitate discussion and determination of this question the Commission found it necessary to address certain definitional matters at the outset; in particular, the terms ‘Aboriginal’ and ‘customary law’.

These matters have been considered in the past by the Australian Law Reform Commission (ALRC) and the Northern Territory Law Reform Committee (NTLRC) in the context of similar references.<sup>1</sup> Rather than duplicating the work of these agencies, the Commission took 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>2</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>3</sup> It is now clear that as a consequence of past government policies, racial

integration and the passage of time there are now significantly varying degrees of biological descent among 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>4</sup> and which give Aboriginal people some degree of control over who is accepted as Aboriginal.<sup>5</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>6</sup>

There are a number of definitions of ‘Aboriginal’ found in current Western Australian legislation. Some statutes adopt a threefold test combining biological descent with the cultural criteria of self-identification and community acceptance;<sup>7</sup> while others still employ the potentially offensive protection era terminology of ‘full-blood’ and ‘quarter-blood’ descent.<sup>8</sup> Another definition, favoured by Commonwealth and some Western Australian legislation, refers to membership of ‘the Aboriginal race’.<sup>9</sup> This definition has been judicially interpreted to require satisfaction of the threefold test

1. For a fuller discussion of these previous inquiries, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 2–5. Reference to these inquiries can be found throughout the Commission’s Discussion Paper and this Final Report.
2. See, for instance, the *Aborigines Protection Act 1886 (WA)*.
3. The legislative history is laid out in some detail in: Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 2003, 5206 ff (Mr Derrick Tomlinson).
4. 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.
5. Nettheim G, ‘Australian Aborigines and the Law’ in *Law and Anthropology 2* (Vienna: VWGO, 1987) 371, 375.
6. McCorquodale J, ‘The Legal Classification of Race in Australia’ (1986) 10(1) *Aboriginal History* 7, as cited in Nettheim, *ibid* 371, 373.
7. The threefold test was laid down by the High Court in *Commonwealth v Tasmania* (1983) 46 ALR 625, 817. The threefold definition was first proposed by the Department of Aboriginal Affairs, *Report on a Review of the Working Definition of Aboriginal and Torres Strait Islanders* (Canberra, 1981).
8. See, for example, the *Aboriginal Affairs Planning Authority Act 1972 (WA)*, discussed under ‘Criticisms of the AAPA Scheme’, Chapter Six, below p 233. Compare also s 4 of that Act which adopts a different definition based on the threefold test.
9. See, for example, *Family Court Act 1997 (WA)*; *Fish Resources Management Act 1994 (WA)*.

described above with the descent criterion being a 'quantum of Aboriginal genes'.<sup>10</sup> In its Discussion Paper the Commission expressed concern that the threefold test may be too demanding and that some Aboriginal people—in particular, members of the stolen generation who have not yet reconnected with family—may be unable to satisfy the cultural criterion of community acceptance.<sup>11</sup> The cultural criterion of self-identification has also proved problematic in adoption cases because infants cannot self-identify as Aboriginal and would therefore not satisfy the threefold test. Parliament has recently rectified this problem by amending the *Adoption Act 1994* (WA) to include a definition of 'Aboriginal person' based on descent alone.<sup>12</sup>

In its 1986 report *The Recognition of Aboriginal Customary Laws* the ALRC took the view that the definition of 'Aboriginal' should be left sufficiently vague as to be able to be determined on a case-by-case basis.<sup>13</sup> However, it is the Commission's opinion that the application of legislation by government departments and administrative authorities requires a clear definition.<sup>14</sup> 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 at length in its Discussion Paper and being deeply conscious of the concerns of Aboriginal people, the Commission proposed that a standard definition of 'Aboriginal person' in terms of descent should be inserted in the *Interpretation Act 1984* (WA) for the purposes of all Western Australian written laws. In order to ensure that the standard definition of 'Aboriginal person' was not unduly restrictive, the Commission proposed that the following factors may be of evidentiary or probative value in determining whether a person is wholly or partly descended from the original inhabitants of Australia:

- genealogical evidence;
- evidence of genetic descent from a person who is an Aboriginal person;
- evidence that the person identifies as an Aboriginal person; and
- evidence that the person is accepted as an Aboriginal person in the community in which he or she lives.

It should be noted that while the Commission's proposed definition stresses Aboriginal ancestry, no fixed proportion of Aboriginal descent is identified. Further, the weight to be given to each or any of the above factors is considered to be a matter for the decision-maker and may vary from case-to-case.<sup>15</sup>

The Commission received a number of submissions on this proposal, the overwhelming majority of which supported the more inclusive definition suggested by the Commission. Importantly, most submissions highlighted the need for a single definition to be applied consistently in Western Australia.<sup>16</sup> Indeed, the Law Council of Australia argued that the Commission's definition should be adopted nationally in each of the state, territory and Commonwealth Interpretation Acts.<sup>17</sup>

Although the Commission provided a separate, similar definition for Torres Strait Islanders in its Discussion Paper, its original proposal also included the following shorthand:

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

While supporting the proposal, the Department of Indigenous Affairs noted that this shorthand form would introduce a 'blanket approach' that may be problematic in relation to legislation such as the *Aboriginal Heritage*

10. See detailed discussion in de Plevitz L & Croft L, 'Aboriginality Under the Microscope: The biological descent test in Australian law' (2003) 3 *Queensland University of Technology Law and Justice Journal* 1, 2. See also discussion in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 30–31.

11. LRCWA, *ibid* 31.

12. For discussion of recent parliamentary changes, see Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 2003, 5214 (Ms Giz Watson); 13 March 2003, 5308 (Ms Ljiljanna Ravlich).

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

14. The test used by Western Australian administrative decision-makers to assess whether a person is 'Aboriginal' is unclear; however, it is probable that the threefold test is used in these circumstances. The Commission invited submissions on the problems faced by Aboriginal people in Western Australia in proving their Aboriginality for the purposes of accessing programs and benefits offered by Western Australian government agencies for the exclusive benefit of Aboriginal people. Submissions received indicated the need for support services to trace heritage and access relevant information, particularly for regional Aboriginal people: Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 2; Pilbara Development Commission, Submission No. 39 (19 May 2006) 6.

15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 49, Proposal 3.

16. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 2–3; Department of Corrective Services, Submission No. 31 (4 May 2006) 2–3; Department of the Attorney General, Submission No. 34 (11 May 2006) 3.

17. Law Council of Australia, Submission No. 41 (29 May 2006) 3.

*Act 1972* (WA) where rights may be accorded to Torres Strait Islanders in respect of Western Australian Aboriginal heritage.<sup>18</sup> The Commission agrees with the Department's submission and has removed the shorthand. The Commission notes that this need not unduly complicate legislative provisions, since individual Acts may adopt the shorthand in the interpretation or definition sections of the Act where it is intended that references to Aboriginal people include Torres Strait Islander people.<sup>19</sup>

The Department of Indigenous Affairs further submitted that consideration should be given to providing guidelines to instruct decision-makers as to the weight to be given to the factors set out above. It suggested that recognition as Aboriginal by the relevant community should be given substantial weight by decision-makers.<sup>20</sup> The Commission understands that this may be a significant determining factor of Aboriginality in many cases; however, in order to protect those people who were removed from their Aboriginal families and those who have relocated and severed ties to their Aboriginal community, the Commission feels that the other factors listed in Recommendation 4 should also be taken into account. The Commission does not consider it appropriate to set out guidelines for decision-makers beyond the matters that may be considered in support of a claim of Aboriginal descent.

The Commission considers that the following inclusive definition of 'Aboriginal person' (and also of 'Torres Strait Islander person') will remove the difficulties experienced by some Aboriginal people of having to satisfy all three tiers of the threefold test while allowing cultural criteria to be considered by the decision-maker in determining Aboriginality. 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 acknowledges that identification as an Aboriginal person for social or cultural purposes must be determined by Aboriginal people alone.

#### Recommendation 4

##### Definition of Aboriginal person and Torres Strait Islander person

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:

**'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 may be considered:

- (a) genealogical evidence;
- (b) evidence of genetic descent from a person who is an Aboriginal person;
- (c) evidence that the person identifies as an Aboriginal person; and
- (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 may be considered:

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

18. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 2–3.

19. Although less than 900 Torres Strait Islander people currently reside in Western Australia, the Commission recognises that Torres Strait Islanders are a distinct people with their own cultural identity, traditions and customs and that this may influence the way in which certain practices, processes or provisions consequent upon the Commission's recommendations apply. The Department of Indigenous Affairs (WA), *Overcoming Indigenous Disadvantage in Western Australia Report 2005* (2005) notes that the 2001 Australian Census recorded that 'the vast majority of Indigenous persons in Western Australia stated that they were of Aboriginal origin (96%), 1.5% were of Torres Strait Islander origin, while those with dual Aboriginal and Torres Strait Islander origin comprised 2.3%': 25. The total population of Indigenous people in Western Australia was estimated in 2002 at 65,931 persons or 3.5% of the total population of Western Australia. This estimate will be revised later this year following the 2006 Census.

20. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 3.

## 'Customary law'

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.<sup>21</sup> 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.<sup>22</sup> 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 of this order.<sup>23</sup>

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 communities than in others. For example, for some Aboriginal people, particularly those living in remote communities, 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.<sup>24</sup>

The Commission determined that the term 'customary law' cannot be (and on some arguments should not be) precisely or legalistically defined. Instead, the Commission favoured an understanding of the term that encompassed the holistic nature of Aboriginal customary law which the Aboriginal people of Western Australia shared with the Commission. These comments were endorsed by Aboriginal people during return

consultation visits to present the Commission's proposals and Discussion Paper findings.

## What Constitutes Customary Law?

Many non-Aboriginal people associate Aboriginal customary law with 'payback' or traditional punishment; however, as noted above, 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.



21. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 50.

22. See 'Aboriginal customary law: Is it "law"?', *ibid* 50–51.

23. See LRCWA, Project No. 94, *Thematic Summaries of Consultations – Manguri* (4 November 2002) 3.

24. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 51–52.

## *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.*

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. 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. In these circumstances the Commission took the 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.<sup>25</sup>

In this context the Commission also considered whether it was obliged under its Terms of Reference only to examine for potential recognition those Aboriginal laws that appeared unchanged by European contact.<sup>26</sup> The fact that many Aboriginal customary laws have developed and changed over time is noted throughout the Commission's Discussion Paper. It is the Commission's firm view that evolution—both in the substance of these laws and in their practice—is inevitable. Such dynamism is apparent even in the judicial interpretation of legislation in the 'codified' Western Australian legal system. With Aboriginal law change is unavoidable, both as a result of its oral tradition and the reality of over 200 years of colonial occupation. This issue was addressed in detail in John Toohey's Background Paper for this reference and does not need repeating here.<sup>27</sup> It is sufficient to say that the Commission agreed 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>28</sup>

### **Who is bound (and who should be bound) by customary law?**

The Terms of Reference required the Commission to determine who is bound, and who should be bound, by Aboriginal customary law. In the Commission's community consultations, 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 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.<sup>29</sup>

It is the Commission's view that voluntariness should be the guiding principle in application of customary law to individuals.<sup>30</sup> 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.<sup>31</sup> It is, however, pertinent to note that the question 'Who is bound (and who should be bound) by Aboriginal customary law' becomes somewhat academic when discussed in terms of the Commission's recommendations. As explained in Chapter One, the Commission's recommendations do not create a

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25. Ibid 52–53.

26. Ibid 52.

27. Toohey J, 'Aboriginal Customary Laws Reference – An Overview' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 173, 182.

28. Ibid.

29. For more in-depth discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 53–54.

30. See discussion under 'Principle Three: Voluntariness and consent', Chapter Two, above pp 5–6.

## *The Commission's recommendations aim to make space within Western Australian law for recognition and respect of important aspects of Aboriginal customary law and culture.*

separate system of law for Aboriginal people in Western Australia. Aboriginal people remain bound and protected by Australian and Western Australian law at all times. Whether individual Aboriginal people are also bound and protected by their relevant customary law is a matter for them and their communities. The Commission's recommendations aim to make space within Western Australian law for recognition and respect of important aspects of Aboriginal customary law and culture, but not all the Commission's recommendations will apply or be relevant to all Aboriginal people in Western Australia. This is not only in recognition of the diversity of Aboriginal peoples in Western Australia, but also in recognition that Aboriginal people have the right to control their own individual and collective destinies and to choose independently whether and how they are bound by Aboriginal law.

### **Role of kinship in Aboriginal society**

Kinship is at the heart of Aboriginal society and underpins the customary law rules and norms associated with each of the areas to be discussed in this Report. Importantly, kinship governs all aspects of a person's social behaviour and prescribes the obligations or duties a person has toward others as well as the activities or individuals that a person must avoid.<sup>32</sup> Robert Tonkinson explains the kinship system thus:

Social relationships in which people refer to each other using terms of biological relatedness such as 'mother', 'son', 'cousin' are called kinship systems. In Aboriginal society everybody with whom a person comes into contact is called by a kinship term, and social interaction is guided by patterns of behaviour considered appropriate to particular kin relationships. Although a person's sex and age are important in determining social status, the system of relatedness largely dictates the way people behave towards one another, prescribing dominance, deference, obligation or equality as the basis of the relationship.

Aborigines employ what is known as a 'classificatory' kinship system; that is, the terms used among blood relatives are also used to classify or group more distantly related and unrelated people. Classificatory systems are based on two principles. First, siblings of the same sex (a group of brothers or a group of sisters) are classed as equivalent in the reckoning of kin relationships. Thus my father's brothers are classed as one with my father and are called 'father' by me; likewise, all women my mother calls 'sister' are my 'mothers'. Following this logic, the children of all people I call 'father' or 'mother' will be classed as my 'brothers' and 'sisters'. Secondly, in theory this social web can be extended to embrace all other people with whom one comes into contact in a lifetime.<sup>33</sup>

Not all Aboriginal kinship systems are the same but they do tend to share the basic principles addressed in the preceding extract.<sup>34</sup> Essentially, in Aboriginal society, kinship should be understood as a circular concept rather than a linear one as is the norm in non-Aboriginal society. As a result of the classificatory kinship system, individuals in Aboriginal society will have significant obligations to people who are classified as their son or sister but who would not necessarily register as someone to whom that person owed a duty in non-Aboriginal society.

It is important to note at this stage that while the kinship system was an undeniable part of traditional Aboriginal society, the Commission found, during its community consultations, that it is also strongly instilled in contemporary Aboriginal society, including urban Aboriginals. Therefore, while there may be some utility in the distinction between the extent to which remote Aboriginal people and urban Aboriginal people engage with (and accept the authority of) Aboriginal customary law, there is less of a distinction between remote and urban Aboriginals in relation to conceptions of kinship and acknowledgement of the obligations imposed by the kinship system.<sup>35</sup>

31. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 54.

32. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 144.

33. Tonkinson R, 'MarduJarra Kinship', as cited in McRae H, Nettheim G & Beacroft L (eds), *Indigenous Legal Issues* (Sydney: LBC Information Services, 2nd ed., 1997) 83.

34. Vines P, 'When Cultures Clash: Aborigines and inheritance in Australia' in Miller G (ed), *Frontiers of Family Law* (Dartmouth: Ashgate, 2003) 98, 108.

35. The extent to which these obligations are actually observed by more urbanised Aboriginal people will, of course, vary. However, it appears that certain kinship obligations, such as the duty to accommodate kin, are taken very seriously regardless of urban or remote location.

# Recognition of Aboriginal Customary Law

## The Commission's Starting Point

The Terms of Reference required 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 meant that the starting point for the Commission's consideration of the potential for recognition of Aboriginal customary law was the current Western Australian (and Australian) legal system. As John 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>

While this may appear to curtail the Commission's investigation, this has not been the case. As discussed in Chapter One, the Commission's consultations with Aboriginal people in Western Australia showed a clear consensus against the operation of two separate systems of law – something that many considered would be an unnecessarily divisive outcome. Aboriginal people consulted for the reference emphasised the need for striking a balance between Aboriginal and non-Aboriginal law and facilitating a harmonious relationship between Aboriginal and non-Aboriginal Western Australians.

The Commission's Discussion Paper 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.<sup>2</sup> 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 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>3</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 believed to be of paramount importance in formulating its recommendations for reform.

## Recognition and the Relevance of International Law

In considering the potential of recognition of Aboriginal customary law in Western Australia the Commission was required by its Terms of Reference to have regard to relevant Commonwealth legislation and to Australia's international obligations. An entire chapter of the Commission's Discussion Paper was therefore devoted to discussion of Aboriginal customary law in the international context.<sup>4</sup>

The rights of indigenous peoples or ethnic minorities are recognised in a number of international instruments that have been ratified by Australia. These include the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*.<sup>5</sup> In response to growing international concern during the

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1. Toohey J, 'Aboriginal Customary Laws Reference – An Overview' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 173, 174 (emphasis added).  
2. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 55.  
3. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 15.  
4. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Part IV.  
5. *Ibid* 69–70. Although not ratified by Australia the *Convention Concerning Indigenous and Tribal Persons in Independent Countries* (ILO Convention 169) has been employed by the Australian judiciary in the interpretation of statutes and, it has been suggested, is becoming increasingly understood to be binding international customary law. See Anaya J, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996).



affairs);<sup>10</sup> the right of indigenous peoples to participate in decision-making in matters that affect them;<sup>11</sup> the right to maintain and develop their political, economic and social institutions;<sup>12</sup> and the right to practise and revitalise cultural traditions and customs.<sup>13</sup> Importantly, in Article 33 the Declaration contains the right of indigenous peoples to promote, develop and maintain their institutional structures and distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, *their juridical systems or customs, in accordance with international human rights standards.*<sup>14</sup>

past two decades about the marginalisation of the world's indigenous peoples, the United Nations established several mechanisms dedicated to indigenous issues and, as reported in the Commission's Discussion Paper, was working toward an international *Declaration on the Rights of Indigenous Peoples*.<sup>6</sup> On 23 June 2006 in its first session, the United Nations Human Rights Council adopted a revised version<sup>7</sup> of the Declaration which has now been formally recommended to the United Nations General Assembly for adoption in its September 2006 session.<sup>8</sup>

The revised Declaration contains, among other things, a limited right of indigenous self-determination<sup>9</sup> (including self-government in matters of internal or local

It is pertinent at this juncture to note that, even if adopted by the United Nations General Assembly, the revised Declaration would have no immediate binding effect at international law. Nonetheless, it will stand as a statement of general principles that state parties such as Australia are expected to aspire to and implement so far as possible. Ideally the Declaration will lead to the future passage of a convention on the rights of indigenous peoples which has binding force at international law.<sup>15</sup> Alternatively, with the passage of time and like the *Universal Declaration of Human Rights* before it, aspects of the Declaration could eventually become accepted as binding peremptory norms of customary international law.<sup>16</sup>

6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 70–72.

7. Because, after 11 years' debate at the international level, the state-party members of the international working group were unable to reach consensus on the terms of the Draft Declaration the process was abandoned in February 2006. The Special Rapporteur, Mr Luis-Enrique Chavez, presented a revised text to the Commission on Human Rights which differs from the original draft in a number of important respects, including a weaker version of the right to self-determination of Indigenous peoples. It is this text that has been adopted by the new Human Rights Council and has been forwarded to the United Nations General Assembly. Australia is one of only four countries that have actively pursued rejection of the self-determination and collective rights aspects of the Declaration; the other countries being America, Canada and New Zealand (each with substantial minority Indigenous populations).

8. UN Doc A/HRC/1/L.3 (23 June 2006). The Commission has been advised that the Australian government is likely to oppose adoption of the revised *Declaration on the Rights of Indigenous Peoples* in its current form: Robert Meadows QC, Solicitor General for Western Australia, Submission No. 30 (2 May 2006) 2. According to Australia's UN delegate, while supporting a greater role for Australia's Indigenous peoples in decision-making, Australia opposes adoption because of uncertainty of the meaning of self-determination and the right of free, prior and informed consent: see *Statement by Mr Peter Vaughan, Head of the Australian delegation to the Permanent Forum on Indigenous Issues, on behalf of Australia, New Zealand and the United States of America On Free, Prior Informed Consent* (22 May 2006), <[http://www.australiaun.org/unweb/content/statements/social/2006.05.17\\_soc\\_indigenous.pdf](http://www.australiaun.org/unweb/content/statements/social/2006.05.17_soc_indigenous.pdf)>. The nature and extent of the Indigenous right to self-determination is discussed in greater detail in the Commission's Discussion Paper: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 419–22.

9. *United Nations Declaration on the Rights of Indigenous Peoples*, Article 3.

10. *Ibid* Article 3 *bis*.

11. *Ibid* Article 19.

12. *Ibid* Article 21.

13. *Ibid* Article 12.

14. *Ibid* Article 33 (emphasis added).

15. As outlined in the Commission's Discussion Paper, although considered bound at international law, the ratification of international conventions by Australia will not necessarily mean that Australia will observe their precepts at home. The treaty-making power is an executive power and treaties are not accepted as binding in Australia until incorporated into Australian law by the federal legislature. However, Australian courts are becoming more inclined to interpret statutes consistently with international law in circumstances of statutory ambiguity, particularly where the civil rights of individuals are threatened. For further discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 67–69.

16. To become a rule of customary international law to which a state is bound, the rule must be consistently practised by the state and the state must have accepted its obligation to adhere to such rule. For further discussion of international law in this context, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Part IV; and Davis M & McGlade H, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 381.

## Do conflicts between Aboriginal customary law and international human rights law create a barrier to recognition?

As outlined in the Discussion Paper, there are three main areas of potential conflict between Aboriginal customary law and international human rights law that could present barriers to recognition of Aboriginal customary law in Western Australia. The first is that specific recognition of the laws of a section of society would violate the principle of equality before the law. In light of recent media claims to this effect this was chosen as a matter for detailed discussion in Chapter One of this Report. In that chapter it was shown that there are peculiar reasons why Aboriginal people should be seen as a special case. Firstly, as the original inhabitants of Australia, Aboriginal people cannot simply be seen as one of many ethnic minorities; and secondly, the concrete conditions of inequality experienced by Aboriginal people (described in Part II of the Discussion Paper) suggest the need for affirmative discrimination or differential treatment which is permitted under the *Racial Discrimination Act 1975* (Cth). In addition, it must be acknowledged that the cultural rights of indigenous peoples are also protected by the *International Covenant on Civil and Political Rights* to which Australia is a signatory.

The other two areas of potential conflict involve the recognition of particular Aboriginal customary practices that may contravene international laws (such as spearing and non-consensual child marriage) and the recognition of collective rights of indigenous peoples as against the individual rights of women under international law. The Commission's research on each of these areas highlights the fact that, although recognition of Aboriginal customary law may be considered desirable as part of a program of affirmative discrimination and

reconciliation, blanket recognition is not possible. These conflicts are discussed at some length in the Commission's Discussion Paper<sup>17</sup> and are canvassed in further detail in Chapter One of this Report.

The clear message from both Aboriginal and non-Aboriginal commentators is that the potential for recognition of particular laws and practices to impact upon protected individual human rights must be determined on a case-by-case basis. This is considered essential not only to protect the fundamental human rights of all Australians, but also to protect the rights of vulnerable groups, such as women and children, within the Indigenous minority. In view of the potential for conflict described above, the Commission proposed, as its threshold test for recognition, the consistency of relevant Aboriginal customary laws or practices with international human rights standards.<sup>18</sup> All submissions received in respect of this proposal endorsed the Commission's view;<sup>19</sup> however, a number of submissions reinforced the need for explicit protection of Aboriginal women and children.<sup>20</sup> The Commission has therefore expanded its recommendation to make this important precondition to recognition clear.<sup>21</sup>

### Recommendation 5

#### Recognition of customary law consistent with international human rights standards

That recognition of Aboriginal customary laws and practices in Western Australia must be consistent with international human rights standards and should be determined on a case-by-case basis. In all aspects of the recognition process particular attention should be paid to the rights of women and children and the right not to be subject to inhuman, cruel or unusual treatment or punishment under international law.

17. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 74–76.

18. *Ibid* 76, Proposal 5.

19. Dr Dawn Casey, Submission No. 24 (1 May 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006); Department of the Attorney General, Submission No. 34 (11 May 2006); Law Council of Australia, Submission No. 41 (29 May 2006); Indigenous Women's Congress, Submission No. 49 (15 June 2006); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006).

20. Centre for Aboriginal Studies, Curtin University, Submission No. 22 (1 May 2006) 3; Dr Dawn Casey, Submission No. 24 (1 May 2006); Indigenous Women's Congress, Submission No. 49 (15 June 2006); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006). The Commission also notes the new Article 22(2) *bis* of the *United Nations Declaration on the Rights of Indigenous Peoples* which directs state-parties to take measures in conjunction with Indigenous peoples to ensure that women and children are protected against violence and discrimination.

21. The Commission also recognised in its Discussion Paper that international human rights standards and the decisions of international treaty bodies provide important benchmarks against which the protection and promotion of the rights of Aboriginal peoples in Western Australia can be measured. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 76.

## How Should Aboriginal Customary Law be Recognised?

In its Discussion Paper the Commission weighed the arguments for and against the recognition of Aboriginal customary law and determined that the continuing existence and practice of Aboriginal customary law in Western Australia should be appropriately recognised.<sup>22</sup> In doing so the Commission accepted that there are jurisdictional limitations to recognition of customary law in Western Australia; for example, there are some areas of law (such as the making of treaties and some aspects of family law) that are outside the legislative domain of the Western Australian Parliament.<sup>23</sup> The Commission also stressed that recognition of customary law must work within the existing framework of the Western Australian legal system.<sup>24</sup> However, because of the difficulty of precisely defining what constitutes Aboriginal customary law and the varying content and practice

of Aboriginal customary law in Western Australia (among other things), the Commission rejected any attempt to comprehensively codify Aboriginal customary law.<sup>25</sup> This view endorsed previous recommendations of the ALRC and the NTLRC.<sup>26</sup>

The overwhelming majority of submissions in response to the Commission's Discussion Paper supported recognition of Aboriginal customary laws in Western Australia of the kind advanced by the Commission's proposals.<sup>27</sup> Some submissions suggested that the Western Australian legal system should recognise some aspects of customary law, but not others. In particular, it was highlighted that violent traditional punishments,<sup>28</sup> violence or sexual abuse of women or children<sup>29</sup> and 'unreasonable customs'<sup>30</sup> should not be condoned by Western Australian law. Only two submissions expressed no support whatsoever for recognition of Aboriginal customary law and culture in Western Australia.<sup>31</sup>



22. Ibid 55–56.

23. Ibid 56–57.

24. Ibid 64.

25. Ibid 62. Other arguments against codification included 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 consequent upon codification; the fact, stressed by the ALRC, that courts would become the 'primary agencies for the application of customary law'; and the potential for distortion of customary laws that may follow from application of customary law by non-Indigenous people and agencies.

26. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) 147–48; NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 11.

27. Indeed some submissions supported the recognition of Aboriginal customary law in all Australian jurisdictions: Law Council of Australia, Submission No. 41 (29 May 2006) 4.

28. It is noted that some Aboriginal people have also emphasised that they do not favour recognition of all physical customary law sanctions. Such sentiments were strongly expressed by participants at the Commission's return consultation visits to Aboriginal communities in Geraldton (3 March 2006); and Broome (10 March 2006). Others highlighted that physical punishments were only ever acceptable if done in proper ritual conditions: LRCWA, Discussion Paper community consultations – Warburton, 27 February 2006; Kalgoorlie, 28 February 2006; Fitzroy Crossing, 9 March 2006. The latter approach was also widely expressed in the Commission's initial consultations with Aboriginal communities and organisations across Western Australia throughout 2002–2004.

29. For example, Reynold Indich (Jumindi), Submission No. 4 (16 February 2006); Dr Kate Auty SM, Submission No. 9 (16 March 2006); Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006); Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006); Law Council of Australia, Submission No. 41 (29 May 2006); Office of Commissioner of Police, Submission No. 46 (7 June 2006); Indigenous Women's Congress, Submission No. 49 (15 June 2006).

30. June Vile, Submission No. 12 (26 April 2006). Ms Vile cited incidents observed by anthropologists in the early 19th century (1820s–1830s) such as 'leaving a grandmother with a broken leg to die under a tree when the tribe went walkabout'. It is submitted that such incidents cannot reasonably be described as 'customs' – these are likely to have been the result of sheer necessity and would be most unlikely to occur today.

31. Brian Marsh, Submission No. 5 (8 February 2006); Margaret Deegan, Submission No. 37 (19 May 2006).

## The overwhelming majority of submissions in response to the Commission's Discussion Paper supported recognition of Aboriginal customary laws in Western Australia.

As recognised in many submissions and in the Commission's Discussion Paper,<sup>32</sup> Aboriginal customary law is constantly evolving and adapting to the conditions of modern society and the application of Australian law. As a result many physical sanctions traditionally applied under Aboriginal customary law have been significantly tempered or prohibited by Aboriginal people themselves.<sup>33</sup> At the same time certain traditional offences, such as breaches of sacred law<sup>34</sup> and kinship rules regarding marriage,<sup>35</sup> are often subject to far less serious consequences. Nevertheless, as acknowledged in the Commission's Discussion Paper, some Aboriginal people remain liable to traditional physical punishments and these punishments still have 'major symbolic and cultural significance' among certain Aboriginal peoples.<sup>36</sup> As discussed in Chapter One, the Commission's recommendations *do not* condone unlawful violent traditional punishments.<sup>37</sup> In respect of violence against Aboriginal women or children, also discussed at length in Chapter One,<sup>38</sup> the Commission emphasises that violence or sexual abuse of Aboriginal women and children has never been part of Aboriginal customary law. The Commission's recommendations are incontrovertibly clear that such actions will not be tolerated by Western Australian law.

### Forms of recognition

The Commission considered a number of different forms of recognition of Aboriginal customary law; among them constitutional recognition, administrative recognition, judicial recognition and statutory recognition. Each of

these forms of recognition has advantages and disadvantages. For example, administrative recognition has the advantage of being flexible and therefore being able to adapt to changing circumstances; however, it lacks the transparency and consistency in application of statutory recognition.<sup>39</sup> At the same time, statutory recognition has the potential to disempower Aboriginal people by removing, in some circumstances, Aboriginal autonomy over the content, application and interpretation of Aboriginal customary law.<sup>40</sup> The Commission noted that the judiciary has played an important role in the recognition of customary law for certain purposes in Western Australia;<sup>41</sup> however, it agreed with the ALRC's conclusion that 'the common law does not provide an appropriate *general* basis for the incorporation or recognition of Aboriginal customary laws'.<sup>42</sup>

### The Commission's Conclusion: Functional Recognition

Taking into account the advantages and disadvantages of the different forms of recognition of Aboriginal customary law, the Commission expressed its support in its Discussion Paper for 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 (legislative, judicial, administrative and constitutional) resulting in proposals for recognition of Aboriginal customary law that fall broadly into two categories: affirmative and reconciliatory.<sup>43</sup>

32. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 91–92.

33. It was observed by Aboriginal people in the Commission's consultations that spearing, for instance, has been considerably curtailed as a punishment for breach of Aboriginal customary law. The significant downturn in frequency of physical sanctions was also recognised by mid-twentieth century anthropologists: see Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings Publishing Co., 1974) 66–67; Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 101. The latter referred to less frequent physical sanctions observed at Yirrkala during 1969–1970.

34. The Commission has noted that some breaches of sacred law would once have resulted in punishment by death. It is clear that such punishment is no longer considered acceptable: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 89.

35. See, for example, the discussion of traditional Aboriginal marriage rules and Aboriginal marriage today: *ibid* 332–35

36. *Ibid* 167.

37. See above pp 28–29.

38. See above pp 18–30.

39. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 62–64.

40. *Ibid* 62.

41. Including in relation to consideration of defences and in the mitigation of sentence for criminal offences; 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: *ibid* 61.

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

43. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 64.

## Affirmative recognition

In the affirmative category, the objectives of the Commission's recommendations for recognition of customary law are the empowerment of Aboriginal people, the reduction of disadvantage, and the resolution of problems and injustice caused by the non-recognition of Aboriginal customary law in the Western Australian legal system. This is achieved by such reforms 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;<sup>44</sup>
- the adoption of a whole-of-government approach to service delivery for Aboriginal Western Australians;<sup>45</sup>
- the introduction of models of self-governance for Aboriginal communities;<sup>46</sup>
- the recognition and removal of existing cultural biases;<sup>47</sup>
- the functional recognition of traditional Aboriginal marriage;<sup>48</sup> and
- the empowerment of Aboriginal Elders and other respected community members to play an active role in the administration of justice.<sup>49</sup>

## Reconciliatory recognition

In the reconciliatory category, the objectives of the Commission's recommendations are the promotion of reconciliation between Aboriginal and non-Aboriginal Western Australians and of pride in Aboriginal cultural heritage and identity. Reconciliatory recognition is

achieved by recommendations that address the decline in cultural authority among Aboriginal people and communities.<sup>50</sup> In regard to the non-Aboriginal community, reconciliatory recognition is found in the requirement that all employees and contractors of Western Australian government agencies undertake targeted, local cultural awareness training.<sup>51</sup> A further example of such recognition is the establishment of an independent Office of the Commissioner for Indigenous Affairs.<sup>52</sup> As discussed earlier, this body will provide a focal point for Aboriginal issues in Western Australia and, as well as reporting to Parliament on certain matters, will be tasked with promoting the interests of Aboriginal people and reconciliation in this state.<sup>53</sup>

But perhaps the clearest example of reconciliatory recognition is the Commission's recommendation for amendment of the Western Australian Constitution to, among other things, acknowledge the unique status of Aboriginal peoples as the descendants of the original inhabitants of Western Australia and as the original custodians of the land.<sup>54</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. This recommendation is discussed in more detail immediately below.

The recommendations for affirmative and reconciliatory recognition of Aboriginal law and culture contained in the Commission's Final Report are more than simply symbolic gestures. These recommendations 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 Aboriginal and non-Aboriginal peoples.

44. See, for example, the Commission's recommendations regarding the relevance of Aboriginal customary law and culture to a grant of bail (Recommendations 33 & 34); to sentencing (Recommendation 36); to the possibility of an order for a single-gender jury (Recommendation 41); to prosecutorial guidelines (Recommendation 43); and to funeral attendance for prisoners and restraints used in such circumstances (Recommendations 59 & 61).

45. Recommendation 1.

46. Recommendation 131.

47. For example, the cultural bias against non-lineal family structures was particularly evident to the Commission during research for this reference. This is addressed in recommendations relating to inheritance (Recommendations 65 & 71); funeral attendance for prisoners (Recommendation 59); rights of extended family in the coronial process (Recommendation 76); and recognition of non-biological primary carers of children (Recommendation 59). Other cultural biases are evident in the disproportionate number of Aboriginal people in Western Australian prisons and in the failure to provide adequately for Aboriginal language interpreters for court proceedings. The issue of cultural bias in the context of this project is discussed further in Hands TL, 'Teaching a New Dog Old Tricks' (2006) 6(17) *Indigenous Law Bulletin* 12, 13–14.

48. Recommendations 83, 84 and 85.

49. Recommendation 17.

50. See, for example, the Commission's recommendations for community justice groups (Recommendation 17); for reform of Aboriginal community governance (Recommendations 130 & 131). See also the discussion under 'Principle Six: Respect and empowerment of Aboriginal people', Chapter Two, above pp 37–38.

51. See Recommendation 2, above p 51. See also Recommendations 11, 12, 56 & 128.

52. See Recommendation 3, above p 58.

53. See discussion under 'The Proposed Office of the Commissioner for Indigenous Affairs', Chapter Three, above pp 55–57.

54. See Recommendation 6, below p 74.

*The recommendations achieve the intent of statutory and administrative recognition of Aboriginal customary law while allowing Aboriginal control over the content and application of that law to remain.*

## Constitutional Recognition: The Commission's Recommendation

From its consultations 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. The Commission's Discussion Paper considered two types of constitutional recognition: constitutional acknowledgement of Aboriginal people as original inhabitants or 'first Australians' and constitutional recognition of Aboriginal customary law as a 'source of law'.<sup>55</sup>

After assessing the advantages and disadvantages of each form of recognition the Commission proposed in its Discussion Paper that Western Australia adopt a form of constitutional recognition of Aboriginal peoples that 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 the state. This is the type of provision enacted by Victoria in 2004.<sup>56</sup> Although preambular recognition of Aboriginal peoples has been mooted by the current Attorney General of Western Australia,<sup>57</sup> the Commission argued that such recognition should instead be entrenched as a foundational provision of the Constitution. This option was preferred for a number of reasons. First, the Commission was concerned that a preamble would be seen as a mere aspirational statement: an add-on rather than a genuine provision of the Constitution. Second, as precedents demonstrate,<sup>58</sup> 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 argued 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 noted that there is currently no s 1 to the Western Australian Constitution – it having been repealed in 1998.<sup>59</sup> The Commission was of the opinion that this provided a clear and immediate opportunity for constitutional acknowledgment of Aboriginal peoples by foundational provision in the manner of the Victorian amendment.

Submissions to the Discussion Paper were extremely supportive of the Commission's proposal. The Human Rights and Equal Opportunity Commission particularly welcomed the proposal and supported such recognition in the Constitution of every Australian jurisdiction.<sup>60</sup> The Law Council of Australia commended the Commission's approach of recommending an amendment to the body of the Western Australian Constitution 'rather than simple insertion into a preamble'.<sup>61</sup> The Law Society of Western Australia supported the Commission's proposal<sup>62</sup> and noted that the Western Australian government has already committed to improving its relationship with the Aboriginal peoples of Western Australia and has recognised their status as first Australians in policy and government charters.<sup>63</sup>

Because of its importance as a key proposal of the Discussion Paper, the Commission also produced a plain English pamphlet outlining the proposal and its underlying rationale. This brochure was distributed widely to Aboriginal communities and organisations

55. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 57–60.

56. *Constitution (Recognition of Aboriginal People) Act 2004* (Vic) amending the *Victorian Constitution Act 1975*.

57. McGinty J, Attorney General of Western Australia, *Speech to the Constitution at Large Conference* (22 March 2003).

58. 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; and 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.

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

60. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 1.

61. Law Council of Australia, Submission No. 41 (29 May 2006) 7.

62. Law Society of Western Australia, Submission No. 36 (16 May 2006) 2.

63. Western Australian Government, Charter of Multiculturalism (November 2004).

across the state. The proposal also featured in discussions during the Commission's return consultations with Aboriginal people in Western Australia and at focus group meetings with Indigenous organisations and government agencies. The Commission's proposal received strong support in each of these forums.

The Commission noted in its Discussion Paper that constitutional acknowledgement of Aboriginal peoples was a form of reconciliatory rather than substantive recognition of Aboriginal customary law and that some may see this as a 'weaker' form of constitutional recognition than source of law recognition. Nonetheless, the Commission believes that, in the context of the pragmatic and extensive recommendations for the recognition of Aboriginal customary law and culture contained in this Report, this is the best path at this time<sup>64</sup> for Western Australia. Significantly, it avoids the problems with constitutional recognition of customary law described in the Commission's Discussion Paper, such as the need to ascertain the law, to possibly 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 remains the Commission's opinion that any method of recognition that involves unnecessary state interference with Aboriginal customary law should be avoided. As Ken Brown has observed, '[c]ustomary law will remain significant to its adherents whether or not it receives formal endorsement in a constitution'.<sup>65</sup>

In the Commission's view, the recommendations for reform that are contained in this Report achieve the intent of statutory and administrative recognition of Aboriginal customary law while 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 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. With the strong support of submissions the Commission therefore confirms its recommendation to Parliament for amendment to Western Australia's Constitution.

## Recommendation 6

### Constitutional recognition of Aboriginal peoples

That, at the earliest opportunity, the Western Australian government introduce into Parliament a Bill to amend the *Constitution Act 1889* (WA) to effect, in s 1, the recognition of the unique status of Aboriginal peoples as the descendants of the original inhabitants of this state. The Commission commends the following form, modelled on a similar provision in the *Constitution Act 1975* (Vic):

#### 1. Recognition of Aboriginal peoples

- (1) The Parliament acknowledges that the Colony of Western Australia was founded without proper consultation, recognition or involvement of its Aboriginal peoples or due respect for their laws and customs.
- (2) The Parliament recognises that Western Australia's Aboriginal peoples, as the original custodians of the land on which the Colony of Western Australia was established —
  - (a) have a unique status as the descendants of Australia's first people;
  - (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Western Australia; and
  - (c) have made a unique and irreplaceable contribution to the identity and wellbeing of Western Australia.
- (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 Western Australia.

64. The Commission notes that a new constitutional statehood process is currently underway in the Northern Territory and that the further consideration of constitutional recognition of Aboriginal customary law as a source of law will be a part of that process. The Commission notes the comments of the Law Council of Australia in its submission to the Commission's Discussion Paper that a more extensive consideration of the constitutional recognition of Aboriginal customary law is required before such recognition can be ruled out. The Commission suggests that the Western Australian government monitor this process with a view to considering greater constitutional recognition of Aboriginal customary law in the future.

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