

# Chapter Six

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## Aboriginal Customary Law and the Civil Law System

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# Tortious Acts and Omissions

## Australian Tort Law

In Australian law the legal branch of torts has developed to provide redress for wrongful acts or omissions that have caused injury (physical or economic) to another person. The principal objects of tort law are to deter wrongdoing and to compensate losses arising from conduct contravening socially accepted values. Legal liability in tort generally arises where an act done or omission made has caused a party identifiable damage in circumstances where a duty of care exists between the tortfeasor (the wrongdoer) and the party that is wronged, and that duty is breached.<sup>1</sup> Whether a duty of care exists under Australian law will generally depend upon whether the damage was reasonably foreseeable and whether there is a sufficient degree of proximity (or factual closeness of relationship) between the tortfeasor and the injured party. The fundamental principle underlying tort law is liability based on individual fault.

## An Aboriginal Customary Law of Tort?

The position under Aboriginal law differs markedly to that under Australian law. In Aboriginal society the notion of kinship<sup>2</sup> governs duties owed to others. Many duties which may appear to Western eyes to be unenforceable social obligations will carry significant consequences under customary law.<sup>3</sup> These duties include the duty to care for and support kin; the duty to protect certain kin; and duties arising in relation to accidents or negligent acts or omissions. In respect of the latter the Commission heard of many examples where a range of people were held liable under customary law – not because of responsibility for a

direct act causing harm, but because they stood in a special kin relationship with the person harmed or with the wrongdoer.<sup>4</sup> The Commission also found that the liability attaching to breach of kinship obligations or tortious offences is generally a strict liability without opportunity for defence.<sup>5</sup>

The Commission's research revealed that customary law responses to the breach of kinship duties can vary and are not always commensurate with the harm caused. Responses can range from social penalties (such as ridicule, shaming or ostracism) to physical penalties (such as battery or wounding). However, the characterisation of a particular customary law response as 'social' rather than 'physical' should not necessarily be taken to indicate a less serious breach of obligation: social penalties are likely to be far more seriously regarded in Aboriginal society, where the notion of kinship and community underpins a person's entire existence, than in non-Aboriginal society which is generally predicated on the concept of the nuclear family underwritten by individualism.

The Commission's consultations and relevant anthropological research revealed that the object of responses at customary law to the breach of kinship obligations appears to be punishment rather than compensation. There is, in this regard, an apparent difference between Aboriginal law and Australian law, which is based on the compensatory principle of returning the injured party to the position (as far as is possible) that they were in before the wrong occurred. However, as noted in the Commission's Discussion Paper, it could compellingly be argued that responses for tortious wrongs under Aboriginal customary law are compensatory in the sense that their primary purpose is to restore harmony to a family or community rather than to exact 'revenge' for the harm suffered.<sup>6</sup>

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1. There are certain recognised categories of relationship where a positive duty of care attaches; for example, parent-child, doctor-patient and teacher-student.
  2. For a fuller explanation of kinship, see discussion under 'The role of kinship in Aboriginal society', Chapter Four, above p 66.
  3. For further discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 269.
  4. *Ibid* 270–71.
  5. *Ibid* 271.
  6. *Ibid* 272.

*In Aboriginal society many duties which may appear to Western eyes to be unenforceable social obligations will carry significant consequences under customary law.*

## Recognition of Aboriginal kinship obligations

In its Discussion Paper the Commission made a number of proposals for the recognition of Aboriginal kinship obligations in Western Australian law.<sup>7</sup> However, in respect of tortious acts and omissions the Commission was of the opinion that the content of Aboriginal kinship obligations (and responses to their breach) is a matter for Aboriginal people alone and should not be subjected to unnecessary interference by the general law. In reaching this conclusion the Commission noted that in

many cases the kinship duties owed by Aboriginal people under customary law are in the nature of social obligations (at least in the eyes of Australian law) and are therefore not the proper subject of state control.<sup>8</sup> The Commission received no submissions in relation to tortious acts or omissions and no new evidence has arisen to persuade the Commission of the need for recognition of Aboriginal customary laws in this area. The Commission therefore confirms the conclusions reached in its Discussion Paper and declines to make recommendations for reform in this area.



7. See, for example, proposals to recognise classificatory kin relations in relation to distribution of Aboriginal intestate estates (Proposal 52); provision for dependants (Proposal 55); cultural objections to autopsy (Proposal 58); prisoner attendance at funerals (Proposal 47); adoption (Proposal 67); and foster care and alternative child welfare placement (Proposal 68): *ibid.*

8. *Ibid.* 272. The Commission also took into account the fact that in cases concerning Aboriginal people and torts committed against them, courts traditionally recognise matters specific to the Aboriginality of the victim. In particular, loss of cultural fulfilment, loss of tribal standing and consequent loss of ceremonial function have been significant factors in the awarding of damages for loss of amenities where an Aboriginal plaintiff is involved.

# Contractual Arrangements

## The Existence of a Customary Law of Contract

Anthropological research has revealed evidence of extensive trade routes and regulated trade or supply agreements between individuals and groups in traditional Aboriginal society. The enforceability of obligations under these agreements and sanctions consequent upon breach, together with the elements of promise exchange, bargain and the sophisticated nature of rules governing transactions indicate that, in a very broad sense, a customary law of contract did exist in traditional Aboriginal society. However, a strong social dimension, not mirrored in Australian law, can also be discerned in the various types of contractual arrangements in traditional Aboriginal society. For example, kinship obligation, reciprocity and social status appear to have played a central role in Aboriginal contractual arrangements and sometimes the social relationship between trading partners may be as important as the trade itself. The question for the Commission was whether there is a need for Australian law to functionally recognise Aboriginal customary laws in this area.<sup>1</sup>

### A need for recognition?

The Commission's research (and that of the ALRC before it) revealed no evidence of conflict between Aboriginal customary law and Australian law in relation to contract. The common law has developed various rules to regulate verbal agreements and unconscionability – two areas that have the potential to induce conflict or cause problems for Aboriginal people. In its Discussion Paper, the Commission determined that, in the absence of any evidence of current conflict between Aboriginal customary law and Australian law in this area, the potential for development of the common law to recognise customary rules of contract should remain a matter for

the judiciary. In the absence of any submissions to the contrary the Commission reiterates its view that no statutory intervention is required to direct courts to have regard to customary law in this area.<sup>2</sup>

## Protecting Aboriginal Consumers

In arriving at its conclusion the Commission was influenced by the fact that the majority of contracts entered into by Aboriginal Australians (and indeed all Australians) are consumer and credit contracts. These contracts are generally governed by legislation aimed at protecting the consumer and disputes surrounding such contracts are often settled without judicial intervention. Western Australia's consumer protection regime would therefore appear to provide a more practical focus in efforts to reduce any disadvantage that Aboriginal people may experience as a result of the different expectations traditionally placed upon Aboriginal contractual relations.

In its Discussion Paper the Commission examined relevant consumer legislation and looked at some of the specific issues facing Aboriginal consumers in Western Australia.<sup>3</sup> The Commission found that there was a clear case for more accessible consumer protection services and an urgent need for consumer education that is specifically targeted at Aboriginal people to increase knowledge of their rights and responsibilities as consumers. Western Australia's Department of Consumer and Employment Protection (DOCEP) has sought to address the special needs of Aboriginal consumers in Western Australia by the employment of Aboriginal educators, who are working closely with regional offices and Aboriginal advocates and Elders to create a framework for the appropriate delivery of consumer protection advice and services to Aboriginal communities. One finding of the Aboriginal educators was the lack of regional DOCEP presence in the Kimberley. The government has moved quickly to

1. See, LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 274–76.

2. *Ibid* 276–77.



remedy this problem by establishing a regional office in Kununurra which will focus on Aboriginal consumer issues.<sup>4</sup> DOCEP is also currently working on a separate Indigenous consumer website to provide accessible information about Western Australian protection programs for Aboriginal consumers including programs dealing with improvement of financial literacy among Aboriginal consumers; awareness of tenancy rights; and problems regarding the practice of 'book up' in rural and remote communities.<sup>5</sup>

## Book up

Book up is a type of informal credit system which operates with or without attached fees or interest and allows consumers to buy goods now and pay for them later. Book up can benefit consumers by helping them to manage their money between pay-days<sup>6</sup> and by allowing cash withdrawals where there are no banking facilities or where a person might otherwise have no access to credit. However, most stores that offer a book up facility require some form of security and in many cases a consumer's bank debit card or passbook will be retained. As highlighted in the Commission's Discussion Paper, there is a disturbingly common practice of the retention by traders of PIN

numbers with the cards of Aboriginal consumers.<sup>7</sup> This practice not only poses a serious risk of fraud and increases the potential for exploitation of Aboriginal consumers, but also gives traders primary control over their customers' accounts. As outlined in the Discussion Paper, the Commission heard stories where trader access to accounts has resulted in the totality of a consumer's income being withdrawn fortnightly to settle part of a debt leaving the consumer with no access to funds until the debt is fully paid. There have also been several cases of theft of cards and personal identification numbers (PINs) from stores or other traders. In circumstances where no local banking facilities exist, the theft or loss of cards can leave consumers without access to their accounts for some time. There is also the potential for consumer liability for any unauthorised transactions resulting from theft because of the previous disclosure of the consumer's PIN. Another problem with stores retaining cards as security is that when a store is closed (including for lengthy periods over holidays) consumers have no access to their funds.<sup>8</sup>

Apart from problems caused by the retention of PINs with customer debit cards, book up can also cause problems for Aboriginal consumers when it is not

3. Ibid 277–80.

4. Department of Consumer and Employment Protection (WA), Submission No. 48 (14 June 2006).

5. The website will also host the National Indigenous Consumer Strategy for which DOCEP is the lead agency.

6. This allows some Aboriginal families to manage the cycle of 'feast and famine': see Westbury N, *Feast, Famine and Fraud: Considerations in the delivery of banking and financial services to remote Indigenous communities*, Centre for Aboriginal Economic Policy Research, Discussion Paper 187 (1999).

7. National Indigenous Consumer Strategy Working Party, *Taking Action, Gaining Trust: A national Indigenous consumer action plan 2005–2010*, Consultation Document (undated) 12–13.

8. Renouf G, *Book Up: Some consumer problems*, ASIC (2002) 5.

*As highlighted in the Commission's Discussion Paper, there is a disturbingly common practice of the retention by traders of PIN numbers with the cards of Aboriginal consumers.*

managed well or where traders or others take advantage of the system.<sup>9</sup> Book up can encourage over-buying, particularly where no credit limit is set by the trader.<sup>10</sup> This can lock people into a debt spiral and promote dependency on a particular store.<sup>11</sup> Other problematic trading conduct associated with the use of book up in Aboriginal communities includes traders charging higher prices for goods and services (even in circumstances where a book up fee is also charged); allowing relatives to book up on an individual's account without authorisation; and failing to provide accounts to customers, making it difficult to keep track of expenditure.

In response to these problems the Australian Securities and Investments Commission (in association with Australian consumer protection agencies) created a book up kit which was launched in Kalgoorlie in December 2005. The kit is designed to assist traders in implementing responsible book up practices and to support Aboriginal consumers in identifying and addressing problems with book up in their communities. It offers consumer advice on such things as negotiating payment plans, registering complaints and taking action against traders. It also sets out alternatives to book up,<sup>12</sup> and details successful financial management and book up practices instituted in other communities. DOCEP advised the Commission that it has distributed over 200 copies of this resource guide to community groups in Western Australia, but that

[d]espite concerns over book up, Consumer Protection has received no formal complaints in relation to book up which could form the basis of an investigation. It is, therefore, not possible to determine if the distribution of this resource guide has had a specific impact on book up practices in Western Australia. However, it is a specific, targeted, attempt to increase awareness in the Indigenous community of the pitfalls that can accompany book up and best practices for the conduct of book up.<sup>13</sup>

DOCEP also advised that financial institutions, including major banks, have recently 'agreed to implement changes to their merchant EFTPOS agreements to prohibit the retention and/or requesting of PINs from consumers',<sup>14</sup> which is seen as a significant commitment by that industry to improving book up practices in Australia. DOCEP is closely monitoring the proposed introduction of a mandatory code of practice for book up in the Northern Territory<sup>15</sup> and, if found to be effective, will investigate its potential in Western Australia.

The Commission is hopeful that these measures, along with the implementation of the comprehensive National Indigenous Consumer Strategy, will make significant inroads into the consumer issues identified in the Discussion Paper. Given the attention that these issues are currently receiving from DOCEP, the Commission has not felt it necessary to make any recommendations in this regard.

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9. See McDonald I, *Good Bookup, Bad Bookup* (Perth: Financial Counsellor's Resource Project WA, 2002).

10. Westcombe R, 'Bad Money Business' (1991) 2(50) *Aboriginal Law Bulletin* 6, 7. See also Renouf G, *Book Up: Some consumer problems*, ASIC (2002) 5-6.

11. Westcombe, *ibid*.

12. Such as voucher systems, money-fax systems, community banks and credit unions, phone or internet banking transfers, and the Centrepay system provided by Centrelink.

13. Department of Consumer and Employment Protection (WA), Submission No. 48 (14 June 2006) 5.

14. *Ibid*. Australian Bankers' Association, 'Banking sector to assist government and regulator to improve book up practice', media statement (23 March 2006).

15. Announced on 9 June 2006.

# Succession: Distribution of Property upon Death

Succession laws govern the distribution of property upon death and include laws relating to wills, intestacy (where a person dies without leaving a will), administration of the estates of deceased persons and family provision. In traditional Aboriginal society the ownership of property and the right to trade, exchange, pass on, will or gift such property were governed by certain rules. These rules or laws varied from tribe to tribe (or group to group); however, in most cases the range of things that could be personally owned in traditional Aboriginal society (and therefore passed on after death) was restricted under Aboriginal customary law. For example, land and permanent natural resources were inalienable and belonged communally to the tribe or clan. Songs, sacred emblems, designs and dances were also generally communally owned and apart from the necessary hunting and gathering implements, people had few personal possessions.<sup>1</sup>

## Customary Law Distribution of Property upon Death: Continuing Application

While communal ownership remains the dominant paradigm in Aboriginal society in relation to cultural property and to land the subject of claim under native title, contemporary Aboriginal people have, for the most part, accepted the cash economy and there would appear to be greater opportunities for the individual accumulation of material possessions. During its consultations with Aboriginal people, the Commission heard that some families and groups still follow traditional customary laws of property distribution (or a modified version of them) upon the death of a family member.

As outlined in the Commission's Discussion Paper, relevant customary laws still practised in Western Australia include distribution of property to designated kin; destruction of a deceased's property (usually by fire); disposal of property to distant tribes or groups; and determination of property distribution by family Elders.<sup>2</sup>

Some groups reported conflict where the deceased's intentions regarding property distribution upon death were not written down or widely known or where customary law required a system of distribution that did not satisfy immediate kin.<sup>3</sup> Many Aboriginal people appeared to accept 'white' inheritance practices in relation to personal and real property; however, 'customs surrounding the inheritance of intellectual property, kinship obligations, sacred objects and cultural custodianship remained significant to most Aboriginal people consulted on this matter'.<sup>4</sup>

## Aboriginal Intestacy Laws in Western Australia

In Western Australia the *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPA Act) governs the distribution of the estate of an Aboriginal person who dies without a valid will.<sup>5</sup> The AAPA Act and associated Regulations (the AAPA scheme) provide for the deceased's property to be immediately vested in the Public Trustee and for distribution to be undertaken according to the general intestacy provisions of the *Administration Act 1903* (WA).<sup>6</sup> If no persons entitled under the general provisions can be found then the property may be distributed to a customary law spouse, the children of a traditional marriage or a parent 'by reason of tribal marriage'.<sup>7</sup>

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 281–82.

2. Ibid 282–83.

3. Ibid 283, citing the Commission's consultations in Geraldton, Bunbury and Broome in 2003.

4. Hands TL, 'Recognition of Aboriginal Customary Laws in WA' (2006) 33(2) *Brief: Journal of the Law Society of Western Australia* 25, 26.

5. For a full discussion of the application of the current provisions of the *Aboriginal Affairs Planning Authority Act 1972* (WA), see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 284–88.

6. These provisions, found in Part II of the *Administration Act 1903* (WA), apply to all intestate estates in Western Australia and provide for the order of distribution of an intestate deceased's property. Distribution of Aboriginal intestate estates under the specific provisions of the AAPA scheme is only realised if no person of entitlement can be found under the general provisions.

7. *Aboriginal Affairs Planning Authority Regulations 1972* (WA) reg 9(1).

The AAPA scheme further provides that a moral claim may be made against an Aboriginal deceased estate within two years of the date of death if no other valid claim is made on the estate. A moral claim may be made by a person who has, for instance, had primary care of the deceased throughout his or her life or, perhaps, by someone who is in a special classificatory relationship with the deceased. The procedure relating to applications for moral claims to an intestate Aboriginal estate under s 35(3) of the AAPA Act are found in regs 9(5) and 9(6) of the AAPA Regulations. Under those regulations an application must be made to the Public Trustee who is required to cause the claim to be investigated and report in writing to the Minister of Indigenous Affairs. The Minister then makes a recommendation to the Governor in respect of the order that should be made in relation to the moral claim. If no person with a claim to the deceased estate can be found and if no moral claims are lodged or approved, the estate will vest in the Aboriginal Affairs Planning Authority to be held in trust for the benefit of 'persons of Aboriginal descent'.<sup>8</sup>

## Criticisms of the AAPA scheme

Although the AAPA scheme was established to specifically cater for Aboriginal people and recognise their customary laws in the distribution of their estates, the operation of the scheme and its cultural appropriateness has been subject to substantial criticism. In its Discussion Paper the Commission outlined a number of criticisms including:

- That the AAPA scheme discriminated against Aboriginal people because the automatic vesting of an estate in the Public Trustee may deny the right of families to administer the estate of a deceased Aboriginal relative.<sup>9</sup>
- That the qualification requirement in s 33 of the AAPA Act which limits application of the scheme to Aboriginal people of at least 'one-fourth of the full blood' was difficult to apply in practice and may require extensive genealogical research (the costs of which will usually be subtracted from the estate).

- That the qualification requirement denied the rights of customary law marriage partners of a deceased person who has lived within and identified with a particular Aboriginal community, but who is less than one-fourth Aboriginal blood.<sup>10</sup>
- That the 'protection era' terminology of the definition of 'Aboriginal' in s 33 of the Act was likely to cause offence to some Aboriginal people and may be contrary to s 10 of the *Racial Discrimination Act 1975* (Cth).
- That the AAPA scheme cannot apply to an Aboriginal person married according to Australian law.<sup>11</sup>
- That despite claims to recognition of Aboriginal customary law the emphasis in the AAPA scheme remained on lineal relationships (reflecting a non-Aboriginal notion of kinship) rather than collateral or classificatory relationships.
- That the AAPA scheme evidenced significant bias toward male relatives, which does not accurately reflect the customary laws of all Western Australian Aboriginal groups.
- That entitlement under the AAPA scheme (in particular under reg 9) was difficult to prove and that claims will often, therefore, progress immediately to the moral claim process.<sup>12</sup>

## Reform of Aboriginal Intestacy Laws

In considering reform of the law in this area, the Commission investigated statutory schemes for the administration of Aboriginal intestate estates in Queensland and the Northern Territory. A full discussion of the advantages and disadvantages of these schemes may be found in the Discussion Paper.<sup>13</sup> The Commission proposed changes to the current scheme to address the criticisms observed above, to rectify problems with the practical application of the AAPA scheme, and to import positive aspects of schemes operating in other jurisdictions. Among other things the Commission proposed that:

8. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 35(3). For the past two financial years intestate receipts have averaged approximately \$8,500: Aboriginal Affairs Planning Authority, *Annual Report 2004–2005* (2005) 91.

9. Although this provision has never been challenged before a court, it may nonetheless be in contravention of the *Racial Discrimination Act 1975* (Cth).

10. These persons will have their property distributed according to the *Administration Act 1903* (WA) which does recognise de facto relationships if certain conditions are met.

11. *Aboriginal Affairs Planning Authority Regulations 1972* (WA) reg 9(1)(b).

12. Many of these issues were brought to the Commission's attention by the Office of the Public Trustee which strongly supported reform of the law in this area. The Commission wishes to thank the Public Trustee's Principal Legal Officer, Michael Bowyer, for his valuable assistance during this reference.

13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 288–91.

- the offensive definition of 'person of Aboriginal descent' in s 33 of the AAPA Act be replaced with a new standard definition;<sup>14</sup>
- the discriminatory provision automatically vesting Aboriginal deceased estates in the Public Trustee be repealed;
- traditional Aboriginal marriage be recognised as a marriage and children of a traditional Aboriginal marriage be recognised as issue of a marriage for the purposes of the *Administration Act*;
- the moral claims process under the AAPA scheme be retained so that persons who enjoy a classificatory relationship under the deceased's customary law may apply to succeed to the estate if no person of entitlement can be found under the *Administration Act*; and
- that sub-regs 9(1)–(4) of the AAPA Regulations be repealed.<sup>15</sup>



All submissions received on the Commission's proposals for reform of the AAPA scheme were supportive of the proposed changes. However, the Public Trustee drew the Commission's attention to the expense of Supreme Court proceedings in determining whether a person should succeed to an estate as classificatory kin, suggesting that such claims could instead follow the moral claims process.<sup>16</sup> The Public Trustee also provided submissions on how to improve the current moral claims process. Having considered the submissions in detail the Commission accepts that classificatory kin entitlements may be dealt with fairly in the moral claims process and without the expense of a Supreme Court action, which in the case of a small estate could be a considerable portion of the beneficiaries' inheritance.<sup>17</sup>

The Commission further acknowledges the Public Trustee's experience in dealing with moral claims and accepts the Trustee's advice on improving aspects of the current moral claims process, including creating capacity for the Minister of Indigenous Affairs to compel documents relevant to determining the claim and to direct the Department of Indigenous Affairs to undertake any investigations it thinks fit. These changes are reflected in the Commission's final recommendation to Parliament.

Although not referring specifically to claims of classificatory kin, the Aboriginal Legal Service (ALS) also expressed concern about the costs and accessibility of administration proceedings in the Supreme Court. The ALS submitted that lower courts should have the power to deal with intestate estates and probate in cases where the value of the estate falls within the court's civil jurisdiction.<sup>18</sup> The Commission understands the motivation behind this submission; however, it notes that the Supreme Court possesses invaluable experience in the probate jurisdiction and that this may, in fact, work to the advantage of applicants by reducing court time and associated legal costs. Nonetheless the Commission believes that, in consultation with the Supreme Court, provision should be made<sup>19</sup> to ensure that proceedings in relation to an intestate estate with a value of less than \$100,000, or an amount otherwise prescribed, be conducted speedily and with as little formality and technicality as is possible, in order to minimise the costs to the parties. The Commission has therefore amended its recommendation to Parliament accordingly.

14. For the text of the standard definition recommended for Western Australian written laws, see Recommendation 4, above p 63.

15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 291–92, Proposal 52.

16. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 19.

17. In discussions with the Public Trustee the Commission expressed some reservations about allowing an intestate Aboriginal estate of large monetary value to be distributed via moral claim, which is essentially an executive process. However, the Public Trustee advised that it would be very unlikely that such an estate would reach the moral claims process because the size of the estate would enable very thorough genealogical research to be undertaken to identify a beneficiary entitled under s 14 of the *Administration Act 1903* (WA).

18. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11–12.

19. Whether by amendment to specific legislation, amendment to the *Supreme Court (General) Rules 2005* (WA) or by a practice direction of the Supreme Court.

## Recommendation 65

### Administration of intestate Aboriginal estates

1. That the present definition of 'person of Aboriginal descent' contained in s 33 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be deleted and that the standard definitions of 'Aboriginal person' and 'Torres Strait Islander person' contained in Recommendation 4 of this Report apply.
2. That the requirement in ss 34 and 35(1) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) that all property of an intestate Aboriginal deceased be automatically vested in the Public Trustee be removed so that the family or next of kin of such deceased may have the choice to administer the estate of the deceased by grant of formal letters of administration under the *Administration Act 1903* (WA).
3. That s 35(2) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be repealed so that distribution of an estate of an intestate Aboriginal person shall follow the order of distribution contained in s 14 of the *Administration Act 1903* (WA).
4. That sub-regs 9(1)–(4) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be deleted and that any other consequential amendments be made.
5. That traditional Aboriginal marriage be recognised as a marriage and that children of a traditional Aboriginal marriage be recognised as issue of a marriage for the purposes of the *Administration Act 1903* (WA).
6. That, in consultation with the Supreme Court, provision be made that proceedings in relation to an intestate estate with a value of less than \$100,000, or an amount otherwise prescribed, be conducted speedily and with as little formality and technicality as is possible, and so as to minimise the costs to the parties.

### Moral claims against intestate Aboriginal estates

7. That s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) dealing with moral claims be amended to read:

Where there is no person entitled to succeed to the estate of the deceased under s 14 of the *Administration Act 1903* (WA), and no valid claim is made to the balance of the estate within two years after the date of

death of the deceased, the Governor may, on application, order that such balance be distributed beneficially amongst any persons having a moral claim thereto.

8. There should be legislative provision that, without limiting the factors to be taken into account in determining whether a moral claim exists, the Minister for Indigenous Affairs may consider as relevant that the applicant was in a classificatory kin relationship with the deceased under the deceased's customary law.
9. That sub-reg 9(5) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be amended to provide that a person alleging a moral claim against an undistributed Aboriginal deceased estate pursuant to s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) may apply to the administrator<sup>20</sup> for an order for distribution of the whole estate or a portion of the estate.
10. That sub-reg 9(6) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be amended to provide that as soon as reasonably practicable after receiving an application referred to in sub-reg 9(5), the administrator shall provide a written report to the Minister for Indigenous Affairs in respect of the moral claim. In making a decision on the moral claim the Minister may request further information from the applicant or the administrator, compel any person, financial institution or government agency to produce relevant records or direct the Department of Indigenous Affairs to undertake any investigations it thinks fit. If satisfied that an order of distribution should be made in relation to the moral claim, the Minister shall make such recommendation to the Governor.
11. That a new s 35(4) be inserted into the *Aboriginal Affairs Planning Authority Act 1972* (WA) to read:

Where, after a period of four years of the date of grant of letters of administration for the deceased's estate, no order is made under s 35(3) or where such order is made in respect of a portion of the balance of the estate only, the administrator of the estate shall thereupon vest the estate in the Authority<sup>21</sup> upon trust that it shall be used for the benefit of persons of Aboriginal descent.

*Implementation of Recommendation 65 will remove the discriminatory measures found in the current AAPA scheme while allowing for greater recognition of important classificatory kin relationships through the moral claims process.*

## Obligation to administer Aboriginal intestate estates

As discussed above, the current system vests Aboriginal intestate estates that qualify under the *Aboriginal Affairs Planning Authority Act 1972* (WA) in the Public Trustee for administration. While this is, as noted above, discriminatory in that it denies the right of families to apply for letters of administration in respect of these estates, it nonetheless provides an important community service for Aboriginal people, particularly in relation to small estates. The Commission is aware that the *Public Trustee Act 1941* (WA) is currently under review and that the Public Trustee is seeking changes to the Act to allow it to become self-funding.<sup>22</sup> This may mean that more money is available to the Public Trustee to provide better services to its clients, but it may also mean that the Public Trustee will be under a more commercial imperative in regard to the estates that it chooses to administer.

While it is likely that the Public Trustee will continue to administer small intestate Aboriginal estates as part of its community service role, if the above recommendation is implemented it will no longer be obliged to do so. The Commission is concerned that Aboriginal people may have little experience in these matters and, because of the Public Trustee's longstanding role in administering estates under the AAPA scheme, some may have come to depend on the Trustee to handle affairs relating to administration of an estate following a death. The Commission also notes that the ALS is currently not adequately resourced to assist Aboriginal people to apply for letters of administration or support them in discharging the duties of an administrator. In these

circumstances the Commission recommends that the Public Trustee be obliged to administer small intestate Aboriginal estates when it is expedient to do so or when the family of the deceased requests it. In harmony with Recommendation 65, the Commission has set the definition of 'small estate' at \$100,000.

### Recommendation 66

#### Obligation to administer Aboriginal intestate estates

That, as part of its community service role, the Public Trustee be obliged to administer intestate Aboriginal estates valued at less than \$100,000 when it is expedient to do so or when the family of the deceased requests it.

## Proof of relationship to an Aboriginal deceased

The Commission believes that implementation of Recommendation 65 will remove the discriminatory measures found in the current AAPA scheme while allowing for greater recognition of important classificatory kin relationships through the moral claims process. However, the Commission acknowledges that issues may still exist in relation to proof of entitlement under s 14 of the *Administration Act*, particularly where an Aboriginal person's birth was not registered under Australian law<sup>23</sup> or where that person was removed from his or her family pursuant to previous government policies in Western Australia.<sup>24</sup> In its Discussion Paper the Commission invited submissions on whether a

20. It is acknowledged that in most moral claim cases the administrator will be the Public Trustee (because those entitled to administer the estate are generally beneficiaries of the estate in which case the estate would be fully distributed and not subject to the moral claim process); however, under s 25 of the *Administration Act 1903* (WA) a creditor may apply to administer an estate in certain circumstances and could therefore be obliged to find beneficiaries for the remainder of the estate, possibly by way of the moral claims process.

21. The Aboriginal Affairs Planning Authority referred to in the *Aboriginal Affairs Planning Authority Act 1972* (WA) s 8.

22. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 26.

23. It is apparent that prior to 1970 not all births of Aboriginal people were recorded and registered.

24. For example, pursuant to protection and assimilation legislation such as the *Aborigines Protection Act 1905* (WA). Children taken from their parents pursuant to these policies ultimately became known as the 'stolen generation'.

relaxed standard of proof should apply in these circumstances. As it appears that the procedures attached to the moral claim process under the AAPA Act are currently working well, the Commission suggested that a similar process<sup>25</sup> may be implemented to determine the entitlement of an Aboriginal person of unregistered birth to an Aboriginal intestate estate.

Submissions received by the Commission supported a recommendation for a relaxed standard of proof in these circumstances. The Department of Indigenous Affairs submitted that, subject to the appropriate funding, its Aboriginal History Research Unit (AHRU) would be in a position to undertake the required investigations on behalf of the Minister.<sup>26</sup> The department submitted that:

The AHRU has an extensive network of contacts with other government agencies (particularly the Family Information Record Bureau located within the Department of Community Development), genealogical services, Native Title Representative Bodies, link-up services, and Aboriginal organisations.<sup>27</sup>

Noting the support for the Commission's recommendation to 'free-up' intestate Aboriginal estates allowing Aboriginal people to apply for letters of administration in the normal way, the Commission now believes that a 'certificate' issued by the executive as conclusive evidence of entitlement to succeed to an estate is not appropriate. However, it does accept that there is a need for a means of proving one's identity or relationship to a deceased in circumstances where the Aboriginal claimant is of unregistered birth or was a member of the stolen generation and perhaps assumed a new identity. The Commission has therefore recommended the following application process for written notice of proof of relationship to a deceased so that an administrator of an estate or the Supreme Court can take the person's claim into account in any decision relating to distribution of an intestate estate or application for letters of administration of an intestate estate.

The Commission believes that the costs of proving relationship to a deceased in the circumstances described should be borne by the state. It would be unreasonable to expect such costs to be deducted from the estate of an Aboriginal deceased or charged

to the applicant where the lack of proof of identity was due to previous government policy. The Commission suggests that the following provisions be incorporated into a new s 35(6) of the *Aboriginal Affairs Planning Authority Act 1972* (WA).

### Recommendation 67

#### Proof of relationship to an Aboriginal deceased

That a new s 35(6) be inserted into the *Aboriginal Affairs Planning Authority Act 1972* (WA) to provide:

1. That in circumstances where an Aboriginal person claims entitlement to distribution of an intestate Aboriginal estate under s 14 of the *Administration Act 1903* (WA) but has no proof of relationship to the deceased because his or her birth was not registered under Australian law or because the claimant was removed from his or her family pursuant to previous government policies in Western Australia, a notice in writing from the Minister for Indigenous Affairs should be taken as conclusive evidence of the claimant's identity and relationship to the deceased.
2. That an application for proof of relationship should be made to the administrator of the estate who shall provide a written report to the Minister for Indigenous Affairs in respect of the claim. In making a decision on the claim the Minister may request further information from the applicant or the administrator of the estate or, in case of partial intestacy, the executor or administrator with the will annexed, compel any person or organisation to produce relevant records, or direct the Department of Indigenous Affairs to undertake any investigations it thinks fit. If satisfied that the applicant is who he or she claims to be, the Minister shall produce a written notice to that effect.
3. That an application under (2) above may only be made in respect of an intestate Aboriginal estate of less than \$100,000 value at the date of the application.

25. The process is similar; however, since the process does not enable succession to an intestate estate the Commission felt that the extra step of approval by the Governor, which is an important safeguard in the moral claims process, was not required for proof of relationship to an Aboriginal deceased.

26. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 15.

27. Ibid 2.

## Release of funds of intestate estates by financial institutions

In making its recommendations for reform, the Commission was mindful of the fact that the application of the AAPA scheme is limited in practice by the need for intestate Aboriginal estates to be brought to the notice of authorities.<sup>28</sup> In some cases there is capacity for kin to apply customary law to the distribution of a deceased's personal property without legislative or government interference; for example, where the deceased did not individually own any real property (that is, land or residential property) or have significant material or cash assets.<sup>29</sup> In other cases the costs of administration may be such that they would significantly diminish the size of the estate, perhaps rendering it worthless. The Public Trustee has advised the Commission that most intestate Aboriginal estates that it administers are relatively modest, generally averaging around \$8,000.<sup>30</sup>

Under s 139 of the *Administration Act 1903 (WA)* kin may claim cash held in financial institutions for funeral and associated expenses without formal letters of administration. Set in 1983, the gazetted amount permitted for release under this section is \$6,000; however, financial institutions regularly exceed that amount, sometimes paying out up to \$50,000 to meet the immediate needs of bereaved families.<sup>31</sup> These institutions appear to be acting without legal authority and could potentially be held liable for the discretionary release of funds over the prescribed amount, particularly if released to the wrong person.<sup>32</sup> In these circumstances, and in recognition of the importance of this provision in facilitating the distribution of small estates of intestate Aboriginal deceased persons,<sup>33</sup> the

Commission proposed that the gazetted amount be reviewed and updated.<sup>34</sup> This reiterates a similar recommendation of the Commission in its 1990 review of the *Administration Act*.<sup>35</sup> All submissions on this matter were in support and the Commission therefore makes the following recommendation.

### Recommendation 68

#### Release of funds of intestate estates by financial institutions

That the prescribed amount declared by proclamation pursuant to s 139(1) of the *Administration Act 1903 (WA)* be reviewed and updated to an amount appropriate at the date of proclamation.

## The Importance of Wills

### Education

One way to ensure that relevant Aboriginal customary laws of distribution are observed upon death by Western Australian law is to make a will. Such a measure can provide Aboriginal people with the opportunity to express their customary law in terms of their own knowledge and beliefs. As well as recording a testator's wishes regarding the distribution of his or her property upon death, wills have the advantage of being able to record the testator's wishes in relation to location of burial and necessary burial rites to be applied upon death,<sup>36</sup> and can deal with a range of customary obligations.

28. As detailed in the Commission's Discussion Paper, the Public Trustee must first become aware of the death before the property of the deceased will vest in that authority for distribution under the scheme. The Commission also noted that in the case of very small estates, and even in the absence of automatic vesting in the Public Trustee, some families may ignore the legislative requirement of formal letters of administration: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 285.

29. In some cases property will be owned in joint tenancy with a spouse and money may be invested jointly allowing the spouse to access funds without the necessity of formal administration.

30. Michael Bowyer, Principal Legal Officer, Public Trustee (WA), email (2 June 2006). There are, however, some notable exceptions with large estates often resulting from awards of compensation for personal injury.

32. According to anecdotal information provided by the Public Trustee's Client Services Centre, at least one Western Australian bank will release up to \$50,000 under s 139 of the *Administration Act* while another two will release up to \$20,000.

32. Section 139 of the *Administration Act 1903 (WA)* permits a manager of a financial institution to release the prescribed amount to 'any person *who appears to the satisfaction of the manager* of the [bank] to be the widower, widow, parent or child' or de facto partner of the deceased'. (Emphasis added.)

33. In relation to small estates consisting of cash, this recommendation may effectively avoid the need for invoking the formal distribution scheme.

34. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 293, Proposal 53. As mentioned in the Discussion Paper, the Public Trustee submitted that an amount of \$30,000 would be appropriate in consideration of analogous provisions in other Acts. In recognition of the use of s 139 to distribute small estates, the Commission itself recommended that the amount be increased to \$15,000 in its *Review of the Administration Act 1903 (WA)*, Report No. 88 (1990) Recommendation 7. In view of the passage of time since the Commission's last consideration of this matter, the Commission agrees that the Public Trustee's suggested figure of \$30,000 is appropriate.

35. LRCWA, *Review of the Administration Act 1903 (WA)*, Report No. 88 (1990) Recommendation 7. See previous footnote for detail.

36. Although currently a testator's wishes regarding burial can be ignored by an executor this can assist in reducing family conflict regarding place of burial following a death. For further discussion and recommendation on this point, see Recommendation 78, below p 262.

The Commission believes that more can be done by government to encourage Aboriginal people to make wills to ensure that their wishes (be they customary law related or otherwise) are observed by the general law upon death. The Commission therefore proposed that a program aimed at educating Aboriginal people about the value of wills and also about their entitlements, rights and responsibilities under Western Australian laws of succession be established.<sup>37</sup> This proposal received strong support, both from Aboriginal people and from relevant government agencies.<sup>38</sup>

## Recommendation 69

### Wills education

1. That the Department of Indigenous Affairs be funded to establish a program aimed at educating Aboriginal people about the value of wills and also about their entitlements, rights and responsibilities under Western Australian laws of succession.
2. That in devising this program the Department of Indigenous Affairs seek advice from the Public Trustee, the Aboriginal Legal Service and other relevant organisations and individuals.

## Will-making

In its submission the Public Trustee observed that '[i]t is only worth educating people about making wills if they then have access to professionals who can prepare wills for them'.<sup>39</sup> The Public Trustee advised that it currently prepares wills for free where it is appointed an executor,<sup>40</sup> but that it is not funded to visit people outside of the Perth metropolitan area. Although it has a greater regional presence, the Aboriginal Legal Service is not currently sufficiently funded to undertake the task of drafting wills for Aboriginal people; nonetheless, it expressed strong support for the

educative initiative and suggested that will-making should be made a 'priority'.<sup>41</sup> The Commission agrees.

Since the release of the Commission's Discussion Paper a Bill has been introduced into Parliament to amend the *Wills Act 1970* (WA) to provide for, among other things, the relaxation of formal execution requirements where the Supreme Court is satisfied that a document embodies the testamentary intentions of a deceased. The definition of 'document' for this purpose includes video or sound recordings, informal records of information and electronic documents.<sup>42</sup> The Bill also allows the Supreme Court to have regard to extrinsic material, such as statements made by a deceased about his or her intentions.<sup>43</sup> In its submission the Department of Indigenous Affairs (DIA) suggested that 'video wills' would be a useful tool in recording the testamentary intentions of Aboriginal people:

An oral or visual method of recording a testator's wishes may be more suitable than a written will, and may have the added benefit of reducing family disputes during the administration of an estate if family members are able to see the deceased person making provisions for the distribution of his or her estate. DIA also notes that traditional Aboriginal practice may have allowed a person's word or oral instructions to be sufficient to decide who inherits. A 'video will' could support this traditional practice.<sup>44</sup>

While formal wills are to be encouraged (in particular, for ease of grant of probate) the Commission sees enormous potential for informal or 'video wills' to increase the incidence of will-making among Aboriginal people in Western Australia. It may also significantly reduce the costs associated with the making of formal wills. Nonetheless, the Commission believes that efforts must be made to ensure that informal wills are recorded in a controlled environment and preferably with independent legal advice to increase the probability of acceptance by the Supreme Court as the uncoerced testamentary wishes of the deceased. Consideration should also be given to appropriate storage of informal wills.

37. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 294, Proposal 54.

38. Dr Dawn Casey, Submission No. 24 (1 May 2006) 2; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 14; Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 21; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11. This proposal also received strong support in the Commissioner's consultations with Aboriginal people.

39. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 21.

40. Either directly or where a spouse or de facto partner is appointed executor with the Public Trustee appointed as executor or co-executor in default.

41. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

42. *Wills Amendment Bill 2006* (WA) cl 23(1).

43. *Wills Amendment Bill 2006* (WA) cl 22.

44. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 14.



The *Aboriginal Affairs Planning Authority Annual Report 2004–2005* shows that money received from intestate Aboriginal estates is currently held by the Authority ‘for the benefit of persons of Aboriginal descent’.<sup>45</sup> The Commission sees significant congruence in applying funds gained by the non-existence of wills of Aboriginal people to the cause of ensuring that those Aboriginal people who wish to make a will are funded to do so. It is the Commission’s recommendation, therefore, that funds held in the Authority’s Intestate Trust Account should be committed to ‘kick-start’ a will-making initiative to be headed by the Department of Indigenous Affairs in consultation with the Aboriginal Legal Service, the Public Trustee and regional legal practitioners.

### Recommendation 70

#### Will-making initiative

1. That the Department of Indigenous Affairs—in consultation with the Aboriginal Legal Service, the Public Trustee and regional legal practitioners—establish a will-making initiative for Aboriginal people in Western Australia.
2. That consideration be given to committing to this initiative the funds held in the Aboriginal Affairs Planning Authority’s Intestate Trust Account by virtue of the operation of the intestate provisions of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*.

## Family Provision

Entitlement to distribution of both testate and intestate estates in Western Australia is qualified by claims made for family provision under the *Inheritance (Family and Dependants Provision) Act 1972 (WA)*. Under this Act a person may make a claim against an estate if, by the deceased’s will or by virtue of the rules governing intestacy, adequate provision has not been made from the estate for the proper maintenance, support, education or advancement in life of that person.<sup>46</sup>

It is the Commission’s opinion that the provisions of the Act do not provide adequately for the extended kin relationships recognised in Aboriginal society.<sup>47</sup> Aboriginal people take their kinship obligations at customary law very seriously and these obligations may include the provision of housing, financial assistance, education or general support of persons in a classificatory kin relationship. In particular, child-rearing in Aboriginal society is often shared and the responsibility for provision for a child may fall with different kin throughout that child’s life. In these circumstances there is scope for a person in a customary law kin relationship with a deceased at the time of his or her death, who is wholly or partly dependant upon the deceased, to be inadequately provided for in the distribution of an Aboriginal deceased estate.

In its Discussion Paper, the Commission proposed amendment to the list of persons who may claim for

45. Department of Indigenous Affairs, *Aboriginal Affairs Planning Authority Annual Report 2004–2005* (2005) 91. Under s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972 (WA)* where no person can be found to succeed to an intestate Aboriginal estate, such money is vested in the Authority ‘upon trust that it shall be used for the benefit of persons of Aboriginal descent’.

46. *Inheritance (Family and Dependants Provision) Act 1972 (WA)* s 6.

47. The list of persons who may claim for family provision from an estate is found in *Inheritance (Family and Dependants Provision) Act 1972 (WA)* s 7. For further discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 294–95.

*Aboriginal people take their kinship obligations very seriously and these may include the provision of housing, financial assistance or general support of persons in a classificatory kin relationship.*

family provision against a testate or intestate Aboriginal estate to include a person who is in a kinship relationship with the deceased which is recognised under the customary law of the deceased and who, at the time of death, was being wholly or partly maintained by the deceased.<sup>48</sup> The Public Trustee has indicated its support for this proposal and no submissions have been received that oppose it.<sup>49</sup> The Commission therefore proceeds with its recommendation.

As with the recommendations for reform of Aboriginal intestacy laws (above), the Commission is concerned that the average Aboriginal estate may be too modest to sustain the costs associated with an application for family provision. The Commission has therefore recommended that, in consultation with the Supreme Court, provision should be made<sup>50</sup> to ensure that proceedings in relation to an intestate estate with a value of less than \$100,000, or an amount otherwise

prescribed, be conducted speedily and with as little formality and technicality as is possible, and so as to minimise the costs to the parties.

### Recommendation 71

#### Claims for family provision against an Aboriginal estate

1. That the list of persons entitled to claim against a testate or intestate estate of an Aboriginal person under s 7 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) be extended to include a person who is in a kinship relationship with the deceased which is recognised under the customary law of the deceased and who at the time of death of the deceased was being wholly or partly maintained by the deceased.
2. That traditional Aboriginal marriage be recognised as a marriage and that children of a traditional Aboriginal marriage be recognised as issue of a marriage for the purposes of the *Inheritance (Family and Dependants Provision) Act 1972* (WA).<sup>51</sup>
3. That, in consultation with the Supreme Court, provision be made that proceedings in relation to an intestate estate with a value of less than \$100,000, or an amount otherwise prescribed, be conducted speedily and with as little formality and technicality as is possible, and so as to minimise the costs to the parties.



48. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 295, Proposal 55.

49. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 22.

50. Whether by amendment to specific legislation, amendment to the *Supreme Court (General) Rules 2005* (WA) or by a practice direction of the Supreme Court.

51. For specific detail of the Commission's recommendation for recognition of Aboriginal traditional marriage in Western Australian legislation, see Recommendation 83, below p 274.

# Guardianship and Administration

The *Guardianship and Administration Act 1990* (WA) establishes a system to protect the rights of people with decision-making disabilities. In particular, it enables a substitute decision-maker to be appointed to make decisions in the best interests of the represented person. There are two types of substitute decision-makers that can be appointed:

- a guardian who makes lifestyle decisions for the represented person; and
- an administrator who makes financial and legal decisions for the represented person.

In cases where a suitable person cannot be found the Public Advocate will act as a guardian and the Public Trustee as administrator. Concerns have been raised about the application and accessibility of the guardianship and administration system to Aboriginal people in Western Australia and these are detailed in the Commission's Discussion Paper.<sup>1</sup>

## Improving Guardianship and Administration Services to Aboriginal People

### Office of the Public Advocate

In 2001 the Public Advocate commissioned a study into the needs of Aboriginal people within the guardianship and administration system in Western Australia. Since that time the Office of the Public Advocate has implemented a number of strategies to increase awareness of its services among Aboriginal people and to establish formal partnerships and protocols with Aboriginal and non-Aboriginal service providers to improve delivery of guardianship services to Aboriginal people. These strategies appear to be assessed and developed on a regular basis. In her submission, the Public Advocate indicated that one of her 'key priorities'

is to improve how her Office responds to Aboriginal people with decision-making disabilities.<sup>2</sup>

The Commission commends the Office of the Public Advocate for its work in increasing the visibility of and access to relevant services for Aboriginal people. In particular, the Commission notes the Office's recent report on elder abuse in Aboriginal communities which has raised awareness of this phenomenon in Western Australia.<sup>3</sup> The Commission hopes that protecting elderly Aboriginal people from physical, financial and psychological abuse will continue to remain a high priority for the Public Advocate and for government. This issue is discussed further in Chapter Seven: Aboriginal Customary Law and the Family.

### State Administrative Tribunal

The State Administrative Tribunal, established in January 2005, hears applications for guardianship and administration. In its Discussion Paper the Commission proposed that the tribunal assess the cultural appropriateness of its procedures and consider the development of a set of protocols and guidelines for members in relation to the management of hearings involving Aboriginal people.<sup>4</sup> The State Administrative Tribunal has responded that it agrees with the Commission's proposal and that it has taken steps to implement it.<sup>5</sup> While the Commission does not think it necessary that its proposal that the State Administrative Tribunal assess the appropriateness of its procedures in relation to Aboriginal people be formalised in a recommendation to Parliament, it strongly suggests that the tribunal consult with the Public Advocate, the Public Trustee and relevant Aboriginal organisations in devising culturally appropriate procedures and guidelines for the management of hearings involving Aboriginal people. In particular, the Commission draws the tribunal's attention to the matters discussed below in relation to assessment of

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 297–98.

2. Office of the Public Advocate, Submission No. 13 (18 April 2006) 1.

3. Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005).

4. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 298, Proposal 56.

5. State Administrative Tribunal, Submission No. 15 (24 April 2006) 1.

capacity and the need for specific protocols to be established to ensure that cultural aspects of competency are considered.

## Office of the Public Trustee

In its Discussion Paper the Commission observed that, because the current statutory regime in Western Australia automatically vests the estate of an intestate Aboriginal deceased in the Public Trustee, there is the potential (whether real or apparent) for conflict of interest where a beneficiary subsequently appoints the Public Trustee to administer his or her financial affairs (in particular, the money claimed from the deceased estate). The Commission therefore proposed that Aboriginal beneficiaries of deceased estates administered by the Public Trustee should be made aware of all alternatives for the financial management of their inheritance (including management by family members or private financial managers) and that these alternatives are appropriately communicated with the assistance of an independent legal or financial advisor and, if required, an interpreter.<sup>6</sup>

In its submission on this matter the Public Trustee commented that it would be extremely rare for a beneficiary to appoint the Public Trustee to administer their financial affairs and that this usually occurs only where the beneficiary is the subject of an administration order (where the Public Trustee is appointed as the administrator by a court or tribunal), where the beneficiary is under 18 years of age, or where there are legal reasons for delaying distribution of the estate.<sup>7</sup> The Commission accepts this advice. Furthermore, the Commission notes that in the event that its recommendations in relation to Aboriginal intestate succession in Western Australia are implemented by Parliament, the administration of Aboriginal intestate estates by the Public Trustee will be significantly less and so too will the potential for any conflict of interest. Nonetheless, given the past institutionalisation of Aboriginal people (in particular those of the stolen generation) and a history of Aboriginal dependency on state-controlled services, the Commission has decided to confirm its recommendation in the interests of promoting the financial independence of Aboriginal people. The Commission has, however, recast its

recommendation to take into account circumstances where the Public Trustee is required by law or duty to hold a beneficiary's money in trust.

### Recommendation 72

#### Financial management protocols

1. That where an Aboriginal person who is beneficiary of a deceased estate administered by the Public Trustee seeks voluntarily to place the management of their financial and/or legal affairs or of their inheritance in the hands of the Public Trustee, the Public Trustee must, before accepting such management:
  - (a) ensure that the person is made aware of alternatives for the financial management of their inheritance by communicating this in a culturally appropriate way, with the assistance of an interpreter if required; and
  - (b) encourage the person to seek independent legal and/or financial advice and refer the person to appropriate agencies or organisations such as the Aboriginal Legal Service, Legal Aid, the Financial Counsellors Resource Project and the Department of Consumer and Employment Protection.
2. That the same protocol should apply to the Public Trustee in regard to accepting an enduring power of attorney on behalf of an Aboriginal person.

## Other Matters

In its Discussion Paper, the Commission invited submissions on the capacity of the guardianship and administration system to adequately meet the needs of Aboriginal people and on the system's interaction with Aboriginal customary laws and cultural beliefs.<sup>8</sup> Outlined below are some of the important matters brought to the Commission's attention by responses to its invitation to submit.

6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 299, Proposal 57.

7. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 23.

8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 299, Invitation to Submit 10.

*The Commission hopes that protecting elderly Aboriginal people from physical, financial and psychological abuse will continue to remain a high priority for government.*

### Assessment of capacity: appointment of a guardian or administrator

A decision to appoint a guardian or administrator is a course of action which is taken by the State Administrative Tribunal as a last resort. An order will not be made if the needs of the person could be met 'by other means less restrictive of the person's freedom of decision and action'.<sup>9</sup> Under the *Guardianship and Administration Act*, the State Administrative Tribunal can appoint a guardian or administrator only if it is satisfied that a person lacks the capacity to make reasoned decisions about his or her person or estate. In determining capacity the State Administrative Tribunal will usually have regard to evidence from a psychiatrist, psychologist or other medical expert, as well as the views of those people who have an interest in the life of the person with the decision-making disability and, where possible, the person the subject of the hearing. In its submissions to this reference the Office of the Public Advocate has expressed concern that these capacity assessments often have no regard to a person's Aboriginality and that this may work to the disadvantage of Aboriginal people.

Often the assessment of an Aboriginal person's capacity is done from a non-Aboriginal perspective and does not fully consider cultural aspects of competency. Aboriginal people, particularly those from traditional backgrounds who come into contact with the guardianship and administration system can be severely disadvantaged because they do not understand the concepts of guardianship and administration.<sup>10</sup>

For example, the Commission was told by the Public Advocate that in one case an Aboriginal person assessed as having delusions using mainstream psychological methods was found by an Indigenous mental health expert not to be delusional when regard was had to the person's culture and belief system. In these

circumstances it may be appropriate, before making a decision regarding capacity, for the tribunal to cause cultural issues to be investigated further. The Public Advocate has urged wide consultation with an individual's family and community and culturally appropriate medical assessment; however, she notes that 'the public mental health and aged care sectors have limited capacity to fully assess a person's capacity in their cultural context and need to develop more appropriate assessment tools and expertise'.<sup>11</sup>

The Commission notes the observations of the Public Advocate and supports greater government resourcing for the development of culturally appropriate assessment methods in the public health sector. In the meantime, the Commission's widely supported recommendation<sup>12</sup> that all employees, contractors and sub-contractors of Western Australian government



9. *Guardianship and Administration Act 1990 (WA)* s 4.

10. Office of the Public Advocate, Submission No. 13 (18 April 2006) 3.

11. *Ibid.*

12. See Recommendation 2, above p 51.

agencies be required to undertake appropriately adapted cultural awareness training (which includes protocols and information specific to the role of the individual undertaking the training) should assist in improving the cultural knowledge of public sector healthcare professionals. The Commission has further recommended that all court and tribunal staff (including decision-makers) undertake similar training.<sup>13</sup> As part of the State Administrative Tribunal's current assessment of its procedures and protocols for dealing with hearings involving Aboriginal people, the Commission urges that the tribunal take steps to ensure that members are aware of and take into account Aboriginal perspectives in the process of assessing the decision-making capacity of an Aboriginal person.

### Recommendation 73

#### Assessment of decision-making capacity of an Aboriginal person

That, as part of its assessment of its procedures and protocols for dealing with hearings involving Aboriginal people, the State Administrative Tribunal take steps to ensure that members are aware of Aboriginal perspectives in the process of assessing the decision-making capacity of an Aboriginal person who may be the subject of an order for guardianship or administration.

## Cultural obligation to share

As observed in the Discussion Paper, some Aboriginal people have cultural obligations to kin and this can extend to sharing money or assets.<sup>14</sup> The Public Trustee submitted that this obligation can conflict with the duties of an administrator under the *Guardianship and Administration Act*. Section 72(3)(a) of that Act requires that an administrator seek the approval of the State Administrative Tribunal to 'make a payment or disposition of a charitable, benevolent or ex gratia nature' or to 'make a payment in respect of a debt or demand that the represented person is not obliged by law to pay'. An administrator will therefore (in the absence of previous authorisation by the tribunal) need to make an application to the tribunal to approve any requests to share money or assets pursuant to an Aboriginal person's cultural obligations.

While this section does limit the payments that the Public Trustee or other appointed administrator can make on behalf of an Aboriginal client, it is important (as the Public Trustee points out in its submission)<sup>15</sup> to protect Aboriginal people with decision-making disabilities from financial abuse. As noted earlier, the Public Advocate's recent report into the mistreatment of older people in Aboriginal communities has highlighted financial abuse as a significant issue in Western Australia.

Some elderly people, particularly from traditional communities, appear to have no 'western' concept of money and they give monies to relatives because they have a cultural obligation to share. Sometimes this type of relationship can be taken advantage of by perpetrators for their own financial gain.<sup>16</sup>

In these circumstances the Commission believes that, despite the potential conflict between the requirements of s 73(3)(a) of the *Guardianship and Administration Act* and Aboriginal customary laws or cultural beliefs, the interests of Aboriginal people with decision-making disabilities are best served by retaining the provision in its current form.

## Serving Aboriginal people in regional areas

### Regional visibility

Both the Office of the Public Advocate and the Office of the Public Trustee made submissions about the difficulty of serving clients in rural and regional areas. These offices are Perth-based and are generally only resourced to visit clients if the client's funds allow it or the special circumstances of the case demand it. It is the Commission's opinion that a greater regional and rural presence of the Public Advocate and Public Trustee would help Aboriginal people to become aware of the services offered and to develop greater trust in these institutions. It would also assist them to tailor their services in consultation with communities. Such presence needn't be permanent. Once contact has been established, annual or biannual visits to key regions would probably suffice to maintain a degree of visibility of these offices in regional Western Australia. The Commission commends the Public Advocate's initiative to develop protocols with agencies that have a regional presence and work with Aboriginal people. This is an

13. See Recommendation 128, below p 348.

14. See, for example, LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 38 'Obligation to accommodate kin'; 269 'Obligation to care for and support kin'.

15. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 25.

16. Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005) 25.

important manifestation of the whole-of-government approach embraced by governments at state and federal levels and endorsed by the Commission in this Report.<sup>17</sup>

### Need for local cultural consultants

Both the Office of the Public Trustee and the Office of the Public Advocate also drew the Commission's attention to the need for cultural consultants to assist them in dealing with individual Aboriginal clients in a culturally appropriate manner.<sup>18</sup> The Commission notes that both offices already provide cultural awareness training delivered by Indigenous consultants and that this has gone some way to helping their staff to better engage with their Aboriginal clients. However, Perth-based public officers are often given more general cultural awareness training and cannot be expected to know the local protocols that the diversity of Aboriginal people and cultures across the state necessarily demand in regional-based officers.<sup>19</sup> The existence of cultural consultants with knowledge specific to the locality in which the client is based would, in these circumstances, be very helpful. As mentioned in the Commission's Discussion Paper, the proposed community justice groups (Recommendation 17) will, when established, provide a useful source of local cultural knowledge for agencies such as the Public Trustee and Public Advocate. The Commission encourages these agencies to establish links and develop partnerships with community justice groups and local Aboriginal-owned or Aboriginal-run organisations to assist in acquiring necessary cultural information to better serve their clients.

#### Recommendation 74

##### Regional partnerships

That the Office of the Public Advocate and the Public Trustee establish links and develop partnerships with community justice groups and local Aboriginal-owned or run organisations to assist in acquiring necessary cultural information to better serve their clients.

## Importance of maintaining cultural environment

Section 51(2)(h) of the *Guardianship and Administration Act* requires guardians to act 'in such a way as to maintain the represented person's familiar cultural, linguistic and religious environment'. In light of the history of removal of Aboriginal people from their culture, the importance of supporting Aboriginal people with decision-making disabilities within their own communities to maintain their social, cultural, religious and linguistic connections cannot be overstated. However, the Public Advocate reported that this was often not possible because of the lack of specialised services in many communities, in particular alternative accommodation.<sup>20</sup> The Commission has elsewhere noted that the lack of appropriately resourced specialised services extends even to major regional centres.

What this means in practice is that where, for example, an Aboriginal person has an acquired brain injury (as a result of prolonged abuse of volatile substances for instance) or has some organic brain dysfunction, there is often no choice for the guardian but to place the person in a mental health or aged care facility. Similarly, a hostel or nursing home may be the only place where a person with severe physical disabilities can be accommodated. These environments may not only be inappropriate to the person's disability, but can also be a long distance from the person's community and may accommodate few, if any, other Aboriginal people. At the very least, placement in such a facility will remove the person from their usual environment and in many cases their connection to culture will be lost. The Commission reiterates its comments in Chapters Two and Three of this Report about the need for improved government service delivery, and increased resourcing for community-owned and culturally appropriate programs and services to Aboriginal communities.

17. See Recommendation 1, above p 48.

18. Office of the Public Advocate, Submission No. 13 (18 April 2006) 3; Department of the Attorney General, Submission No. 34 (11 May 2006) Appendix 1 (Public Trustee) 27.

19. See discussion under 'Cultural Awareness', Chapter Three, above pp 49–51.

20. Michelle Scott, Public Advocate, telephone consultation (7 June 2006).

# Coronial Inquests

Anthropological studies have shown that various forms of inquiries into cause of death were performed in traditional Aboriginal societies.<sup>1</sup> In Western Australia traditional 'inquests' included examination of bones of an exhumed body,<sup>2</sup> interpretation of signs on the ground surrounding a grave<sup>3</sup> and the use of 'inquest' stones, each representing a possible 'murderer', which were set up around a grave. Traditional Aboriginal people believed that drops of blood would pass from the buried body to a stone, indicating the person or group responsible for the death.<sup>4</sup> The purpose of a traditional Aboriginal inquest was to explain the death and allow the family of the deceased to consider whether they wished to take matters further<sup>5</sup> – either by initiating revenge or by demanding compensation to settle the grievance.<sup>6</sup>

Aboriginal people are therefore somewhat familiar with the notion of coronial inquiry and understand the benefit gained by processes that seek to explain a death. Research indicates that, while some groups may still practise a form of cultural inquiry following a death, the body itself would most likely be dealt with according to Australian law (that is, applying general mortuary and burial practices).<sup>7</sup> The Commission's consultations suggested that Aboriginal people are generally accepting of white institutional involvement in deaths; however, there were concerns about the cultural appropriateness of this involvement in some instances. In particular, some Aboriginal people reported that they felt their customary law was misunderstood or ignored

when white authorities became involved in investigating the death of an Aboriginal person. The Commission was therefore obliged to consider whether current coronial investigation processes in Western Australia were sufficiently culturally appropriate and respectful of the customary law of a deceased and the deceased's family.

## Improving Coronial Processes for Aboriginal People

The Commission's Discussion Paper examined the role of investigations into deaths in traditional Aboriginal societies and that of coronial investigations under current Western Australian law. Certain conflicts, both actual and potential, between the general law and Aboriginal customary law were identified; in particular, issues surrounding cultural objections to autopsy of a deceased and the definition of 'senior next of kin' in the *Coroners Act 1996 (WA)*. The Commission carefully considered the desirability and need for changes to the general law to recognise Aboriginal customary laws and other special needs of Aboriginal people in the coronial process. Having regard to the important role of the coroner in the investigation of suspicious deaths and in making recommendations for the prevention of further deaths, the Commission concluded that it was not appropriate to recommend the wholesale recognition of Aboriginal customary laws in respect of coronial matters. Nonetheless, the Commission

1. For a more detailed discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 300–301.
2. Prevalent in the western desert area of Western Australia: Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 354; Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 85–86.
3. Common in the south-west of the state: Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 349. See also Berndt & Berndt, *ibid* 474: 'Native doctors look for the presence of signs, which they can interpret: a small hole, for instance, or the tracks of some animals, bird or reptile. They may not specify a particular person, but merely locate a murderer "socially".'
4. This practice was common in the north Kimberley: Elkin, *ibid* 346; Berndt & Berndt, *ibid* 353, 475. In the southern-central Kimberley region this practice is recounted in traditional narratives; however, in that region the corpse was typically raised on a tree platform below which was placed a circle of 'named' stones. When the juices of the decomposing body fell on the stones, the native doctor is said to have been able to discern the person responsible for the death or alternatively from which direction the sorcery—which resulted in the death—originated: Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 102.
5. Berndt & Berndt, *ibid* 354.
6. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 344. The Commission's consultations in Wiluna reported that 99 per cent of deaths involve payback punishment delivered at the funeral gathering. It was not clear how responsibility was established for a death but it was said that it was usually 'due to "blame" or some past event'. See LRCWA, Project No. 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 26.
7. Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 104. Bohemia and McGregor state that inquests are no longer held by the Gooniyandi and that deaths are dealt with by white institutions; although there is some suggestion that traditional inquests (without full rites) are still held by the desert peoples of Fitzroy Crossing.

proposed some changes to address the perceived conflicts and to assist in easing cultural concerns of grieving Aboriginal families in relation to coronial processes.

## Definition of 'senior next of kin'

The senior next of kin of a deceased has certain rights in the coronial process. These rights include the right to object to autopsy and the right to be notified at certain stages of the process. A senior next of kin is defined in s 37(5) of the *Coroners Act* to include (in order of priority) a person who was living with the deceased immediately before the death and was either legally married to the deceased or over the age of 18 years and in a marriage-like relationship with the deceased (including same-sex relationships); a person who was, immediately before the death, legally married to the deceased (but not necessarily living with the deceased); a child of the deceased (over the age of 18 years); a parent of the deceased; a sibling of the deceased (over the age of 18 years); an executor or guardian; or a person nominated by the deceased to be contacted in case of emergency.

As observed in the Commission's Discussion Paper, the above definition of senior next of kin follows a Western family construct and does not allow for the broader notion of Aboriginal kinship or for recognition of senior kin under Aboriginal customary law.<sup>8</sup> It was noted that the Coroners Acts of the Australian Capital Territory, Queensland, Tasmanian and Northern Territory embrace a broader concept of family, providing specifically for Aboriginal and Torres Strait Islander cultural concepts of kin.<sup>9</sup>

Although conflicts arising from the different understandings of kin in Western and Aboriginal cultures were reported to the Commission in relation to other areas of law, the Commission received limited submissions on this matter in regard to coronial issues. The Commission therefore invited submissions from interested parties on whether there was a need to amend the definition of senior next of kin in the

*Coroners Act* to allow for a person to apply to the coroner to be recognised as senior next of kin having regard to the Aboriginal customary law of the deceased.<sup>10</sup>

As outlined in the Discussion Paper, this is not the first time that an amendment to the definition of senior next of kin to accommodate Aboriginal customary law has been touted in Western Australia. The Commission's invitation to submit was based on a recommendation of the 1999 Chivell review of the *Coroners Act*.<sup>11</sup> The State Coroner argued against amendment at that time on the basis that any legislative change to the definition of senior next of kin could have significant negative impact upon the certainty of the current system; however, he indicated that he would seek the views of Aboriginal people and organisations in this regard.<sup>12</sup> The State Coroner's submission to the Commission indicates that he did seek these views, but that the response he consistently received was that the list provided in the s 37(5) definition was considered to be acceptable. He stated that he 'received no indication from any person to the effect that the list should be changed or that there was an important need to recognise a different person in the order of priority'.<sup>13</sup>

It was also pointed out by the State Coroner that:

It is usually only in cases where there is a dispute among family members when there is a significance in determining who is to be the senior next of kin and in these cases there is often a dispute as to the extent to which customary law applies.<sup>14</sup>

The Commission agrees that a change to the legislative definition to accommodate persons of significance under the deceased's customary law would not assist in resolving intra-family conflict and may indeed inflame such disputes at a time of heightened emotions associated with grief. The Commission is convinced by submissions received from both the State Coroner and the Deputy State Coroner that the Coroner's Court appreciates the nature of the Aboriginal kinship system and that, in practice, the views of extended family

8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 306–307.

9. *Coroners Act 1997* (ACT) s 3; *Coroners Act 2003* (Qld) sch 2; *Coroners Act 1995* (Tas) s 3; *Coroners Act 1993* (NT) s 3.

10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 307, Invitation to Submit 11. The Commission stressed that the senior next of kin identified in relation to coronial matters may be different to the person identified as having burial rights to the body of a deceased (although it appears that a body will usually be released to a senior next of kin where the coroner has no knowledge of the existence of a will). The Commission has made a number of recommendation regarding burial rights and these are dealt with in the following section.

11. Chivell W, *Report on Review of the Coroners Act 1996 (WA)* (May 1999) 23.

12. Office of the State Coroner, 'Response to Report on the Review of the *Coroners Act 1996 (WA)*' (30 August 1999) 3.

13. Alastair Hope, State Coroner, Submission No. 6 (7 March 2006) 4.

14. *Ibid* 5.

members are taken into account.<sup>15</sup> The Commission also recognises the importance of having legislative certainty about the identity of the senior next of kin to facilitate police in advising the right person of a death<sup>16</sup> and in ensuring that that person is aware of his or her rights in the coronial process. Since it received no submissions from Aboriginal people in respect of this matter, the Commission has determined that it is not appropriate to recommend amendment to the definition of senior next of kin.

## Cultural objections to autopsy

Although post-mortem examination of internal organs for the purposes of inquiring into the cause of a death is not unheard of in traditional Aboriginal societies, such practices were largely confined to the eastern parts of Australia.<sup>17</sup> The mortuary practices of traditional Aboriginal people in Western Australia indicate a widely held belief that a body must be buried intact to ensure that the spirit 'enters the dreamtime'. This belief has also featured in a number of contemporary cases in Western Australia where courts have been called upon to decide a dispute where an Aboriginal family has objected to an autopsy on cultural grounds but the coroner has overruled those objections.<sup>18</sup> Before discussing the outcome of the Commission's investigation into cultural objections to autopsy of an Aboriginal deceased, it is necessary to outline the objection process and submissions received in respect of the need for improvements to that process.

### The objection process

Where a person has died of unnatural causes, or where the cause of death is unknown, that death must be reported to the coroner.<sup>19</sup> The deceased's family are advised of the death by police and are given a

brochure—'When a Person Dies Suddenly'—which gives the family basic information about the coronial process. Section 37 of the *Coroners Act 1996* (WA) gives a deceased's senior next of kin the right to object to a coronial post-mortem examination. There is no period specified in the Act, but the brochure states that an objection must be lodged within 24 hours of receiving the brochure.<sup>20</sup>

If the senior next of kin objects to post-mortem examination, then the coroner will make a decision whether a post-mortem is necessary and communicate that decision in writing to the family. If the coroner overrules the objection and the family wish to pursue the matter, then they have two clear working days (after being advised of the coroner's ruling) to apply to the Supreme Court for an order that no post-mortem examination be performed on the deceased.<sup>21</sup> Under Supreme Court Practice Direction 2/1997 every endeavour will be made to list an application within three days of filing.<sup>22</sup> Applications are heard on affidavit evidence,<sup>23</sup> reducing the need for parties in rural or remote areas to travel to the hearing, and an order is generally made at the conclusion of the hearing or the following day.

### Time for objection to coroner

The Commission heard from Aboriginal people in Fitzroy Crossing that the time limit of 24 hours in which to make objection to the coroner was too short. Although all families will experience grief at a close relative's passing and many may not be in a position to contemplate the possibility of post-mortem of their loved one, it is arguable that in respect of Aboriginal families the cultural aspects of grief are even more disabling. For example, in the Kimberley area when an Aboriginal person dies, close relatives will immediately

15. Ibid 4–5; Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 8–10. The Commission also notes that, although only the senior next of kin may object to an autopsy, other family members listed under s 37(5) of the *Coroners Act 1997* (WA) have rights, such as the right to be informed of certain matters.

16. Although in relation to Aboriginal people living under customary law it is important that the police seek the advice of a more distant relative or Aboriginal liaison officer to assist in advising the next of kin about a death. See discussion under 'Time for objection to coroner', below pp 250–52. See also cultural advice in notification of a death provided by Karrayili Adult Education Centre (Fitzroy Crossing), *Tell Me More About the People I Work With* (undated) 25.

17. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 353; Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 349.

18. See, for example, Western Australian cases: *Ronan v The State Coroner* [2000] WASC 260; *Jones v The Coroner, Albany* [2005] WASC 134 (13 June 2005); *Re the Death of Unchango (Jr)* (1997) 95 A Crim R 65. There have also been a number of cases in other Australian jurisdictions which make similar cultural and spiritual claims, notably *Green v Johnstone* [1995] 2 VR 176.

19. *Coroners Act 1996* (WA) s 17.

20. According to the Coroner's Court website, an objection received after 24 hours will be acted upon if possible, but after that period the post-mortem examination may have already commenced. Guidelines direct coroners, in cases where a post-mortem is not required to be performed immediately, to ensure that none is conducted 'until a period of at least 24 hours including a full working day has elapsed from the time when the Coroner's Brochure has been provided to a next of kin': State Coroner of Western Australia, 'Guidelines for Coroners' (undated) Guideline 9.

21. *Coroners Act 1996* (WA) s 37(2). The Supreme Court may grant an extension of time for application under s 37(3a).

22. Although, the Commission is advised that in practice such applications are dealt with in less than the three days specified in the practice direction.

23. Although Practice Direction 2/1997 states that in exceptional circumstances the court may dispense with the requirement for filing of an affidavit and permit oral evidence to be given in support of the Notice of Motion.

## *Mortuary practices of traditional Aboriginal people in Western Australia indicate a widely held belief that a body must be buried intact to ensure that the spirit ‘enters the dreamtime’.*

show their grief by ‘hitting themselves with a billy can, rock or bottle until they make themselves bleed’.<sup>24</sup> This practice shows respect for the dead person, but can also affect a person’s emotional and physical state, so much so that they cannot make an informed decision about whether or not they should object to a post-mortem examination of their deceased relative. In these circumstances relatives may fail to register, within the allotted time of 24 hours, an objection to post-mortem based on their genuinely held cultural or spiritual beliefs. The fact that the immediate family is overwhelmed by grief and may not take in the information contained in the coroner’s brochure may be compounded by language difficulties.

The Coroners’ Guidelines direct police officers notifying a next of kin of a death to explain the person’s rights and to take all reasonable steps to ensure that the person understands them,<sup>25</sup> but this may be extremely difficult in the circumstances described above.<sup>26</sup> The Coronial Counselling Service offers grief counselling and can help families to understand more about the post-mortem procedure and their rights. However, according to a submission received from the Deputy State Coroner, coronial counsellors are currently not adequately available to bereaved families in remote or rural areas,<sup>27</sup> which would appear to limit the impact of coronial counselling in these circumstances, particularly within the first 24 hours.

The Commission believes that it is important that people are given sufficient opportunity to make an informed decision about whether or not they wish to object to a post-mortem examination of their deceased relative. This includes being made aware of the benefits to be

gained by the post-mortem process in regard to finding an explanation for the death. Of course, there are, in some cases, good reasons for ordering an examination without delay; for example, in circumstances where vital evidence is likely to deteriorate in the case of a suspicious death or where there is evidence of a severe and potentially dangerous infection.<sup>28</sup> In other cases, there may be no need for haste and an extension of time to allow for the possibility of objection, particularly where the family’s culture or religion is likely to impact upon the decision, could be provided. Currently the Coroners’ Guidelines direct coroners to ensure that a post-mortem is not conducted (unless immediately necessary) ‘until a period of at least 24 hours including a full working day has elapsed from the time that the Coroner’s Brochure has been provided to the next of kin’.<sup>29</sup> It would seem a small thing to ask that this period be extended to 48 hours including a full working day to accommodate grieving families and to give them time to access the Coronial Counselling Service should they wish to.

In making this recommendation the Commission stresses that at all times the coroner retains the discretion to order that the post-mortem be performed if he or she believes that it must be done without delay. The Commission also notes that such extension of time will not unduly affect those families who have no objection to post-mortem examination and/or wish to have the body released as soon as possible for burial. In these cases the Coroners’ Guidelines direct that the coroner should have written confirmation (or be otherwise satisfied) that the senior next of kin does not object before ordering the post-mortem which can then be performed without delay.<sup>30</sup>

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24. Karrayili Adult Education Centre (Fitzroy Crossing), *Tell Me More About the People I Work With* (undated) 25.

25. State Coroner of Western Australia, ‘Guidelines for Police’ (undated) Guideline 5.

26. For this reason those notifying Aboriginal people of a death should take advice from Aboriginal non-relatives to ensure that the right person is told about the death and in circumstances where they cannot harm themselves: see Karrayili Adult Education Centre (Fitzroy Crossing), *Tell Me More About the People I Work With* (undated) 25.

27. Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 10. See also Recommendation 75, below p 251, regarding improved resourcing for the Coronial Counselling Service.

28. See State Coroner of Western Australia, ‘Guidelines for Coroners’ (undated) Guideline 8. The Commission notes the evidence of Dr Cooke in *Re the Death of ‘MRG’ deceased; ex parte Curtin* (Unreported, Supreme Court of Western Australia, BC9702404, Owen J, 29 May 1997) which states that the difficulty of identifying subtle causes of death, such as infection or metabolic causes, increases as the time interval between death and autopsy lengthens.

29. *Ibid*, Guideline 9.

30. *Ibid*.

## Recommendation 75

### Time for objection to post-mortem examination

1. That the *Guidelines for Coroners (WA)* be amended to state that in cases where a post-mortem examination does not have to be conducted immediately, a coroner should ensure that no post mortem examination is conducted until at least a period of 48 hours including one full working day has elapsed from the time when the coroner's brochure 'When a Person Dies Suddenly' has been provided to a next of kin to allow for any objections to be made pursuant to s 37 of the *Coroners Act 1996 (WA)*.
2. That the coroner's brochure 'When a Person Dies Suddenly' be amended to reflect the increase in time for objection to 48 hours.

### Time for filing of application under s 37(3)

In its submission the Aboriginal Legal Service (ALS) claimed that the time limit of two days in which to file an application in the Supreme Court for an order that no post-mortem examination be performed was too short.<sup>31</sup> In support of this claim the ALS noted that some Aboriginal people have to travel great distances to access the legal advice necessary for an application. The ALS suggested that the time specified in s 37(3) of the *Coroners Act* should be extended to 72 hours. The Commission notes that in all other Australian jurisdictions where a right exists to apply to a court for an order that a post mortem examination not be performed, the time allowed is 48 hours from notification of the coroner's decision.<sup>32</sup> The wording of the Western Australian Act—that is, two clear working days—would seem to allow potentially more than the 48 hours available in other jurisdictions. In fact, according to s 61(f) of the *Interpretation Act 1984 (WA)* the two clear working days will not include the day on which the coroner's decision is received or the day on which the application is filed with the

Supreme Court. In addition the Supreme Court may, on application of the senior next of kin, grant an extension of time for filing if 'it is satisfied that exceptional circumstances exist so that it is necessary and desirable in the interests of justice to grant the extension'.<sup>33</sup> The Second Reading Speech introducing these provisions indicates that they were made in cognisance of the difficulties of family members in remote or rural locations accessing the Supreme Court.<sup>34</sup> Indeed the amendments to the Act followed a 1997 case where a remote Aboriginal applicant seeking to challenge an autopsy order on cultural grounds was denied the order as a result of an out-of-time application.<sup>35</sup>

While sympathising with the difficulties of remote Aboriginal people in accessing legal advice, the Commission notes that the matter has already been considered by Parliament and feels that the amendments to the Act adequately address the problem. The Commission encourages the ALS to assist a senior next of kin to apply for an extension of time where circumstances warrant it, even where the ALS is not itself in a position to appear for the applicant.

### Appropriate forum for hearing of application under s 37(3)

The ALS further submitted that, for reasons of accessibility, the Magistrates Court should be empowered to hear applications for an order not to perform a post-mortem under s 37(3) of the *Coroners Act*.<sup>36</sup> Again the point was made that it is difficult for people in rural and remote areas to access the Supreme Court, particularly in light of the time limit placed on applications in these matters. The Commission appreciates the rationale behind the ALS submission; however, it notes that in rural and remote areas the local magistrate also acts as coroner. The Commission considers that it would be impossible in these circumstances for a magistrate to apply an independent mind to the question whether or not an order that the magistrate made as coroner should stand. In the interests of applicants receiving a fair and unbiased hearing and also in the interests of finality of proceedings, the Commission has declined to

31. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

32. See, for example, *Coroners Act 1980 (NSW)* s 48A(6); *Coroners Act 1993 (NT)* s 23(3); *Coroners Act 1995 (Tas)* s 38(3); *Coroners Act 1985 (Vic)* s 29(3).

33. *Coroners Act 1996 (WA)* s 37(3a).

34. Western Australia, *Parliamentary Debates*, Legislative Council, 22 April 1999, 7556 (Mr Peter Foss, Attorney General).

35. *Re the Death of 'MRG' deceased; ex parte Curtin* (Unreported, Supreme Court of Western Australia, BC9702404, Owen J, 29 May 1997). Justice Owen's remarks in this judgment urge Parliament to address the time allowed for filing.

36. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

recommend a change of forum from the Supreme Court to the Magistrates Court in relation to applications for an order that a post-mortem examination not be performed.

### Appropriate recognition of cultural and spiritual beliefs in the objection process

The Commission's consultations in the Gascoyne region revealed that there were concerns in the Aboriginal community about autopsy practices and genuinely held fears that body parts or organs removed from a body might not be returned.<sup>37</sup> In its Discussion Paper the Commission examined a number of cases where the Supreme Court had been called upon to decide whether or not to order a post-mortem examination on an Aboriginal deceased in the face of a cultural objection that had been overruled by a coroner.<sup>38</sup> In these instances the court is required to weigh the public interest in identifying the cause of death<sup>39</sup> against the interest of the family to preserve the deceased's body. The authorities show that, where there are no public health concerns or suspicious circumstances surrounding a death, or where cause of death can be reasonably determined by an external examination and the circumstances of the death without an invasive autopsy, a court will generally uphold a cultural objection and no post-mortem examination will be authorised.<sup>40</sup>

In 1991 the Royal Commission into Aboriginal Deaths in Custody noted the legitimacy of Aboriginal cultural objections to autopsy. It recommended that protocols be developed by state coroners to ensure that Aboriginal cultural beliefs and traditional rites are

respected, and that coroners investigating Aboriginal deaths should make 'all reasonable efforts to obtain advice from the family and community of the deceased in consultation with relevant Aboriginal organisations'.<sup>41</sup> Other jurisdictions, notably Queensland,<sup>42</sup> the Australian Capital Territory<sup>43</sup> and New Zealand,<sup>44</sup> have legislative provisions that direct coroners to have regard to the cultural sensitivities and customary beliefs of families in making a decision whether or not to order a post-mortem examination of a deceased.

As discussed earlier, in Western Australia s 37 of the *Coroners Act* provides a process where the deceased's senior next of kin can object to a post-mortem examination. However, as the Commission noted in its Discussion Paper, s 37 does not oblige the coroner to consider cultural sensitivities in making a decision whether or not to order a post-mortem examination and in any event an objection can be overruled by the coroner.<sup>45</sup> Although the State Coroner has issued guidelines to assist coronial staff in making decisions about post-mortem (either before or after an objection), there is no direction that cultural, spiritual or, in the case of an Aboriginal deceased, customary law beliefs are taken into account in the decision-making process. The guidelines direct a coroner to consider 'the views of the senior next of kin of the deceased'<sup>46</sup> and to 'take account of any known views of any other relatives of the deceased and any person who, immediately before death, was living with the deceased' when making a decision whether or not to order a post-mortem examination.<sup>47</sup> It has been suggested by the State Coroner that in the context of an Aboriginal deceased, this guideline requires a coroner to take into

37. LRCWA, Project No. 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 7.

38. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 304.

39. This would include such matters as the need to investigate the precise causes of unexpected deaths in babies that may otherwise be unascertainable or attributed to sudden infant death syndrome. The State Coroner's submission highlighted the disturbing statistics of infant deaths among Australia's Aboriginal population and the importance of post-mortem and coronial investigation data in identifying and addressing Aboriginal health issues that contribute to infant death: Alastair Hope, State Coroner, Submission No. 6 (7 March 2006) 1–2 and attached charts.

40. See, for example, *Ronan v The State Coroner of Western Australia* [2000] WASC 260; *Re the Death of Unchango (Jr)* (1997) 95 A Crim R 65; *Jones v The Coroner, Albany* [2005] WASC 134 (13 June 2005); *Saunders v State Coroner of Victoria* [2005] VSC 460 (18 November 2005); *Green v Johnstone* [1995] 2 VR 176 (all cases involving Aboriginal cultural concerns regarding autopsy). *Wuridjal v The Coroner* [2001] NTSC 99 (9 November 2001) shows that where suspicious circumstances surround a death the genuinely held cultural beliefs of Aboriginal people will not, when properly balanced against the public interest, justify an order that no autopsy be performed.

41. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Recommendation 38. The RCIADIC further recommended that any protocols developed in response to this recommendation be extended to apply to all Aboriginal deaths reported to the coroner (Recommendation 39).

42. In Queensland, coroners must have regard to any concerns raised by a family member or any distress which may be suffered due to cultural traditions or spiritual beliefs: *Coroners Act 2003* (Qld) s 19(4).

43. In the ACT, coroners must have regard to 'the desirability of minimising the causing of distress or offence to persons who, because of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended by the making of that decision': *Coroners Act 1997* (ACT) s 28.

44. In New Zealand in determining whether to perform an autopsy the coroner must have regard to customary beliefs requiring expeditious burial or customary beliefs that consider post-mortem examination of bodies offensive: *Coroners Act 1988* (NZ) s 8.

45. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 304–306. See also Vines P & McFarlane O, 'Investigating to Save Lives: Coroners and Aboriginal deaths in custody' (2000) 4(27) *Indigenous Law Bulletin* 8, 10. Vines and McFarlane argue that a clear protocol in relation to Aboriginal deaths would be 'greatly preferable' to the current general provision for objection and that such protocols should be entrenched in legislation 'to establish rights rather than expectations, rules rather than discretions': *ibid* 13.

46. State Coroner of Western Australia, 'Guidelines for Coroners' (undated) Guideline 12.

47. *Ibid*, Guideline 13.

account the views of the extended family, which may be considered important under Aboriginal customary law.<sup>48</sup>

Commentators have stressed that internal administrative guidelines such as the ones relied upon in Western Australia are not acceptable because they 'may easily be changed without public knowledge'.<sup>49</sup> In support of this contention, it should be noted that the Commission could find no information readily available to the public that indicated the content or indeed the existence of guidelines governing the performance of coronial duties in Western Australia. The Commission notes that the public inaccessibility of coronial guidelines has also been the subject of recent complaint in Victoria.<sup>50</sup> While the Commission's earlier recommendation for a dedicated publicly accessible internet site has been independently implemented by the Coroner's Court, access to coronial guidelines remains restricted and at the date of writing there was no reference to the existence of these guidelines on the site.<sup>51</sup>

In the Commission's opinion, these observations provide sufficient argument for a more publicly transparent procedure for coronial decisions in respect of post-mortems. Section 59 of the *Coroners Act* expressly provides that the *Coroners Regulations 1997 (WA)* may 'specify the matters to be taken into account when considering whether or not a post-mortem examination should be performed'. The Commission can see no reason why guidelines directing a coroner to have regard to cultural matters in making a decision to order a post-mortem examination should not be posited in legislative form in the *Coroners Regulations*. To this end the Commission proposed the following amendment to the regulations modelled on s 28 of the *Coroners Act 1997 (ACT)*:

That the *Coroners Regulations 1997 (WA)* be amended to include a direction that in making a decision whether or not to order a post-mortem examination on an

Aboriginal deceased person, a coroner must have regard to the desirability of minimising the causing of distress or offence to relatives and extended family (including classificatory kin) of the deceased who, because of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended by the making of that decision.<sup>52</sup>

The Commission received four submissions in response to this proposal. The submissions of the Aboriginal Legal Service and the Law Society of Western Australia supported legislative direction to coroners to take account of cultural, spiritual and customary beliefs in making a decision to order a post-mortem examination.<sup>53</sup> The submission of the State Coroner made no comment against legislative direction to consider cultural beliefs, although it did raise the point that the suggested formulation places an onus on the coroner investigating the death to consult more extensively with families than is currently the case.<sup>54</sup> The State Coroner observed that this would affect, in practice, the timely release of a body for burial and that this might impact negatively on those whose cultural beliefs demand that the deceased be buried expeditiously.<sup>55</sup> In view of the fact that objection on the basis of cultural and spiritual matters is expressly noted on the autopsy objection form filled out by families, the Commission accepts that cultural concerns will usually be communicated to a coroner and, subject to allowing extra time for objection as recommended above (Recommendation 75), the onus should remain with the family to make these concerns known. The Commission has therefore amended its recommendation to clarify the matter. Nonetheless, the Commission notes that in many cases coroners will—by virtue of their experience with Aboriginal families, cultural awareness training and familiarity with cases decided by the Supreme Court—have sufficient knowledge of the cultural concerns of Aboriginal people and should be expected to take these matters into account in deciding whether or not to order a post-mortem examination of an Aboriginal deceased.

48. State Coroner of Western Australia, 'Recognition of the Rights of Aboriginal People in the Coronial Process', letter (4 July 2005) 1.

49. Vines P & McFarlane O, 'Investigating to Save Lives: Coroners and Aboriginal deaths in custody' (2000) 4(27) *Indigenous Law Bulletin* 8, 12.

50. Victorian Parliament Law Reform Committee, *Inquiry into the Coroners Act 1985*, public hearings (22 August 2005) 3, Mr G Bond; (20 September 2005) 205, Dr I Freckleton.

51. <[www.coronerscourt.wa.gov.au](http://www.coronerscourt.wa.gov.au)>. See discussion under 'Accessibility of coronial guidelines and findings', below pp 254–55.

52. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 306, Proposal 58.

53. The Law Society argued that the legislative direction should be entrenched in the *Coroners Act* rather than in regulations to provide 'a more visible indication of respect for Aboriginal customary law, and thus [be] more accessible to relevant stakeholders, including Aboriginal communities'. The Commission has considered this argument, but believes that it is sufficient for the direction to be contained in the regulations as contemplated by s 59 of the *Coroners Act 1996 (WA)*.

54. Alastair Hope, State Coroner, Submission No. 6 (7 March 2006) 3.

55. As mentioned in the Commission's Discussion Paper, some Aboriginal groups believe that unreasonable delay in burial of a body may affect the ability of a deceased's spirit to 'be at rest': see Freckleton I, 'Autopsy Law: Multiculturalism working successfully' (1998) 6 *Journal of Law and Medicine* 5. The Commission did, however, hear from Aboriginal people in Fitzroy Crossing that expeditious burial was not a priority for Aboriginal people of that area. Of more concern was ensuring that the deceased's relatives were able to be contacted to attend the funeral and the family would hold burial until relatives were assembled.

In her submission the Deputy State Coroner rejected a legislative direction to coroners to take account of cultural beliefs of a deceased's relatives, arguing that this provides for less flexibility in the exercise of the coroner's discretion to order a post-mortem examination.<sup>56</sup> The submission suggested that coroners already take these beliefs into account and that legislation would unnecessarily complicate the negotiation process surrounding an objection. As the Commission stated in its Discussion Paper, it has no doubt that cultural and spiritual concerns, including Aboriginal customary beliefs, are taken seriously by coroners in considering objections to autopsy. However, as the Commission also made clear it believes, for the reasons stated earlier, that

it is nevertheless desirable to make this consideration explicit in Western Australia. If nothing else, a legislative direction to a coroner to take cultural matters into account in ordering an autopsy of an Aboriginal deceased will make it clear to the family of a deceased that their cultural beliefs have been considered in the decision-making process. Currently, a family must pursue an overruled objection to autopsy through the Supreme Court to obtain the same assurance.<sup>57</sup>

The Deputy State Coroner also argued that the Commission's proposal unreasonably discriminated in favour of Aboriginal people by being specific about Aboriginal customary laws and cultural beliefs in its formulation.<sup>58</sup> The Commission did pre-empt this argument in its Discussion Paper by stating:

Although constrained by its Terms of Reference to consideration of Aboriginal customary laws, the Commission can see no reason why the above proposal should be limited in application to Aboriginal deceased persons. The Commission applauds the State Coroner's efforts to ensure that 'the coronial process treats people equally irrespective of race, colour or creed'.<sup>59</sup> The Commission would therefore support a general provision of this nature if it were considered appropriate by the State Coroner.<sup>60</sup>

As there appears to be no objection to a more general provision, the Commission has reformulated its recommendation to ensure that it is culturally and spiritually inclusive.

As a final comment, the Commission notes the remarks of the State Coroner in that Office's 2004–2005 Annual Report that:

Where objections are made, every effort is taken to attempt to ascertain the extent to which the cause of death can be determined without an internal post mortem examination. *It is a rare case in which there are no external factors which would give some insight into a likely cause of death.*<sup>61</sup>

That report shows that of 128 objections received in the year 2004–2005, 44 were withdrawn before decision and 70 were accepted by the coroner and no post-mortem examination was ordered. Only 14 objections were overruled by the coroner. These figures may indicate that coronial authorities are sensitive, in the face of an objection, to the cultural, spiritual and emotional concerns of families in preserving the integrity of their deceased relative's body. However, they may also show that post-mortem examinations are being ordered in many more cases than is strictly necessary to properly discharge the duties of the office.

### Recommendation 76

#### **Cultural, spiritual or customary beliefs to be taken into account in deciding whether to order post-mortem examination**

That the *Coroners Regulations 1997 (WA)* be amended to provide that in making a decision whether or not to order a post-mortem examination of a deceased a coroner must take into account any known or communicated cultural, spiritual or customary beliefs of the deceased's family.

## Accessibility of coronial guidelines and findings

The Commission noted that, while coronial guidelines played a large part in reducing the potential of cultural conflict in the coronial process, access to these guidelines was extremely difficult. This affects the public

56. Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 3 & 7.

57. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 306. The Commission notes the concerns expressed by coronial counsellors in a 1999 review of the *Coroners Act 1996 (WA)* that 'financial reasons may prevent the "vast majority" of Western Australians from exercising their right to pursue a case if an objection [to autopsy] is overruled': Chivell W, *Report on Review of the Coroners Act 1996 (WA)* (May 1999) 34.

58. Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 3–4.

59. State Coroner of Western Australia, 'Recognition of the Rights of Aboriginal People in the Coronial Process', letter (4 July 2005) 1.

60. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 306.

61. Office of the State Coroner, *Annual Report 2004–2005* (2005) 5 (emphasis added).

transparency of coronial processes which, especially in relation to deaths in custody, is of utmost importance. The Commission therefore proposed that the Department of Justice (now the Department of the Attorney General) establish, at the earliest opportunity, a dedicated internet site for the Coroner's Court of Western Australia to enable public access to coronial guidelines, procedures, protocols and findings.<sup>62</sup> This proposal was supported by all submissions received on this matter, notably the State Coroner, Deputy State Coroner and the Law Society of Western Australia.

The Commission is delighted to report that the Coroner's Court now has a functioning website<sup>63</sup> which features plain English information about coronial processes and counselling services as well as coronial findings. The Commission notes, however, that there is no access to the *Coroners Act*, *Coroners Regulations* or *Coroners' Guidelines* on this site. While the website is a significant improvement on the availability of information about coronial processes in Western Australia, the Commission does not believe that it sufficiently addresses the concerns regarding transparency outlined in its Discussion Paper. The State Coroner indicated in his submission that coronial guidelines will be available on the site 'in the near future'.<sup>64</sup> Undoubtedly there is a need to update the guidelines and this is the reason for the delay. The Commission is satisfied that access to coronial guidelines will be available on the Coroner's Court website in the near future and suggests that a link to relevant legislation on the State Law Publisher's website also be included. The Commission does not feel that it is necessary to formalise its proposal in light of these developments.

## Increased coronial counselling services in regional areas

In her submission the Deputy State Coroner indicated a need for the provision of additional coronial counsellors in regional areas with resourcing to travel to remote areas where required.<sup>65</sup> As mentioned earlier, this is a vital service that is currently not adequately available to bereaved families located outside the metropolitan

area. The Commission agrees with the Deputy State Coroner's suggestion and recommends that resourcing for expansion of the coronial counselling service in rural areas be investigated. The Commission further recommends that an Aboriginal counsellor/educator be employed on a full-time basis to assist the Coroner's Court in providing cultural awareness training to all coroners, including magistrates who act as coroners in country areas. Cultural awareness training should be provided to coroners in the relevant region and with specific advice from local Aboriginal communities. While travelling to the regions for the purposes of providing training to coroners, the Aboriginal counsellor/educator should take the opportunity to forge links with the local community and provide education sessions about coronial processes to local police, prisons, hospitals, Aboriginal organisations and funeral directors. Such education sessions need not be Aboriginal-specific, but should include information to assist people in dealing with bereaved Aboriginal families.

### Recommendation 77

#### Expansion of Coronial Counselling Service to rural areas

1. That resourcing for expansion of the Coronial Counselling Service in rural areas be investigated.

#### Employment of Aboriginal coronial counsellor/educator

2. That an Aboriginal counsellor/educator be employed on a full-time basis to assist the Coroner's Court in providing locally based and locally informed Aboriginal cultural awareness training to all coroners, including magistrates who act as coroners in country areas.
3. That the Aboriginal counsellor/educator be tasked to improve education about coronial processes in regional and remote areas and that this education include information about Aboriginal culture and customs relevant to the specific area.

62. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 308, Proposal 59.

63. See <[www.coronerscourt.wa.gov.au](http://www.coronerscourt.wa.gov.au)>.

64. Alastair Hope, State Coroner, Submission No. 6 (7 March 2006) 5.

65. Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 10.

# Funerary Practices and Burial Rights

## Aboriginal Funerary Practices and the Laws of Western Australia

Death is a regrettably frequent event in contemporary Aboriginal society and the funerary rites that are customarily performed upon death remain important to Aboriginal culture. In its Discussion Paper the Commission examined traditional and contemporary Aboriginal funerary practices in Western Australia<sup>1</sup> and found that the current laws are sufficiently flexible to accommodate the performance of certain customary rites upon death, including preparation of the deceased's bodily remains for final disposal.<sup>2</sup> The Commission also found that the by-laws and rules relating to the performance of graveside ceremonies would not unduly interfere with customary law in the burial process.<sup>3</sup> The Commission has therefore not seen any need to make recommendations in relation to the practice of funerary rites in Western Australia.

## Aboriginal Burial Rights and the Laws of Western Australia

Burial (as opposed to cremation) is the most common Aboriginal mortuary practice in Western Australia.<sup>4</sup> Being able to die and be buried in one's traditional homelands was very important in traditional Aboriginal societies.<sup>5</sup> As Robert Tonkinson explains, 'old people who feel that their lives may be coming to an end prefer to die close to their birthplace so that their spirit will be spared

a long journey back to its original home'.<sup>6</sup> Although many Aboriginal people believe that a deceased's body should be returned to the land from which it originated, this is not always the case. Sometimes Aboriginal people prefer to be buried in the place they grew up or where they lived prior to their death or in the same resting place of a pre-deceased spouse or family member.<sup>7</sup> Nonetheless, there appears to be widespread acceptance of customary laws dictating burial of a deceased in his or her spiritual homeland. The Commission's consultations with Aboriginal communities in Western Australia revealed that burial in one's place of birth or traditional 'country' was, and remains, the custom for many Aboriginal people.<sup>8</sup>

## Right to dispose of a deceased's body

Under Aboriginal customary law, the right to dispose of a deceased's body usually rests with the family or blood relatives of a deceased. The family's wishes will therefore prevail over those of the deceased's spouse.<sup>9</sup> The position under Aboriginal customary law is at odds with Australian law which holds that the right to bury the deceased will lie with the executor of the deceased's will or, in the absence of a will, with the person who has the highest entitlement to the deceased's estate. In Western Australia, the highest entitlement lies with the surviving spouse (or de facto partner) of the deceased followed by the children of the deceased, the deceased's parents, the deceased's siblings, then other specified family members.<sup>10</sup> Where two people have an equally ranking entitlement to

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 310–11.

2. *Ibid* 312–13.

3. *Ibid* 313.

4. Cremation was a customary practice that was traditionally confined to the eastern half of the continent. According to the Funeral Directors' Association of Western Australia, very few Aboriginal people in Western Australia today choose to be cremated.

5. Byrnes J, 'A Comparison of Aboriginal and Non-Aboriginal Values' (2000) 3 *Dissent* 6, 10.

6. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 104. Piddington has observed in respect of the Karadjeri group of the north-west that a person always 'wishes to return to his horde territory to die, for it is to this land that he is bound by material, social and religious ties': Piddington R, *An Introduction to Social Anthropology* (Edinburgh: Oliver & Boyd, vol 1, 1950) 289. While in *In the Matter of the Estate of Bellotti* (Unreported, Supreme Court of Western Australia, Lib. No. 970594, Bredmeyer M, 7 November 1997) burial in one's country was said to be the custom of the Yamatji peoples of the Carnarvon area. This custom was confirmed by Aboriginal people in a number of different areas around Western Australia during the Commission's initial consultations.

7. Queensland Law Reform Commission, *Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper (June 2004) [5.5].

8. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 311–12.

9. *Ibid* 311–14.

10. See *Administration Act 1903* (WA) ss 14 & 15. The de facto partner must have been living with the deceased for two years immediately preceding the death.

administration—for example, the parents of a deceased child—the right to bury will be decided according to the practicalities of burial without unreasonable delay.<sup>11</sup> Courts have routinely rejected cultural arguments as irrelevant when deciding who has the right to bury a deceased.<sup>12</sup>

## Resolving conflict between Aboriginal law and Australian law in burial disputes

Because of the marked difference between the position at customary law and under Australian law, disputes over rights to dispose of an Aboriginal deceased arise regularly.<sup>13</sup> Often conflicts result from the wishes of family to bury a deceased family member in their traditional homelands pursuant to the relevant customary laws and the competing wishes of the deceased's spouse to have his or her loved one buried elsewhere. In some cases there have been competing cultural beliefs about who has the right to bury an Aboriginal deceased or where the burial should take place.<sup>14</sup> In its Discussion Paper the Commission discussed in some detail the various problems arising in this area and examined the laws of other jurisdictions, including Canada and the United States. The Commission concluded that without further submissions on this issue it was not in a position to offer a firm proposal. Submissions were therefore invited on the following matters:

1. Whether cultural and spiritual beliefs genuinely held under Aboriginal customary law should be considered by the court where there is a dispute in relation to the disposal of a body of an Aboriginal deceased. And if so, what significance should be attached to such cultural and spiritual beliefs?
2. What would be the appropriate protocol to apply in cases where there are genuinely held but

competing cultural and spiritual beliefs?

3. What, if any, significance should be placed on the deceased's wishes regarding burial if embodied in a signed document (not necessarily a will)?
4. Whether the Supreme Court of Western Australia is the appropriate forum for the determination of burial disputes and, if not, what would be the appropriate forum?<sup>15</sup>

## The Commission's Conclusion

Seeking to maximise submissions from Aboriginal people, the Commission designed a plain English pamphlet on this issue which was distributed and discussed during its return consultation visits to Aboriginal communities around the state. The Commission received a number of submissions from Aboriginal respondents at those meetings as well as written submissions from the Aboriginal Legal Service and the Law Society of Western Australia.

### Should cultural beliefs be considered by courts in resolving burial disputes?

As observed in the Commission's Discussion Paper, the resolution of burial disputes is always a difficult challenge for courts. Not only is the subject matter emotionally charged, but the claims of both parties are often of equal merit and the cultural and spiritual beliefs of the parties genuinely held. It has been mentioned above that courts apply the 'highest entitlement principle' in resolving burial disputes and that cultural arguments are usually held to be irrelevant to the determination of a matter. The Commission therefore posed the question: should cultural beliefs be considered by courts in resolving burial disputes?

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11. See *Calma v Sesar* (1992) 106 FLR 446 where there was a burial dispute between both Aboriginal parents of a deceased born in Port Hedland, Western Australia. The mother (who lived in Alice Springs) made arrangements for a Roman Catholic burial in Darwin where the deceased had been killed, while the deceased's father (who lived in Port Hedland) made arrangements for burial in the deceased's birthplace – his 'country' under the deceased's Aboriginal customary law. Because an equal right to administration existed, the court decided on the basis of practicalities, including the need for expeditious burial. The court therefore held in favour of the mother because the deceased's body was in Darwin and suitable arrangements had already been made for burial there.

12. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 314–15. But note *Jones v Dodd*, discussed below.

13. The Aboriginal Legal Service confirmed this view, submitting that such disputes are 'particularly common amongst Aboriginal peoples': Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

14. See, for example *In the Matter of the Estate of Bellotti* (Unreported, Supreme Court of Western Australia, Lib. No. 970594, Bredmeyer M, 7 November 1997) where a the deceased's family (of Yamatji descent) and the spouse (of Nyooongar descent) had competing beliefs about place of burial. See also *Milanka Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, 107 of 2002, Gallop AJ, 24 July 2002) where the deceased's testamentary wish to be buried in his 'borning place' was disputed by the family who said that his customary law required him to be buried in his 'father's father's country' which was in a different area.

15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 317, Invitation to Submit 12.

## *Death is a regrettably frequent event in contemporary Aboriginal society and the funerary rites that are customarily performed upon death remain important to Aboriginal culture.*

In its Discussion Paper the Commission pointed out various arguments against the introduction of legislation directing courts to consider Aboriginal customary law in relation to burial disputes over an Aboriginal deceased, including:

- That the wishes or cultural beliefs of non-traditional Aboriginal people may be overridden by the wishes or cultural beliefs of traditional family members. This is most often the case where a deceased has lived in an urban or non-Aboriginal environment for a long period, but family members still observe traditional customs.
- That burial may be unnecessarily delayed because evidence of cultural beliefs and customary laws would be required to decide the dispute and often parties are unrepresented by counsel.<sup>16</sup>
- That there may be an increase in litigation of burial disputes.
- That, where a decision is made against the person with the highest claim to entitlement, the impact of a decision in relation to expenses associated with the funeral and transport of the body may significantly erode the deceased's estate.<sup>17</sup>
- That there is a high likelihood of increased appeals against first instance decisions where there is conflicting evidence of the deceased's cultural and spiritual beliefs or the deceased's wishes regarding burial or where the competing customs or spiritual beliefs of the parties are taken into account.<sup>18</sup>

The Commission formed the preliminary view that although the current approach may limit the court's ability to take into account cultural factors such as Aboriginal customary law, it would be impractical to resolve burial disputes through considering the

competing customs and beliefs of the deceased's family members. This would require courts to make difficult value judgements about which party's cultural or spiritual beliefs were more valid. In these circumstances, courts have commented that the only course that is feasibly open to them is to decide the matter according to the law; that is, that the person entitled to administer the estate has the right to conduct the funeral.<sup>19</sup>

The Law Society of Western Australia was the only submission to address this issue. The Society submitted that although it would be inappropriate to provide a legislative prescription for how burial disputes should be resolved

respect for the cultural and spiritual beliefs of Aboriginal peoples requires that the determination of burial rights must include consideration of the relevant Aboriginal customary law and the circumstances of the deceased, including his/her cultural and spiritual values. Cases ought to be decided on a case-by-case basis.<sup>20</sup>



16. Griggs L & Mackie K, 'Burial Rights: The contemporary Australian position' (2000) 7 *Journal of Law and Medicine* 404, 404–405. The Commission has been informed that the Aboriginal Legal Service does not usually represent parties to Aboriginal burial disputes: Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

17. Since a legislative direction would—in order to conform to the *Racial Discrimination Act 1975* (Cth)—have to apply to all cultures, transport and funeral expenses could be significant where an order for burial in another state or country was made.

18. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 316.

19. *Holtham v Arnold* (1986) BMLR 123, 125; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 5.

20. Law Society of Western Australia, Submission No. 36 (16 May 2006) 10.



The Law Society did not address the matter of what significance should be attached to cultural and spiritual values of the parties or what protocol the court should apply where the parties' cultural beliefs are genuinely held but nonetheless conflict. Instead, the submission focused solely (and perhaps appropriately) on the beliefs of the deceased. As will become clear below, the Commission is in favour of honouring, where practicable, a deceased's burial wishes where embodied in a signed document or authenticated audio or video recording. However, in the absence of clear direction from the deceased in terms of Recommendation 78, the Commission feels that the benefits of the current common law approach (in particular, the promotion of judicial expediency in resolving burial disputes) may be unnecessarily forfeited by legislative direction to consider cultural and spiritual values.

As noted in the Commission's Discussion Paper, in *Jones v Dodd*<sup>21</sup> the Full Court of the Supreme Court of South Australia questioned the applicability of the highest entitlement principle in circumstances where an Aboriginal deceased had died intestate and had left no estate to administer. In that case the court held that it would be unrealistic to apply the principle to resolve the dispute and that the proper approach was

to have regard to the practical circumstances, which will vary considerably between cases, and the need to

have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question.<sup>22</sup>

The Commission sees significant appeal in the approach of the court in *Jones v Dodd*; however, this does not affect the Commission's present resolution against legislatively directing courts to consider cultural matters. The Commission believes that, as common law precedent, courts will take the decision in *Jones v Dodd* into account in determining cases where no estate exists or where there is no likelihood of an application for a grant of administration in intestacy ever being made.<sup>23</sup>

Apart from the immediate question, there are a number of matters that concern the Commission in relation to the treatment and final disposal of deceased remains in Western Australia that have come to light during this reference. The Commission suggests that an inquiry into matters relating to the final disposal of a deceased's body including coronial, cultural, burial and health-related matters be undertaken in Western Australia and that this inquiry should feature wide public consultation.

## Should a deceased's burial instructions be determinative?

Although, as can be seen from the above, there is a form of possessory right over a deceased body which lies with the deceased's executor or next of kin, it has long been a tenet of common law that there is no 'property' in a body.<sup>24</sup> Practically this means that a testator's instructions regarding disposal of his or her bodily remains are not binding on the deceased's executor<sup>25</sup> and that 'a person has no right to dictate what will happen to his or her body' after death.<sup>26</sup> It has been argued that the 'no property' rule, as it has come to be known, rests on questionable legal foundations, denies the fundamental premise of testamentary freedom and is difficult to reconcile with certain statutory rights (such as organ and tissue

21. *Jones v Dodd* [1999] SASC 125.

22. *Ibid* [51] per Perry J, Millhouse and Nyland JJ concurring.

23. *Ibid* [50].

24. *Williams v Williams* (1882) 20 Ch D 659, confirmed in Australia by the High Court in *Doodeward v Spence* (1908) 6 CLR 406.

25. Atherton R, 'Who owns your body?' (2003) 77 *Australian Law Journal* 178, 184.

26. *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693 (Young J).

## Aboriginal people expressed support for a deceased being able to give instructions about burial wishes in a will or other signed document.

donation)<sup>27</sup> which allow a person to have legally binding control of their bodily remains after death.<sup>28</sup>

Also somewhat contrary to the no property rule, in most Australian jurisdictions a person can, in a will or other written document, express a wish to be (or not to be) cremated and that wish must be respected. For example, in Western Australia s 13 of the *Cremation Act 1929* places administrators under a statutory duty to use all reasonable endeavours to ensure that a person's written wishes regarding cremation are carried into effect. In *Manktelow v The Public Trustee*,<sup>29</sup> the Supreme Court of Western Australia held that this provision<sup>30</sup> will require an executor or administrator to endeavour to give effect to a deceased's wish to be buried over the family's or the administrator's wish that the deceased be cremated.<sup>31</sup> However, the Commission knows of no Australian case where a deceased's written instructions regarding place of burial or funeral arrangements (as opposed to burial vs cremation) have been judicially enforced against an executor or administrator of a deceased estate.

In the United States, courts have rejected the no property rule and have consistently upheld the deceased's directions (whether contained in a will, a written document or substantiated oral statements) in relation to disposal of his or her bodily remains.<sup>32</sup> Further, provided that it is not unreasonably wasteful of the estate's resources,<sup>33</sup> 'absurd, indecent or

generally contrary to public policy'<sup>34</sup> a United States court will uphold a deceased's directions in regard to the place of burial, nature of burial and funeral arrangements.

Aboriginal people consulted for this reference expressed support for a deceased being able to give instructions about burial wishes in a will or other signed document, indicating that such instructions would usually be respected. In view of the Commission's widely supported recommendation for initiatives to encourage will-making among Aboriginal people,<sup>35</sup> and subject to the implementation and success of these initiatives, a legislative direction requiring a deceased's personal representative<sup>36</sup> to carry out burial instructions might have the effect of reducing disputes between family members about the place of burial of an Aboriginal deceased. For example, regardless of who has the right to dispose of a body, that person would be required to respect a deceased's directions as to how and where his or her bodily remains should be buried. In the case of an Aboriginal deceased this could include a direction that the deceased be buried 'on country' and that such burial be accompanied by funerary rites according to his or her customary law. The Commission has further received a number of submissions that were made by individuals and organisations to the Queensland Law Reform Commission's reference on the final disposal of dead bodies in that state.<sup>37</sup> Submissions received

27. See, for example the *Human Tissue and Transplant Act 1982* (WA). See also Griggs L & Mackie K, 'Burial Rights: The contemporary Australian position' (2000) 7 *Journal of Law and Medicine* 404, 408.

28. Conway H, 'Dead, But Not Buried: Bodies, burial and family conflicts' (2003) 23 *Legal Studies* 423, 432–33.

29. [2001] WASC 290 (19 October 2001).

30. Along with s 8A(b) of the *Cremation Act 1929* (WA) which provides that a medical referee shall not issue a permit for cremation where a person has left a written direction that his or her body should not be cremated.

31. [2001] WASC 290 (19 October 2001) [8].

32. Griggs L & Mackie K, 'Burial Rights: The contemporary Australian position' (2000) 7 *Journal of Law and Medicine* 404, 408–409; Conway H, 'Dead, But Not Buried: Bodies, burial and family conflicts' (2003) 23 *Legal Studies* 423, 433.

33. Griggs & Mackie, *ibid* 408.

34. Conway H, 'Dead, But Not Buried: Bodies, burial and family conflicts' (2003) 23 *Legal Studies* 423, 434.

35. Recommendations 69 & 70, above pp 239–40.

36. By 'personal representative' the Commission refers to the executor, administrator or potential administrator of the deceased's estate. The Commission notes that, in practice, there will generally not be time enough for a court to grant of probate or letters of administration prior to burial of a deceased. In releasing a body for burial and in the absence of a known will, coronial courts, hospitals or funeral directors generally rely on the evidence at hand to establish next-of-kin – usually the person with the highest entitlement to administration.

37. Queensland Law Reform Commission, Submission No. 50 (June 2006). Submissions were provided by the Queensland Law Reform Commission with the consent of the parties involved. Submissions were received from InvoCare Ltd; Queensland State Coroner; Funeral Directors' Association of Queensland; Queensland Bioethics Centre for the Queensland Catholic Dioceses; Reverend Les Percy, Minister of the Presbyterian Church (Qld); Queensland Cemeteries and Crematoria Association; the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane; the Baha'i Council for Queensland; the Public Trustee of Queensland; Cape York Land Council; the Society of Trust and Estate Practitioners (Qld); Margaret Dillon, Registered Nurse; and the Queensland Police Service.



supported the idea that a deceased should have power to stipulate the method of disposal of his or her bodily remains and that whoever disposes of the body should be legally bound by those directions.<sup>38</sup> The Commission therefore recommends that Parliament legislate for observance of the burial wishes of a deceased.

Having regard to the wording of the analogous provision in the *Cremation Act*, the Commission suggests that any signed and attested written document should be enough to indicate a deceased's wishes. The Commission also notes that the Wills Amendment Bill 2006 (WA), currently before Parliament, provides for the Supreme Court to accept informal wills, including video and audio recordings and that burial wishes contained in such recordings should also be acceptable for the purposes of establishing the deceased's directions. The Commission considers that Part IV of the *Cemeteries Act 1986* (WA) 'Burials and conduct of funerals' would be an appropriate legislative vehicle for a direction to observe a deceased's burial instructions.

The Commission observes that the *Cemeteries Act* and certain by-laws and regulations govern the conduct of funerals and the health and legal requirements of burial of human remains (including place of burial) in Western Australia. The Commission has therefore made the

carrying out of a deceased's burial wishes subject to any written laws of Western Australia that may preclude the precise wishes of the deceased from being carried out. Further, because expenditure for burial of a deceased will usually be recouped from the deceased's estate, the Commission suggests that if complying with the deceased's burial instructions would be unreasonably wasteful of the estate's resources, the executor or administrator may apply to the Supreme Court pursuant to s 45 of the *Administration Act 1903* (WA) for directions.<sup>39</sup>

### Recommendation 78

#### Burial instructions of deceased to be observed

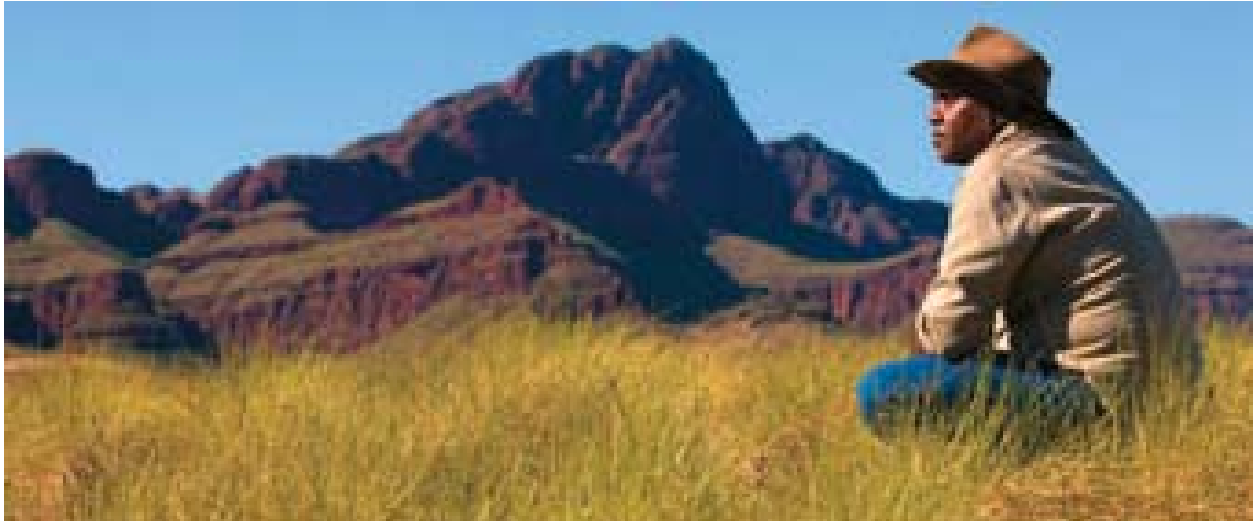
That the following section be inserted into Part IV of the *Cemeteries Act 1986* (WA):

#### 13A Deceased's burial instructions to be observed

- (1) Provided they are not unlawful or against public policy, it shall be the duty of an executor or administrator of a deceased person's estate to use all reasonable endeavours to give effect to the burial instructions contained or expressed in a will, including a codicil or any testamentary instrument or disposition.
- (2) If, having regard to the value and liabilities of the deceased's estate, the executor or administrator believes that carrying out the deceased's burial instructions would be unreasonable, the executor or administrator may apply to the Supreme Court for directions pursuant to s 45 of the *Administration Act 1903* (WA).
- (3) For the purposes of s 13(1) the term 'will' shall be taken to include any such instrument accepted by the Supreme Court as an informal will under the *Wills Act 1970* (WA).

38. Ibid. The Queensland Bioethics Centre for the Queensland Catholic Dioceses submitted that people should be encouraged to make their wishes known regarding disposal of remains, but that these wishes should not be legally binding. However, this position was contra to the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane who argued that directions regarding the disposal of a deceased's remains should be legally binding provided they are not unlawful and the deceased's estate permits.

39. Similar restrictions to the binding nature of burial wishes of a deceased were expressed in submissions to the Queensland Law Reform Commission's reference on final disposal of dead bodies in that state: see Queensland Law Reform Commission, Submission No. 50 (June 2006).



## What is the appropriate forum for burial disputes?

Submissions from Aboriginal people rejected the notion of courts determining disputes over who has the right to bury an Aboriginal deceased. A strong preference for mediation between the parties was expressed. The Commission agrees with this approach; however, it recognises that there will always be cases that cannot be mediated and these will fall to a court to decide.

Both the Aboriginal Legal Service and the Law Society of Western Australia supported retaining a court process, but each argued strongly that the court process must be more accessible.<sup>40</sup> The Magistrates Court was thought to be the more appropriate forum for determination of burial disputes. The Commission agrees that provision should be made for the Magistrates Court to deal with burial disputes where no written burial instructions pursuant to Recommendation 78 have been left by the deceased.<sup>41</sup>

The Law Society submitted that any court process should be preceded by compulsory mediation between the parties facilitated by the Department of the Attorney General's Alternative Dispute Resolution Unit.<sup>42</sup>

In light of the submissions of Aboriginal people, outlined above, and the need to find quick and accessible resolutions to burial disputes, the Commission agrees that mediation is a fitting point of departure.<sup>43</sup> The Commission does, however, question whether the Department's Alternative Dispute Resolution Unit is the appropriate body to conduct such mediation. The Commission believes that the Department of the Attorney General should undertake consultation with Aboriginal communities, the Aboriginal Legal Service and other relevant stakeholders to establish which organisation/s might be best equipped to offer culturally appropriate dispute resolution to parties in such times of grief. The need for burial disputes to be decided quickly must be taken into account in determining whether an organisation is equipped to offer such mediation. Therefore, the accessibility and regional availability of the service should be considered. The Commission is also concerned that the vast distances between parties in some cases may preclude useful mediation. It may, therefore, be necessary to consider an organisation's access to video-link facilities (available in most regional centres) and whether experience in handling mediation between distant parties is required.

40. Law Society of Western Australia, Submission No. 36 (16 May 2006) 10; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

41. A change in forum from the Supreme Court to the Magistrates Court was also supported by the Queensland State Coroner in response to the same question posed by the Queensland Law Reform Commission. Interestingly, in relation to coronial matters the Coroner submitted that the Coroner's Court would be an appropriate place for resolution of a dispute: Queensland Law Reform Commission, Submission No. 50 (June 2006) Queensland State Coroner.

42. Law Society of Western Australia, Submission No. 36 (16 May 2006) 10. The Public Trustee of Queensland submitted that mediation resolves almost all disputes faced by that office, even where cultural issues are involved. They submitted that they were not aware of any application to a court in Queensland to resolve a burial dispute in the past 30 years in which the Public Trustee was involved. This point takes especial significance in light of the approximately 22,000 wills that the Trustee draws up for Queenslanders each year. Queensland Law Reform Commission, Submission No. 50 (June 2006) Public Trustee of Queensland.

43. The Commission notes that where a dispute over burial is brought to the attention of coronial authorities (where the body of the deceased is in coronial care), parties are referred to counselling and alternative dispute resolution to resolve the issue. Where a dispute cannot be resolved between the parties the body is released to the senior next of kin (determined on the evidence available to the coroner). Aggrieved parties may then turn to court processes. Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 9.

## Recommendation 79

### Forum for dealing with burial disputes

1. That provision be made for the Magistrates Court to deal with burial disputes where no burial instructions contained in a will (whether formal or informal) or other signed and attested written document have been left by the deceased.

### Mediation between parties to burial disputes

2. That the hearing of burial disputes be preceded, wherever practicable, by mediation between the parties.
3. That the Department of the Attorney General undertake consultation with Aboriginal communities, the Aboriginal Legal Service and other relevant stakeholders to establish which organisation/s might be best equipped to offer culturally appropriate and immediate mediation to parties to a burial dispute in respect of an Aboriginal deceased.

## Other alternatives

Because burial is in essence a final act, it is difficult to imagine compromise where parties present with genuinely held but competing cultural, spiritual or familial claims to disposal of a deceased's body. The Commission has, however, heard of instances where alternatives have been found to substitute for burial in one's own country and to assist the spirit of the deceased to find its way to its homelands. For example, in Broome the Commission was told that soil from a deceased's country was commonly used to mix with the soil from the gravesite where burial in a deceased's homelands was not possible.<sup>44</sup> This might be in circumstances where no designated cemetery exists in the deceased's homelands or where there is family dispute about the place of burial which would in all likelihood be resolved by a court in favour of the spouse. The Commission commends these efforts.

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44. LRCWA, Project No. 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 25.

# Indigenous Cultural and Intellectual Property Rights

Intellectual property is a generic term for the various rights or bundles of rights which the law accords for the protection of creative effort or, more especially, for the protection of economic investment in creative effort. Australian intellectual property regimes are established and governed primarily through Commonwealth legislation. The ability of the Western Australian government to recognise Aboriginal customary laws in relation to Indigenous cultural and intellectual property rights is therefore limited to the development of protocols and to the support of relevant amendment to Commonwealth legislation.



## Protecting Indigenous Cultural and Intellectual Property in Western Australia

In its Discussion Paper the Commission acknowledged the significance of culture to Aboriginal communities and the often communal nature<sup>1</sup> of the ownership of Indigenous cultural and intellectual property. It also examined the potential of conflict between Aboriginal customary law and Australian intellectual property laws in the areas of copyright in artistic works and Indigenous intellectual property in the regulation of resources.<sup>2</sup> The Commission found that, although intellectual property laws remain the jurisdiction of the Commonwealth government, there are certain administrative measures that can be taken by the Western Australian government to better educate the public about protecting Indigenous cultural and intellectual property.

## Indigenous arts and cultural heritage

The Commission proposed that protocols relating to the use, sale and protection of Indigenous cultural and intellectual property be developed and promoted in Western Australia to inform government agencies, educational and cultural institutions, and private industries in their dealings with Aboriginal artists.<sup>3</sup> All submissions received on this matter endorsed the Commission's proposal. The Commission notes in particular the endorsement of the Department of Culture and Arts<sup>4</sup> which has, through its *Cultural Commitments* strategy described in the Commission's Discussion Paper, already begun to develop local protocols to protect Aboriginal artists and to promote Aboriginal arts development.<sup>5</sup> The Department of

1. The Commission acknowledges the submission of Dr Dawn Casey of the Western Australian Museum who argued strongly that in Western Australia there are 'tiers or hierarchies of ownership of a range of knowledge and iconography'. Dr Casey stressed that it is important to never assume 'that community is the base-line of ownership': Dr Dawn Casey, Submission No. 24 (1 May 2006) 2.
2. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 320–27.
3. *Ibid* 365, Proposal 60.
4. Department of Culture and the Arts (WA), Submission No. 32 (8 May 2006).
5. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 324–25, citing Department of Culture and the Arts (WA), *Cultural Commitments: Indigenous Policy Statement and Action Plan* (June 2004).

Corrective Services advised the Commission that it had also introduced guidelines to regulate the sale and use of art and craft produced by Aboriginal prisoners and to protect prisoners' intellectual property rights.<sup>6</sup> The Aboriginal Legal Service noted that protection of the integrity of Aboriginal cultural heritage requires appropriate recognition by government and non-government agencies of cultural diversity.<sup>7</sup> The Commission strongly agrees with this approach and has amended its recommendation to reflect this.

### Recommendation 80

#### Protocols for protection of Indigenous cultural and intellectual property

That protocols relating to the use, sale and protection of Indigenous cultural and intellectual property be developed and promoted in Western Australia. Such protocols should inform Western Australian government agencies and educational and cultural institutions in their dealings with Indigenous artists and the observance of these protocols by all Western Australian industries, companies and individuals should be actively encouraged by government. The protocols should recognise and appropriately reflect the cultural diversity of Aboriginal peoples in Western Australia and should be developed in close consultation with Aboriginal artists and communities.

## Indigenous intellectual property in the regulation of resources

An area of considerable concern to Western Australian Aboriginal communities is the 'bioprospecting' of Indigenous knowledge. Bioprospecting refers to the exploration of biodiversity (that is, plant-related substances) for commercially valuable genetic and biochemical resources, with particular reference to the pharmaceutical, biotechnological and agricultural industries.<sup>8</sup> In 2002 the Commonwealth, state and territory governments committed to a 'Nationally

Consistent Approach for Access to and Utilisation of Australia's Native Genetic and Biochemical Resources'. This agreement is intended to give effect to Australia's obligations to ecological sustainability under the international *Convention on Biodiversity* and encourage the type of bio-investment in Australia described in the example above.<sup>9</sup> Article 8(j) of the *Convention on Biodiversity* encourages signatories to:

[R]espect, preserve and maintain traditional knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.<sup>10</sup>

In 1999 the Commonwealth government enacted the *Environment Protection and Biodiversity Act 1999* (Cth). This Act essentially implements the Convention in respect of Commonwealth landholdings and includes references to matters contained in Article 8(j). Western Australia has committed to introducing biodiversity conservation legislation that introduces a terrestrial bioprospecting licensing regime to ensure that:

- biological resources are used in an ecologically sustainable manner and biodiversity is protected;
- benefits arising from exploitation of Western Australia's biological resources are shared with the Western Australian community; and
- Aboriginal people's native title and intellectual property rights are recognised and protected.<sup>11</sup>

In December 2004 the Department of Conservation and Land Management released a discussion paper seeking public submissions on the subject of a state biodiversity conservation strategy and is apparently in the process of analysing those submissions. The Minister for the Environment has indicated that the final biodiversity conservation strategy and accompanying Bill will be introduced into Parliament in 2006.<sup>12</sup> The

6. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 17.

7. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 12. The ALS referred to the concept of 'cultural security' as a model for protection of cultural heritage and recognition of cultural diversity. Cultural security is a concept currently used in delivery of health services and is discussed in this context in the Commission's Discussion Paper: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 23–24.

8. Posey DA, 'Indigenous Peoples and Traditional Resource Rights: A basis for equitable relationships?' in *Ecopolitics IX Conference Papers and Resolutions: Perspectives on Indigenous Peoples Management of Environment Resources*, (Darwin: Northern Territory University, 1–3 September 1995) 43, 46. See also Davis M, *Biological Diversity and Indigenous Knowledge*, Parliament of Australia Research Paper No. 17 (29 June 1998).

9. Ibid 61–62.

10. *Convention on Biological Diversity 1992*, Article 8(j). Australia ratified the Convention in 1993.

11. Western Australian Government, *Biodiversity Conservation Act Consultation Paper* (December 2002), <[http://www.naturebase.net/biocon\\_act\\_consult\\_text.html](http://www.naturebase.net/biocon_act_consult_text.html)>.

12. Western Australia, *Parliamentary Debates*, Legislative Council, 7 April 2005, 493b (Mr Kim Chance representing the Minister for the Environment).

## Unregulated bioprospecting could represent a lost opportunity for some Aboriginal communities to capitalise on their traditional knowledge and to develop the community's economic base.

Commission has been advised that the first draft of the Bill has not yet been completed.

Although the Commission acknowledges the complexity of this task and applauds the government's consultative processes in relation to development of Western Australia's biodiversity conservation strategy, it is concerned that traditional Aboriginal knowledge the subject of bioprospecting meanwhile remains unprotected. The Commission understands that this issue is important to Aboriginal people and that unregulated bioprospecting could represent a lost opportunity for some Aboriginal communities to capitalise on their traditional knowledge and to develop the community's economic base.<sup>13</sup> The Commission reiterates the concerns outlined in its Discussion Paper regarding the need for the immediate development of protocols to guide government agencies and Western Australian industries in dealing with biological resources and to ensure that consultation (and, where relevant, benefit-sharing) is undertaken with Aboriginal communities as a matter of course. It is the Commission's opinion that these protocols should especially be followed in relation to relevant agreements entered into under the 'business undertakings' power in s 34A of the *Conservation and Land Management Act 1984* (WA).<sup>14</sup>

The Commission therefore confirms its recommendation that the Western Australian government develop protocols aimed at those issues arising from the 'bioprospecting' of Aboriginal medical and ecological knowledge in the exploration of biodiversity for commercially valuable genetic and biochemical resources.<sup>15</sup> The Department of Indigenous Affairs has submitted that it would welcome the opportunity to be involved in the development of these protocols.<sup>16</sup>

### Recommendation 81

#### Protocols to regulate 'bioprospecting' of Aboriginal knowledge

That, at the earliest opportunity, the Western Australian government develop protocols aimed at addressing issues that arise from the 'bioprospecting' of Aboriginal knowledge; that is, the exploration of biodiversity for commercially valuable genetic and biochemical resources. These protocols should aim to safeguard Indigenous cultural and intellectual property by ensuring that those who seek to benefit from traditional cultural knowledge:

1. undertake direct consultation with Aboriginal people as to their customary law and other requirements;
2. ensure compliance with Aboriginal peoples' customary law and other requirements;
3. seek free, prior and informed consent for the use of any Aboriginal knowledge from the custodians of that traditional knowledge;
4. seek free, prior and informed consent for access to Aboriginal land for any purposes, including collection;
5. ensure ethical conduct in any consultation, collection or other processes;
6. ensure the use of agreements on mutually agreed terms with Aboriginal people for all parts of the process;
7. devise equitable benefit-sharing arrangements; and
8. acknowledge the contribution of Aboriginal peoples.

13. It should be noted that these rights are expressly protected under Article 29 of the *United Nations Declaration of the Rights of Indigenous Peoples*. The Declaration was adopted by the Human Rights Council in June 2006 and forwarded for resolution by the United Nations General Assembly.

14. In particular agreements 'to promote and encourage the use of flora for therapeutic, scientific or horticultural purposes for the good of people in this State or elsewhere, and to undertake any project or operation relating to the use of flora for such a purpose': *Conservation and Land Management Act 1984* (WA) s 33(1)(ca).

15. Ibid 327, Proposal 61.

16. Department of Indigenous Affairs (WA), Submission No. 29 (2 May 2006) 14.

## Promotion of Indigenous Cultural and Intellectual Property Interests

Western Australia's Minister for Culture and the Arts, Sheila McHale MLA, has noted the importance of the diverse Indigenous cultural contribution to the state's arts, ecology and tourism sectors, and to the overall economy.<sup>17</sup> The state government has also announced its commitment to the recognition and support of 'Indigenous ownership of their cultural material and intellectual property' and to facilitating 'a better understanding of Indigenous intellectual property and copyright – with respect to the law and Indigenous protocols'.<sup>18</sup> Nonetheless, the theft and misuse of Indigenous intellectual and cultural property in Western Australia continues.

Because the protection of intellectual property is in many respects beyond the legislative competence of the Western Australian Parliament it might be thought that the state's efforts to improve recognition of

Indigenous cultural and intellectual property are limited to the establishment of administrative protocols and guidelines of the type proposed above. However, the state can also impact positively upon the lives of Indigenous artists and intellectual property holders by lending its vocal support to the review of intellectual property laws at the Commonwealth level to better protect Indigenous cultural and intellectual property. Submissions, including that of the Department of Culture and the Arts, supported the Commission's proposal to this effect.<sup>19</sup>

### Recommendation 82

#### State support for enhanced protection of Indigenous cultural and intellectual property

That the Western Australian government support and encourage the review of Commonwealth intellectual property laws and the institution of special measures to provide better protection for Indigenous cultural and intellectual property.



17. Department of Culture and the Arts for Western Australia, *Cultural Commitments: Indigenous Policy Statement and Action Plan* (June 2004) i.

18. *Ibid* 8.

19. Department of Culture and the Arts (WA), Submission No. 32 (8 May 2006); Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 12.