

Introduction

For the purposes of this Report, and unless otherwise stated, reference to Aboriginal people¹ includes Torres Strait Islander people.²

The Aboriginal Customary Laws Reference

In December 2000, the Commission received a reference to ‘inquire into and report upon Aboriginal customary laws in Western Australia’ and consider whether, and if so how, Aboriginal customary laws should be recognised within the Western Australian legal system. The Commission’s terms of reference for this project were wide-ranging, giving the Commission the freedom to investigate all areas of Aboriginal customary laws in Western Australia other than native title issues and matters addressed under the *Aboriginal Heritage Act 1972* (WA).

Methodology and Consultation Process

The Commission was concerned to ensure Aboriginal involvement in this reference from its outset. A five-member Aboriginal advisory panel oversaw the tender evaluation process, while a larger Aboriginal Research Reference Council³ assisted the Commission in

establishing culturally appropriate methods of managing the reference.⁴ The Commission also appointed two respected Aboriginal Special Commissioners, Professor Michael Dodson and Mrs Beth Woods, to advise and assist the Commission in its conduct of consultations throughout Western Australia.

From November 2002 to August 2003 the Commission undertook an extensive consultative process in the metropolitan, regional and remote areas of Western Australia. The Commission met with Aboriginal communities, individuals, Aboriginal and non-Aboriginal organisations and government agencies. In many cases, consultations took place over a number of days and included large public meetings, gender-based discussion groups, theme-based discussion groups and one-on-one (or restricted group) confidential briefings. The research and information collected during these consultations assisted the Commission in determining the areas of law upon which to concentrate its research efforts and its proposals for reform.⁵

As part of the research gathering phase of the project 15 background papers on different areas of interaction

1. It is noted that the Disability Services Commission of Western Australia found that in their consultations with Aboriginal peoples in Western Australia, most preferred the term ‘Aboriginal’ (or otherwise the name of their specific language group) to the term ‘Indigenous’. Likewise the Law Reform Commission of Western Australia found that in its own consultations and dealings with Aboriginal peoples in this state the term ‘Aboriginal people/s’ was widely accepted. Disability Services Commission (WA), *Access for Aboriginal and Torres Strait Islander People with Disabilities: Policy and practice plan* (April 2006) 5.
2. The 2001 Australian Census recorded that ‘the vast majority of Indigenous persons in Western Australia stated that they were of Aboriginal origin (96%) [or 56,292 people], 1.5% [874 people] were of Torres Strait Islander origin, while those with dual Aboriginal and Torres Strait Islander origin comprised 2.3% [1,330 people]’: Department of Indigenous Affairs (WA), *Overcoming Indigenous Disadvantage in Western Australia* (2005) 25. The latest available estimate of the resident Aboriginal population of Western Australia is 65,931. This figure will be revised following the 2006 Census.
3. A list of members of the Aboriginal Research Reference Council and the initial project team is provided at Appendix G to this Report.
4. This included negotiation of a Memorandum of Commitment ensuring respect for cultural protocols, practices and information. A copy of the Memorandum was presented to each Aboriginal community consulted by the Commission. For details, see Law Reform Commission of Western Australia (LRCWA), *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 10–11 and Appendix F of this Report.
5. A detailed review of the Commission’s research methodology and management of the reference can be found in the Discussion Paper: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 7–14.

between Australian law and Aboriginal law and culture were also commissioned. These were published individually over the period December 2003 to June 2005 and were released as a single volume in January 2006 to complement the Discussion Paper and this Final Report.⁶

The Commission's Discussion Paper

In December 2005, the Commission published a lengthy Discussion Paper which examined in detail the opportunities for recognition of Aboriginal customary laws in the Western Australian legal system.⁷ The Discussion Paper was presented in ten parts.

Part I provided an overview of the Commission's research methodology and management of the reference.

Part II provided background and statistical information about Aboriginal peoples in Western Australia and

introduced some general findings from the Commission's consultative visits to Western Australian Aboriginal communities.

Part III addressed the question, 'What is customary law?' and discussed issues and methods of recognition of Aboriginal customary law within the Western Australian legal system.

Part IV examined the concept of Aboriginal customary law in the international arena, including in the human rights context.

Part V dealt with the Commission's substantive investigation into the interaction of Aboriginal people and the criminal justice system. It discussed traditional Aboriginal law and punishment; Aboriginal community justice mechanisms; Aboriginal courts; criminal responsibility; sentencing of Aboriginal offenders; bail issues; and the practices and procedures of courts, police and prisons.

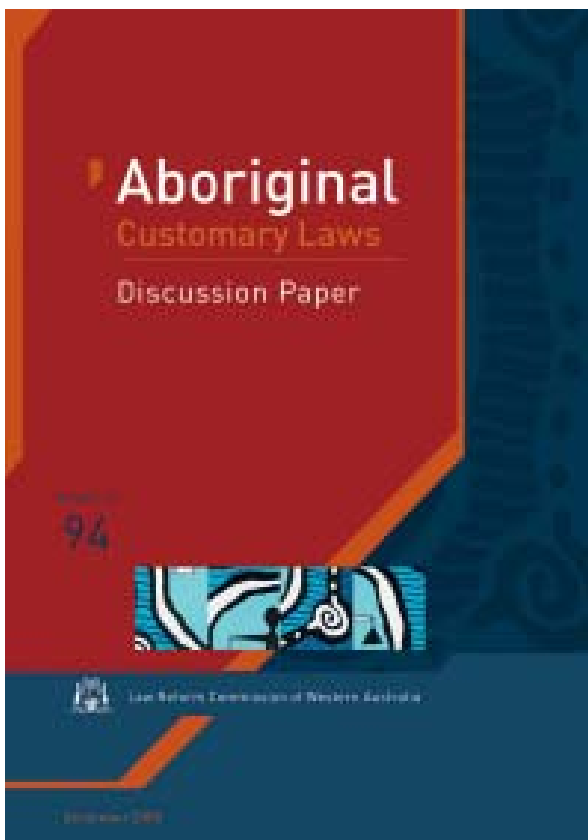
Part VI dealt with Aboriginal customary law and the civil law system including tortious acts and omissions; distribution of property upon death; contractual arrangements and protection of Indigenous consumers; Indigenous cultural and intellectual property rights; coronial matters; funerary practices and burial rights; and guardianship and administration.

Part VII examined the significance of Aboriginal customary law in the family context including traditional Aboriginal marriage; the interaction between Aboriginal customary laws and family law in Western Australia; matters relating to the care and custody of Aboriginal children; and issues of family violence and the protection of Aboriginal women and children.

Part VIII examined ways to improve the recognition of customary law in relation to hunting, fishing and gathering, and associated land access issues.

Part IX investigated ways of making practical changes to procedures of courts, particularly in respect of the reception of evidence of Aboriginal witnesses.

Part X explored Aboriginal community governance and discussed what is being done (and what more can be done) to maximise Aboriginal peoples' participation in the decision-making processes that affect their daily lives.



6. LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No 94 (January 2006).

7. The Discussion Paper was officially launched by the Attorney General of Western Australia, the Hon. Jim McGinty MLA, on 6 February 2006.



of law and criminology at the University of Western Australia. In addition, the Commission's Principal Project Writer, Dr Tatum Hands, published a number of articles in relevant journals (including an Indigenous law journal) explaining the Commission's research methodology, findings and proposals.⁸

Because the proposals contained in the Discussion Paper affect the way that Aboriginal law and culture is understood and recognised in the Western Australian legal system, the Commission

A total of 93 proposals for reform of laws, procedures and practices in Western Australia were made in the Discussion Paper. The Commission also identified 18 matters in which it felt unable, at that time, to make a firm proposal for reform. These were generally in areas where strong conflicting views were expressed by Aboriginal people during the Commission's initial consultations or where the Commission felt that it had received insufficient input from Aboriginal people or other stakeholders to reach a conclusion.

The Submissions Process

The Commission invited interested parties to make submissions in respect of the proposals for reform, invitations to submit or on any other matter contained in the Discussion Paper. To assist in the submissions process, the Commission published a concise overview of the Discussion Paper and the Commission's proposals. A series of plain English brochures outlining key proposals for reform in different areas were also created and circulated widely throughout Western Australian Aboriginal organisations and government agencies. The Commission held focus groups, one-on-one meetings and agency briefings to assist in the understanding of relevant proposals. These included detailed briefings to Aboriginal organisations such as the Indigenous Women's Congress and the Aboriginal Legal Service. Members of the Commission also made presentations at a national law reform conference and to students

appreciated the importance of maximising submissions from Aboriginal people. The Commission recognised that language, remoteness, education and cultural difference may unduly obstruct Aboriginal people from making formal written submissions. To this end the Commission invited informal submissions by means of email or telephone. The Commission also conducted return consultation visits to the Goldfields, Western Desert, Kimberley, South West and Mid West regions to discuss its proposals for reform with Aboriginal communities and to take verbal submissions. All submissions were considered by the Commission in formulating the recommendations to Parliament contained in this Final Report.⁹



8. Hands TL, 'Teaching a New Dog Old Tricks: Recognition of Aboriginal customary law in Western Australia' (2006) 6(17) *Indigenous Law Bulletin* 12–15; 'Recognition of Aboriginal Customary Laws in Western Australia' (2006) 33(2) *Brief: Journal of the Law Society of Western Australia* 25–29; 'Recognising Aboriginal Law' (2006) 31(1) *Alternative Law Journal* 49.
9. A list of submissions may be found at Appendix C to this report.



About the Final Report

This Final Report is intended to be read in conjunction with the Commission's earlier Discussion Paper which provides greater detail in respect of the Commission's initial consultation findings, its research and analysis. Departing somewhat from the Discussion Paper structure, the first four chapters of the Final Report are of a general nature. Chapter One addresses some of the misconceptions about the reference, and about Aboriginal customary law generally, that have featured in media debates since the release of the Commission's Discussion Paper; Chapter Two outlines some guiding principles for reform that are applicable across all areas of the reference; Chapter Three summarises issues raised in the Discussion Paper about the state of Aboriginal disadvantage in Western Australia and the Commission's consultation findings; and Chapter Four discusses methods of and barriers to recognition of Aboriginal customary laws in this state.

These chapters are followed by specific chapters which address the interaction between Aboriginal law and culture and Western Australian law in defined areas: Chapter Five deals with the criminal justice system; Chapter Six with the civil law system; Chapter Seven with family law and family violence; Chapter Eight with

customary harvesting of natural resources; Chapter Nine with evidence and court procedure; and Chapter Ten with Aboriginal community governance in Western Australia.

The Commission's final recommendations to Parliament follow a brief discussion of the issues within each section and also feature in Appendix A to this Report. Where submissions¹⁰ received overwhelmingly supported the Commission's original proposals, discussion of the issues is limited. Those wishing to read a more detailed explanation of the arguments or research supporting the Commission's conclusions may do so by turning to the page of the Discussion Paper indicated in accompanying footnotes. Where submissions have disputed the Commission's original proposals, where new research has come to light or where new issues have arisen, a more detailed explanation for the Commission's final recommendations or findings is provided.

For the purposes of assisting the Western Australian government in the timely implementation of the 131 recommendations contained in this Final Report, the Commission has identified departmental and/or agency responsibility for the implementation of each recommendation. This important information is provided in Appendix B to this Report.

10. The Commission expresses its gratitude to those that made submissions on the Discussion Paper and those who were consulted or advised on aspects of this reference. A list of these individuals, communities and organisations may be found in Appendix C to this Report.