
Recognition of Aboriginal customary laws in WA

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In December 2000, the Law Reform Commission of Western Australia (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. During the past 5 years, the Commission has undertaken extensive consultations with Aboriginal people in all regions of Western Australia and has published a series of background papers on various topics relating to the project. The Commission has now released its Discussion Paper¹ and is inviting submissions from legal practitioners and other interested parties to inform its final recommendations to parliament.

Scope of the Commission’s reference

Other than native title issues and matters under the *Aboriginal Heritage Act* 1972 (which were expressly excluded from the reference), the Commission was given a broad mandate to investigate the potential for recognition of Aboriginal customary laws in relation to all areas of law falling within the State’s legislative jurisdiction.

However, during its community consultations, a number of concerns of Western Australian Aboriginal people were brought to the attention of the Commission. These included issues relating to Aboriginal youth; the decline of cultural authority; health and wellbeing; racism and reconciliation; housing and living conditions; and substance abuse.

To a casual observer, these concerns may be thought to be unrelated to Aboriginal customary law; however, customary law is understood in Aboriginal Australia to encompass ‘everything’ and the Commission found that it could not “be readily divorced from Aboriginal society, culture and religion”.² In any event, the Commission accepted that discussion of these matters was “crucial to the proper execution of the reference” and fell within the Commission’s express mandate to

consider “the views, aspirations and welfare of Aboriginal persons in Western Australia”.³ The Commission’s research has therefore been far broader and more inter-disciplinary than previous Australian inquiries into the recognition of Aboriginal customary law.

The resulting Discussion Paper reflects this broad approach. It covers a number of areas of law and policy, including inheritance; evidence and court procedure; guardianship and administration; contractual arrangements and consumer protection; tortious acts and omissions; funerary practices; community governance; customary harvesting; coronial inquests; criminal justice issues (including community justice mechanisms, Aboriginal courts, police and prisons, bail, sentencing and criminal responsibility); cultural and intellectual property; family law and the care and custody of Aboriginal children; family violence; indigenous disadvantage; and international human rights law. The Commission makes 93 proposals for substantive, procedural and policy reform to provide practical and effective recognition of Aboriginal customary laws and of the cultural concerns of Aboriginal people in Western Australia.

Methods of recognition

The Commission’s proposals allow for a variety of methods of recognition of Aboriginal customary law and culture in Western Australia. These include statutory recognition, administrative and departmental policy recognition, common law or judicial recognition, and constitutional recognition. The Commission has recommended against the codification of customary laws – the difficulty of precisely defining what constitutes customary law (a matter the Commission has determined should be left to Aboriginal people alone) and the erosion of cultural authority and disempowerment of Aboriginal people (which would result from subjecting Aboriginal laws to the interpretation of non-Aboriginal courts and authorities) support the need for a more flexible approach to recognition.

In some cases, the Commission has concluded that it is desirable not to formally recognise Aboriginal customary law so that its practice can remain free from undue interference by government. For example, the Commission found that the customary law equivalent to a tortious duty of care was, in the eyes of Australian law, in the nature of a social rather than legal obligation “and therefore not the proper subject of State control”.⁴

Another example may be found in the area of contractual arrangements, where the Commission concluded that statutory intervention was unnecessary because of the lack of evidence of any conflict between customary law and Australian law and the potential for the common law to develop to recognise customary rules of contract in an appropriate case.⁵

The Commission's proposals: three examples

For the purpose of this article, I have chosen three proposals from the Commission's Discussion Paper which illustrate something of the diversity of matters addressed in the paper. The first discusses proposed constitutional change, the second examines the Commission's concept for the institution of community justice mechanisms in Western Australia and the third deals with proposed amendments to succession laws in Western Australia.

Constitutional change

A clear message from the Commission's consultations with Aboriginal people across the State was that there was a need for constitutional change in order to begin the process of reconciliation in Western Australia and to show respect to Aboriginal law and culture.

In its Discussion Paper, the Commission considers two types of constitutional change: constitutional recognition of Aboriginal customary law as a distinct source of law and constitutional acknowledgement of Aboriginal peoples as "first Australians".

During the 1990s, source of law recognition was debated vigorously in the Northern Territory (where the Aboriginal population is over 28%) but was rejected when put to referendum in 1998. In the Commission's analysis, there is no evidence that source of law recognition can effectively be realised without subjecting Aboriginal customary laws to codification or political control. For this reason, the Commission has preferred the reconciliatory form of constitutional acknowledgement of Aboriginal peoples as "first Australians". This form of recognition has been mooted by the current Western Australian government in the form of an introductory preamble to the State Constitution.⁶

The Commission's Discussion Paper reviews the advantages and disadvantages of a preambular statement and concludes that a dedicated provision of the Constitution is required to effect meaningful constitutional acknowledgement of Aboriginal peoples.⁷ It commends the recent amendment to the Victorian Constitution (which, among other things, recognises Aboriginal peoples as having unique status as descendants of Australia's first people and as original custodians of the land on which the colony was established) as precedent for constitutional change.⁸

This proposal may be thought to be somewhat symbolic; however, substantive recognition of customary law is achieved in other proposals for reform found throughout the Commission's Discussion Paper. Moreover, the acknowledgement of Aboriginal people—as opposed to Aboriginal laws—was considered "a necessary foundation for effective governance" in Western Australia.⁹

Community justice groups

Among the Commission's 46 proposals for reform of the criminal justice system is a detailed proposal for the establishment of community justice groups in Western Australia.¹⁰ The Commission reviewed the existing formal community justice mechanism in Western Australia; that is, the by-law scheme operating under the *Aboriginal Communities Act 1979 (WA)*. The Act provides for Aboriginal communities to declare by-laws applying to community lands to regulate such matters as behaviour, traffic, damage to property, alcohol consumption and admission to land.

The Commission's research revealed significant problems with the operation and validity of by-laws. These problems included police abdicating responsibility for enforcing breaches of by-laws to Aboriginal community wardens (a concept which itself is *ultra vires* the enabling Act); the arbitrary fining of alleged offenders by community councils; and the erosion of the cultural authority of Elders (replaced under the scheme by the 'Western' authority of community councils).

The Commission found that rather than answering the law and order problems of Aboriginal communities, the by-law scheme has merely created another distinct layer of laws to which Aboriginal people are subject.¹¹ Importantly, the by-law scheme never realised

its full potential of allowing Aboriginal communities some degree of governing autonomy (implicit in the preamble to the Act)¹² and never adequately acknowledged customary law.¹³

In place of the existing by-law scheme in Aboriginal communities, it is proposed that community justice groups be established. The Commission has conceived of a basic statutory framework that will allow community justice groups to be substantially self-determining entities; however, there are some basic restrictions applied to membership of a community justice group.

The Commission's research has found that where a governing structure or authority has worked best in Aboriginal communities it has been representative of skin or family groups, which reflects traditional cultural authority structures in Aboriginal communities. In addition, the Commission found that there was a need to protect Aboriginal women's interests and has, to that end, provided that there must be equal gender representation on a community justice group. These membership requirements, along with the requirement that a majority of members of a community support the establishment of a community justice group, will provide for a greater degree of operational legitimacy than the government-imposed community councils required under the current by-law scheme.¹⁰

To control behaviour on community lands in the absence of by-laws, community justice groups are empowered by the community to set community rules and sanctions. Other than the constraints of Australian law, the Commission has not imposed any restrictions on the types of rules and sanctions that may be imposed by community justice groups. In this way, traditional laws and customs can play a role in enforcing order on community lands.

A significant limitation on the ability of by-laws to control behaviour was that a community member could simply step outside the gazetted boundaries of a community to engage in the offending behaviour. In some cases, this simply means walking onto a public road within the community or into the grounds of a public building, such as a school. Although identifiable physical boundaries of community lands are required to register a community justice group under the Commission's proposed scheme,¹⁴ there is nothing that can preclude

community rules and sanctions from operating beyond gazetted community boundaries. For example, if a community agrees that one of its rules will be that no community member is permitted to engage in sniffing petrol or other volatile substances, there is nothing to stop a community justice group from calling a person to account for an offence against that rule, even if that person has engaged in the behaviour in a distant place.¹⁵

To ensure that the governing authority of a community justice group is not regularly disregarded, the Commission has proposed that an offence similar to trespass be enacted to allow police to remove a community member where he or she has been asked to leave the community for a period of time and has disobeyed.¹⁶

Community justice groups will also have the opportunity to perform a number of important formal roles in the criminal justice system, including supervision of offenders whilst on bail or subject to other court orders (such as community service orders) and provision of reliable cultural information to courts (in particular, information relating to Aboriginal customary law).

But perhaps the most important role a community justice group could play is in the diversion of Aboriginal people away from formal criminal justice processes. Despite being just over 3% of the population of Western Australia, Aboriginal people still represent more than 40% of the adult population in the State's jails and almost 80% of the juvenile population in the State's detention centres. As the Commission has remarked, this situation is "indefensible".¹⁷

Diversion from the criminal justice system is envisaged as working in three ways: diversion by a community justice group; diversion by police; and diversion by courts.

In the first situation, an offence (for example, family violence or disorderly behaviour) may come to the attention of a community justice group through complaint by the victim or some other community member. The community justice group may hold a meeting with the offender (and perhaps the victim/s) to discuss the appropriate sanction, whether the offender should be referred to the police or whether he or she may benefit from rehabilitative or healing programmes within the community

or elsewhere. The result could be that the offender is diverted from the criminal justice system and that his or her behaviour is addressed in a culturally-appropriate way.

In relation to the second method of diversion, the Commission anticipates that police will be "empowered to exercise their discretion to refer a matter to a community justice group without charging" an offender.¹⁸ The Commission has provided the framework for a pilot scheme to be established to test the potential for police diversion of young Aboriginal offenders to community justice groups.¹⁹

The third method of diversion involves courts. The interaction between courts and community justice groups will likely be quite significant: courts will hear regularly from community justice group members and will rely upon them for relevant information about Aboriginal culture or customary law that may have a bearing upon the sentencing of an offender.

In appropriate cases (and with the consent of the offender), a court may adjourn sentencing for the offender to attend the community justice group. This will allow healing of the community to begin immediately by involving the community in sanctioning the offender.

A group may insist that the offender undertake a programme of cultural training or undergo non-violent sanctions such as shaming or providing some compensation to the community for the offence. When the community justice group reports to the court following the period of adjournment, the court may decide that "a lesser (or in some cases no additional) penalty" would suffice to deal with the matter.¹⁸

Apart from reducing the unnecessary imprisonment of Aboriginal people for less serious offences (in particular, where the offender would benefit from in-community healing or rehabilitation programmes), this would go some way to reducing the problem of 'double punishment' that some Aboriginal people face as a consequence of being answerable to both Australian law and Aboriginal customary law.

Succession laws

The Commission found that modified versions of traditional customs surrounding the distribution or disposal of property of a deceased are still practised in some areas today.

During its consultations with Aboriginal communities in Western Australia, the Commission heard evidence that, in some communities, customary law calls for property of a deceased to be destroyed or gifted to distant 'tribes'.²⁰ In others, the Commission heard that customary law was not so important in relation to inheritance of property and that Aboriginal people accepted 'white' inheritance practices.²¹ In contrast, customs surrounding "the inheritance of intellectual property, kinship obligations, sacred objects and cultural custodianship" remained significant to most Aboriginal people consulted on this matter.

The Commission's starting point in relation to its review of succession laws for this reference was whether they have the capacity to respect customary practices and accommodate the cultural concerns of Aboriginal people in dealing with a deceased's property.

The Commission found that a great number of Aboriginal people in Western Australia die intestate, leaving their estate to be dealt with under a specific intestacy scheme applying only to Aboriginal people. The scheme under the *Aboriginal Affairs Planning Authority Act 1972* (WA) and associated Regulations (the AAPA scheme) provides that Aboriginal intestate estates vest immediately in the Public Trustee which is required to administer the estate according to the hierarchy set out in the general intestacy provisions of the *Administration Act 1903* (WA). If no persons of entitlement can be found under the general provisions, then distribution may be made to a customary law spouse or children of a traditional Aboriginal marriage.²² The AAPA scheme does not apply if the deceased was married in accordance with Australian law or does not "qualify" within the definition of a "person of Aboriginal descent" under s33 of the AAPA Act; that is, "of the full blood descended from the original inhabitants of Australia or more than one-fourth of the full blood".²³

Immediately it can be seen that the scheme discriminates against Aboriginal people. First, by legislatively vesting the administration of an estate in the Public Trustee, the right of families to administer the estate of a deceased Aboriginal relative is denied.

Second, the qualification requirements deny application of the scheme to Aboriginal people of less than "one fourth of the full blood" who are traditionally married. Although most traditional marriages would be recognised as de

facto unions under the general intestacy laws, they are not necessarily accorded the same respect as marriages under Australian law, setting up further discrimination on cultural grounds. In any case, it becomes clear upon closer analysis that the scheme pays mere lip service to recognition of customary law and, in its present form, acts to the disadvantage of Aboriginal people.

Although this point is made in its Discussion Paper, the Commission has not suggested that Aboriginal customary law should determine succession in all cases of an Aboriginal intestate deceased in Western Australia. To do so would discriminate against those Aboriginal people who do not have strong ties to Aboriginal law or who wish their estate to be inherited in the lineal fashion (such as spouse, children and so on) contemplated by the general law.

The Commission found that there is currently scope for the informal distribution of small Aboriginal intestate estates (including cash held in financial institutions²⁴ and personal property) and that these may be distributed according to customary law without interference from authorities.²⁵ For larger estates consisting of real property, stocks, shares or large cash deposits, formal administration will be required; however, the Commission observed that such matters were never part of customary law (indeed land is traditionally inalienable at customary law) and that conflict between customary law and the general law would therefore be unlikely.²⁵

The Commission also noted that succession in relation to matters of traditional significance (such as sacred objects, kinship obligations etc) will continue by application of customary law, with or without recognition by Western Australian law.

The Commission has therefore proposed substantial amendment to the AAPA scheme to address the criticisms of the scheme and to accommodate Aboriginal cultural concerns. Among the changes proposed are: the removal of the discriminatory provision which vests a deceased Aboriginal estate automatically in the Public Trustee; the relaxation of rules governing grants of letters of administration in respect of an Aboriginal deceased; the recognition of a broader range of kin (including classificatory kin) than currently exists under the AAPA scheme; and the recognition of traditional Aboriginal marriage as a marriage for the purposes of entitlement under the *Administration Act*.²⁶

The Commission has also made proposals to amend the list of persons entitled to family provision under the *Inheritance (Family and Dependants Provision) Act 1972 (WA)* to include those in kinship relationships with the deceased under the deceased's customary law.²⁷

Conclusion

It is now 20 years since the publication of the Australian Law Reform Commission's watershed report into the recognition of Aboriginal customary law in Australia and 15 years since the report of the Royal Commission into Aboriginal Deaths in Custody.

Despite the expressed intentions of governments to implement the recommendations of these reports, little has been done to effect substantive change for Aboriginal people. This past inaction has meant that many Aboriginal people have lost confidence that any action will be taken by governments to remove systemic bias in the Western legal system, to improve the entrenched state of indigenous disadvantage, or to acknowledge and respect the fact that a complex system of laws was in place in Aboriginal societies at the time of colonisation and remains strong today.

The Commission's Discussion Paper is a timely reminder of the enormity of these issues and provides a template for effective, practical reform of laws and policies in Western Australia to address each of these concerns. The Commission seeks your submissions and support to ensure that meaningful reform is realised.

1. Law Reform Commission of Western Australia. *Aboriginal Customary Laws*, Discussion Paper, Project No 94 (December 2005). The author wishes to thank Victoria Williams and Danielle Davis for their comments on an earlier draft of this article.
2. *ibid.*, 50.
3. *ibid.*, 20.
4. *ibid.*, 272.
5. *ibid.*, 277.
6. See, for example, Jim McGinty (Attorney General), Speech to the Constitution at Large Conference, 22 March 2003.
7. Refer Note 1, 59–60. The fact that the Western Australian Constitution currently lacks a section 1 presents an ideal opportunity for recognition of Aboriginal peoples to be inserted as a foundational provision of the Constitution.
8. *Constitution (Recognition of Aboriginal People) Act 2004 (Vic)*, s1A.

9. Refer Note 1, 60. See also Proposal 4.
10. *ibid.*, Proposal 18, pp133–41.
11. *ibid.*, Proposal 11, pp116–20. Many of the by-laws enacted by Aboriginal communities simply duplicate offences under the general law.
12. *ibid.*, pp430–31.
13. *ibid.*, p116. It should also be noted that some Aboriginal communities' by-laws include a defence to a charge of breaching a by-law that the person was acting pursuant to a custom of the community; however, the validity of this defence under the enabling Act is questionable and there is no evidence of any case where the defence has been successfully relied upon.
14. The Commission has made provision for communities without identifiable boundaries (such as, for example, communities or groupings of Aboriginal people in metropolitan areas or in large regional centres) to also establish community justice groups; however, these will probably not be empowered to create official community rules and sanctions. Nonetheless, they will be able to play the same formal roles in the criminal justice system as groups in discrete Aboriginal communities.
15. It should be noted that inhalant use is not an offence in Western Australia, although the police and other authorised officers have power to seize intoxicants in public places or from children. See *Protective Custody Act 2000 (WA)*.
16. Refer Note 1, Proposal 14, pp122–23. The Commission has invited submissions on whether there should be a customary law defence to the offence of trespass to allow persons entry onto lands for customary law purposes such as ceremonies: Invitation to Submit 3, p123.
17. *ibid.*, p95.
18. *ibid.*, p138.
19. *ibid.*, Proposal 43, pp243–44.
20. *ibid.*, p282–83.
21. *ibid.*, p283.
22. Aboriginal Affairs Planning Authority Regulations 1972 (WA) reg 9.
23. The Commission makes the point that the definition in s33 is potentially offensive to Aboriginal people. It proposes an inclusive definition of "Aboriginal person" for the purposes of all written laws in Western Australia. For details Refer Note 1, Proposal 3, pp47–49.
24. See *Administration Act 1903 (WA)* s139. The Commission has also proposed that the amount available for release to kin prescribed under this section be increased. Refer Note 1, Proposal 53, p293.
25. Refer Note 1, p291.
26. *ibid.*, Proposal 52, pp292–93.
27. *ibid.*, Proposal 55, pp 294–95.