

# Aboriginal customary law in Western Australia

*By Harry Blagg, Neil Morgan and Cheri Yavu Kama Harathunian\**

**I**t is almost 16 years since the Australian Law Reform Commission (ALRC) published its groundbreaking report *The Recognition of Aboriginal Customary Laws*.<sup>1</sup>

In the intervening period, much has occurred to strengthen the report's fundamental arguments; namely, that forms of customary law continue to influence the lives of many Aboriginal people and that recognition of Aboriginal forms of law (and we would emphasise the plurality here) would be invaluable both in healing some past wrongs and in assisting Aboriginal communities in maintaining order and social harmony. However, most of the report's key recommendations still await implementation across the country.

In December 2000, the then Western Australian Attorney-General, Mr Peter Foss QC MLC, gave the Law Reform Commission of Western Australia a reference to inquire into customary law in Western Australia. The reference is timely and important, offering an opportunity to revisit the work of the ALRC in the light of subsequent developments in law, research and policy; to 'regionalise' the ALRC's work by developing a better understanding of Aboriginal law in the specific context of Western Australia; to facilitate processes for implementation by creating space for a dialogue with Aboriginal people on the potential parameters and models for recognition; and to explore the possible expansion and operation of indigenous community justice mechanisms.

## **The current landscape**

---

The landscape has altered very significantly since the ALRC report and it is apparent that customary law must now be discussed within a framework of meanings that is

more diversified and variegated than the early 1980s. The ALRC report itself marked a significant stage in these landscape changes. Then, in 1991, the Royal Commission into Aboriginal Deaths in Custody handed down its final report.<sup>2</sup> Although debates continue as to how far the Royal Commission's recommendations have been implemented<sup>3</sup> there is no doubt that the report significantly influenced thinking about Aboriginal justice issues. Shortly afterwards, in mid-1992, the High Court handed down its landmark decision in *Mabo and Others v Queensland (No 2)*,<sup>4</sup> which engendered a radical reconfiguration of ideas about the significance of land and culture within Australian law.

Despite these important legal landmarks, we continue to face enormous difficulty in resolving some fundamental dilemmas with respect to relationships between Aboriginal and non-Aboriginal peoples. These dilemmas cut across traditional legal boundaries but are most acute and obvious in the law enforcement area. On the one hand, Aboriginal people continue to be incarcerated at a rate that is far above the non-Aboriginal rate; indeed, in most Australian jurisdictions, the Aboriginal imprisonment rate now exceeds what it was at the time of the Royal Commission.<sup>5</sup> On the other hand, there is a growing body of evidence that Aboriginal victims are unable to access support services or receive 'justice' to the same extent as non-Aboriginal people. The increasing 'coming to voice' of indigenous women and, linked to this, a growing awareness of extreme levels of violence (including sexual violence) in some

Aboriginal communities, have prompted a number of recent and ongoing inquiries. The 2000 *Aboriginal and Torres Strait Islander Women's Task Force on Violence*,<sup>6</sup> the 2001 *Cape York Justice Study*<sup>7</sup> in Queensland and the ongoing Gordon Inquiry into sexual abuse and family violence in Western Australia<sup>8</sup> are just three examples. These inquiries follow on from research into Aboriginal family violence, attesting both to the significant degree of suffering within Aboriginal communities and to the profound limitations of non-Aborig-

***“Despite these important legal landmarks, we continue to face enormous difficulty in resolving some fundamental dilemmas with respect to relationships between Aboriginal and non-Aboriginal peoples.”***

inal forms of intervention to deal with the problem.<sup>9</sup>

The past 15 years also has seen the emergence of various 'hybrid' and 'alternative' models of justice, often classified under the heading of 'restorative justice'. Debates on restorative justice in Australia have been given particular impetus by developments in societies such as New Zealand and Canada, where debates about indigenous justice tend to be more advanced. These models include practices such as Family Group Conferencing and Circle Sentencing, to which

the New South Wales Law Reform Commission has also made recent reference.<sup>10</sup> There remains significant uncertainty as to whether these practices – at least in the form presented by many advocates – are appropriate for Australia's indigenous peoples.<sup>11</sup> Nevertheless, it remains true to say that they (and the underpinning philosophies of restorative justice) provide a potential bridge for the transport and exchange of ideas between Aboriginal and non-Aboriginal people, and may invigorate discourse about future directions and community justice initiatives.

## **The terms of reference**

The terms of reference for the Commission's research are extremely wide-ranging, excluding only Native Title and the *Aboriginal Heritage Act 1972* (WA). The reference stipulates that the research should inquire into how customary law is:

1. ascertained, recognised, made, applied and altered;
2. who is bound by those laws and how they cease to be bound; and,
3. whether these laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis.

In considering the third point, the Commission is requested to consider whether customary law should be recognised in Western Australia and, if so, what modifications and amendments should be made to court practices and procedures, the civil and criminal law, and other relevant provisions. The

Commission is required to traverse relevant Commonwealth legislation and international obligations as well as state laws and to 'have regard to' matters as diverse as criminal law, civil law, the law of domestic relations, personal property law, inheritance law, evidence and procedure. The reference is also to have regard to issues surrounding Aboriginal notions of the sacred, cultural concerns and sensitivities around gender, and recognise the centrality of Aboriginal people's 'views, aspirations and welfare' in the research process.

Clearly, the meaning and scope of some of these terms of reference remain open to further interpretation, discussion and fine-tuning. For example, what exactly is encompassed, in the context of customary law, by the legal concepts of 'personal property' or the 'law of domestic relations'? In this sense, the terms of reference may appear, at first sight, to be somewhat uncertain and potentially unruly. However, it should be stressed that the Commission's primary objectives are set out in points 1 – 3 above. While it must 'have regard to' a wide range of areas of law, it is not required to provide a detailed exposition of all those specific topics.

Furthermore, the breadth of the terms of reference may well prove to be a positive rather than a negative feature. The project aims to adopt a holistic approach and, in so doing, to reflect the fact that indigenous perceptions of law are unlikely to accord with current legal categorisations, including the interface between civil and criminal wrongs. However, it seems

inevitable that, as the project develops, some facets will be accorded greater weighting. Crucially, in taking decisions about such weighting and about the general direction of the project, the Commission will take advice from key indigenous advisers under the structure outlined below. In this way, the terms of reference give room for the incorporation of indigenous perspectives, classifications and priorities.

## **The project structure & research team**

---

The Commission, on advice from representatives of the indigenous community, has appointed Ms Cheri Yavu-Kama-Harathunian of the Crime Research Centre at the University of Western Australia as the full-time project manager. Cheri is the Centre's first full-time Aboriginal Research Fellow and a woman of the Cubbi Cubbi clan (North Queensland). She has significant experience working in the justice system, including establishing culturally appropriate treatment options for violent offenders in Western Australia's correctional system.

The Crime Research Centre has an established reputation for its research on indigenous justice related issues, having produced a series of works on issues such as family violence, sentencing (including mandatory sentencing), probation and parole, youth justice, crime prevention, policing, Aboriginal night patrols and restorative justice.<sup>12</sup> The Centre also acts as the 'warehouse' for criminal justice

related data in Western Australia, a position which ensures that its policy related research is empirically grounded. The Centre enjoys good working relationships with indigenous justice bodies such as the Aboriginal Justice Council of Western Australia and the Aboriginal Legal Service, and peak bodies such as the Aboriginal and Torres Strait Islander Commission (ATSIC). It is also particularly well linked with a diversity of relevant agencies (including Aboriginal organisations, the courts, the Director of Public Prosecutions, police, justice agencies and family services) through its multi-disciplinary research profile and its Advisory Board.

Given the complexity, sensitivity and importance of the project, many of the foundations are still being laid. Crucial issues of protocol and procedure must be considered and the project manager is working with the Commission to ensure that the project structure fully and properly reflects such considerations. Although some details are still to be finalised, it is anticipated that two Indigenous Special Commissioners will be appointed (one male and one female) and that an Aboriginal Research Reference Council will be established. This Council will comprise of men and women elders, community representatives and relevant representatives of key indigenous agencies and peak bodies. The Council and the Special Commissioners will provide ongoing leadership and direction to the project from the indigenous community. Within this framework, consultations with Aboriginal communities (urban, rural and

remote) will anchor the project. It is impossible to envisage a credible process of consultation and effective project management unless the project first engages with Aboriginal people.

Intersecting with the consultation process, there will be a series of commissioned papers on topics linked to the terms of reference. In the criminal justice and related areas, to choose one example, it is likely that these papers will cover a diversity of issues, including sentencing and punishment, language and evidence, and the role of alternatives such as restorative justice. Particular attention will be paid to community justice mechanisms that assist in actively keeping the peace in indigenous communities (as opposed to simply correcting

offenders), such as self-policing initiatives like night patrols and warden schemes. Consideration will also be given to the potential for such community justice mechanisms – originally developed in the criminal justice context – to take on a broader role. The issue of how to intervene more appropriately and effectively in family violence will also need to be addressed and this will inevitably involve liaising with the work of the Gordon Inquiry.<sup>13</sup>

Another layer of indigenous input (and empowerment) will be the employment of indigenous researchers and writers. The Crime Research Centre is again well placed to coordinate such input and the human resources are far in advance of those that were available in the mid-1980s. In this context, mention should be made of the fact that both the University of Western Australia (UWA) and Murdoch University have pioneered programs to enhance the access of indigenous students to law degree courses. This, along with the increasing success of indigenous students in other key discipline areas, has provided a new pool of research talent. The changes are nothing short of remarkable. In 1988, UWA had only one Aboriginal law graduate and two enrolled students and the Murdoch Law School had only just started. At the end of 2001, more than 20 indigenous students had graduated in law from UWA and around 35 students are currently enrolled. More than six students have graduated from Murdoch and more than 12 are enrolled in the LLB program, with more than that

again currently enrolled in the BLS program.

## Conclusion

---

The Commission's inquiry is of immense significance and preliminary discussions have already revealed a readiness for such a project within the indigenous community and an expectation that it will lead to concrete results. Undoubtedly, the time is therefore 'right' for the project. The challenges are enormous, including the recognition of pluralities and regional differences and balancing the expectations and aspirations of different groups. However, the project creates a good window of opportunity for dialogue and the long-term development of practical regionalised initiatives.

*\* Harry Blagg, Neil Morgan and Cheri Yavu Kama Harathunian are from the Crime Research Centre at the University of Western Australia.*

## Endnotes

---

1. *Australian Law Reform Commission, The Recognition of Aboriginal Customary Laws ALRC 31, (1986) AGPS, Canberra.*
2. *Royal Commission into Aboriginal Deaths in Custody (1991), AGPS, Canberra.*
3. *C Cunneen and D Macdonald Keeping Aboriginal and Torres Strait Islander People Out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody (1996) ATSIIC, Canberra.*
4. (1992) 175 CLR 1.

The full terms of reference for the Law Reform Commission of Western Australia's inquiry into Aboriginal customary law are available on the Commission's website at <[www.wa.gov.au/lrc](http://www.wa.gov.au/lrc)>.

Inquiries about the Aboriginal customary law project should be directed to:

**The Law Reform  
Commission of Western  
Australia**  
4th Floor, Hartley  
Poynton Building  
141 St George's Tce, Perth  
WA 6000  
Ph: (08) 9264 6116  
Fax: (08) 9264 6115  
Email:  
[lrcwa@justice.wa.gov.au](mailto:lrcwa@justice.wa.gov.au)

5. Australian Bureau of Statistics, Prisoners in Australia, (2001) Australian Bureau of Statistics, Canberra.
6. Aboriginal and Torres Strait Islander Women's Task Force on Violence Report (2000) Department of Aboriginal and Torres Strait Islander Policy, Brisbane.
7. Cape York Coordination Unit, Cape York Justice Study: Advanced Copy Vols 1,2 & 3. (2001) Cape York Coordination Unit, Cairns.
8. An Inquiry into the Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities, Chair Ms Sue Gordon (Government of Western Australia).
9. A Bolger Aboriginal Women and Violence (1991) Australian National University, North Australian Research Unit Darwin; P Memmott Violence in Indigenous Communities (2001) National Crime Prevention, Canberra; H Blagg Crisis Intervention in Aboriginal Family Violence: Summary Report (2000) Office of the Status of Women, Canberra.
10. New South Wales Law Reform Commission Sentencing: Aboriginal Offenders (2000) New South Wales Law Reform Commission, Sydney. A pilot Circle Sentencing scheme has been established in Nowra, New South Wales, see Aboriginal Justice Council Newsletter No 31, February 2002
11. H Blagg 'A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia' (1997) 37 British Journal of Criminology 2. 481-505.
12. Recent examples of such research include: N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 Crim LJ 164; N Morgan, H Blagg and V Williams, 'Mandatory Sentencing in Western Australia and the Impact on Indigenous Youth' (2001) Aboriginal Justice Council of Western Australia, Perth <www.waajc.org.au> (April 2001); H Blagg, Working With Adolescents to Prevent Domestic Violence: The Aboriginal Rural Model (1999) National Crime Prevention, Canberra; N Loh and A Ferrante, Aboriginal Involvement in the Western Australian Criminal Justice System: A Statistical Review, 2000 (2001) Crime Research Centre and Aboriginal Justice Council of Western Australia, Perth <www.waajc.org.au> (April 2001).
13. An Inquiry into the Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities, Chair Ms Sue Gordon (Government of Western Australia).