TEACHING AN OLD DOG NEW TRICKS
RECOGNITION OF ABORIGINAL CUSTOMARY LAW IN WESTERN AUSTRALIA

by Dr Tatum L. Hands

The Law Reform Commission of Western Australia ('the Commission') has released its discussion paper, *Aboriginal Customary Laws*. The result of five years' research and consultation, the paper is a timely reminder of the issues that prompted the Australian Law Reform Commission's reference on the same subject 20 years ago. Among these catalysts were the need for reassessment of relations between Aboriginal and non-Aboriginal Australians, the disproportionate representation of Aboriginal people in the criminal justice system, and the interaction of customary law with the broader legal system. Despite numerous reports and initiatives over the past two decades, these issues remain largely unaddressed. The Commission's discussion paper seeks to bring these issues to the forefront of the agenda for law reform in Western Australia ('WA'), to provide a template for meaningful recognition of Aboriginal customary law and culture, and to address entrenched Indigenous disadvantage in the State.

THE COMMISSION'S TERMS OF REFERENCE

The Commission's customary laws project operated under broad terms of reference, excluding only native title issues and *Aboriginal Heritage Act WA* (1972) matters. An initial focus on the existence and practice of Aboriginal customary laws was broadened after public consultations revealed a number of seemingly tangential issues generally affecting Aboriginal communities including youth issues, health, substance abuse, living conditions, educational and employment opportunities, racism and reconciliation, and Aboriginality and identity. Although these issues have demonstrable links to Aboriginal customs, the connection to Aboriginal law is often far less apparent. However, Aboriginal people consulted emphasised that Aboriginal law was part of everything, was within everyone and governed all aspects of their lives. In other words, customary law cannot be readily divorced from Aboriginal society, culture and religion. As a result, the Commission's discussion paper is not confined to recommending changes to legislation; it is a comprehensive, multifaceted study proposing changes to laws, policies, programs and processes in many policy areas.

TEACHING A NEW DOG OLD TRICKS

The Commission investigated various methods of recognition of customary law and culture including statutory, administrative, judicial and constitutional recognition. The approach adopted allows for flexibility and ensures that customary law is not codified and removed from Aboriginal control.

Aboriginal people consulted rejected any notion of two separate systems of law. The need for 'striking a balance between Aboriginal and non-Aboriginal law' to address disadvantage and facilitate reconciliation was emphasised. The Commission's proposals therefore reflect an approach to recognition that sees WA law (the 'new dog') informed by Aboriginal customary law and culture (the 'old tricks').

UNDERLYING THEMES

Rather than discuss the Commission’s discrete proposals (as I have done elsewhere), in this article I consider themes that resonated throughout the consultation, research and writing phases of this project, which informed the Commission’s proposals and which will underpin the implementation of the Commission’s recommendations.

DECLINE OF CULTURAL AUTHORITY

The Commission heard from Aboriginal communities throughout the State that the cultural authority of Elders had considerably declined, possibly as a result of the imposition of 'white' governance structures on communities, the interruption of inter-generational transmission of cultural knowledge due to the past removal of Aboriginal children, and the forced coexistence of different tribes in missions. This was expected to
impact adversely on the future of Aboriginal customary law and culture.

Many of the problems experienced by Aboriginal communities – community dysfunction, alcohol and substance abuse, feuding and youth issues – are symptomatic of a decline in cultural authority. The Commission has responded by proposing means of enhancing the cultural authority of Elders. The Commission’s proposed community justice groups will be empowered to create community rules and sanctions that can reflect customary law as well as deal with other issues such as alcohol and substance abuse. Community justice groups will also have the opportunity to perform roles within the WA criminal justice system, including advising courts on relevant customary law or cultural matters, diverting offenders and supervising bail or release orders.\(^6\)

Community justice groups can also assist in building governance capacity and in defining structures that will respond to the cultural dynamics of each community. The Commission has set out some guiding principles for broader governance reform in Aboriginal communities but has stressed the importance of communities developing their own governance models without undue government interference.\(^7\)

INEQUALITY OF GOVERNMENT SERVICE PROVISION

Lack of basic infrastructure in many Aboriginal communities and overcrowding of public housing were matters that – although not the usual domain of law reform – gained prominence in this discussion paper. Local governments are resource to provide services to constituents pursuant to a formula that recognises factors such as geographical remoteness, Aboriginal population and disadvantage. However, the Commission found that lack of accountability for expenditure of these funds, the inability of local councils to levy rates on certain Aboriginal-owned land and the difficulty of maintaining infrastructure in remote areas meant that some local governments were failing to provide services.\(^8\) The Commission proposed that local governments be held accountable for funding received for the benefit of Aboriginal people.\(^9\)

The Commission noted that recent Census statistics\(^10\) fail to convey the reality of overcrowding in Indigenous households that was reported to and observed by the Commission during its consultations. In some areas as many as 20 people may be resident in a standard three-bedroom house.\(^11\) This puts enormous pressure on ablution and kitchen facilities that are designed to service a maximum of perhaps six occupants. Inevitably houses deteriorate and occupants are evicted for damage, antisocial behaviour, inability to pay for repairs or for accommodating more people than the lease allows. Because Aboriginal people have important social and customary law obligations to accommodate kin, evictions simply transfer the problem of overcrowding to another location and the cycle begins again.\(^12\)

These themes are well known throughout Australia and are the focus of national programs to overcome entrenched Indigenous disadvantage. Less well known are the compounding problems. Poor infrastructure (such as clean water supply, sewerage and waste disposal) poses serious health risks. In some Aboriginal communities diseases which were eradicated in mainstream Australia almost a century ago are still rife.\(^13\) The risk of spreading infectious disease is magnified where adequate sanitation facilities do not exist or where ill people are not able to be isolated because of cramped living conditions.

Overcrowded housing can also create conditions which may contribute towards family violence and child sexual abuse. Women and children may be forced into refuges or to sleep outside in order to protect themselves from violent family members. The interruption to routine, lack of suitable role models and constant fear of violence are reflected in high truancy rates, low self-esteem and poor physical health in Aboriginal youth.\(^14\) Aboriginal women consulted by the Commission feared that children who grow up in this environment may come to see family violence as normal, acceptable behaviour (and in some cases may believe that family violence is culturally sanctioned under customary law).\(^15\) Without immediate redress, this cycle will continue and the physical, mental and social wellbeing of Aboriginal children as well as their opportunities for the future will inevitably be affected. The Commission has made a number of proposals to address issues raised by inadequate service provision and overcrowded housing in Aboriginal communities, as well as proposals aimed at diminishing the serious consequences that flow from these problems.

BIAS AND DISADVANTAGE WITHIN THE WESTERN AUSTRALIAN LEGAL SYSTEM

The failure of the legal system in WA to accommodate the differences between Aboriginal customary law and Australian law can result in disadvantage for Aboriginal people. The Commission’s research revealed that some form of cultural disadvantage was inherent in many of the substantive areas of law investigated. For example, the
fact that much Aboriginal customary law is based on a
notion of kinship that differs significantly to the Western
model of linear relations and the ‘nuclear family’ affects
matters as diverse as inheritance; funeral attendance for
prisoners; burial rights; rights in coroinal process; and
child placement and parenting matters. The Commission
has made a number of proposals to ensure that the role of
kinship in Aboriginal society is better understood in WA
law and policy and that the special obligations imposed
by Aboriginal kinship are, where possible, recognised
and respected.16

Aboriginal kinship can also dictate the degree of
responsibility or liability for an offence or accident and
this can differ widely to notions of criminal and tortious
responsibility under Australian law. The Commission
found that Aboriginal customary law in these areas
often dictates what lawyers know as ‘strict liability’. For
example, whereas under Australian law responsibility for
a fatal car accident would generally lie with the driver
of the car, under customary law all occupants of the car
would be held responsible and liable to punishment.17
In addition, those people in a special kinship relationship
with the occupants of the car might also be punished for
failing to protect their kin.

This suggests that liability under Aboriginal customary
law is based on a broader notion of moral responsibility
which, in some cases, may lead some Aboriginal people
to plead guilty where an arguable defence to a charge
exists under Australian law.18 A lack of understanding
of the differences between the two systems of law may
contribute to the problem. In response the Commission
has proposed (among other things) that courts must
not accept a plea of guilty unless, having considered
language and cultural issues, the court is satisfied that
an accused understands the nature of the plea and its
consequences.19

One aspect of apparent bias that cannot be ignored is the
considerable overrepresentation of Aboriginal people in
the WA prison system. As the Commission’s discussion
paper observes:

Although only constituting about three per cent of the state’s
population, in 2004 Aboriginal people comprised 40 per cent
of the prison population. For juveniles the position in Western
Australia is indefensible: approximately 70 to 80 per cent of
juveniles in detention are Aboriginal.20

These statistics are unable to be explained solely by
rates of offending behaviour among Aboriginal people
as compared to non-Aboriginal people in WA.21 Indeed,
on closer examination the only possible explanation for
this significantly disproportionate rate of imprisonment
of Aboriginal people is the existence of systemic bias or
institutionalised racism within the criminal justice system
and the prevalence of underlying factors such as socio-
economic disadvantage among the State’s Aboriginal
population. The Commission found that Aboriginal
people were disadvantaged by systemic bias in relation to
bail, parole (including lack of appropriate programs and
services in prisons), court procedures, the rules of evidence
and sentencing. Each of these areas has the capacity to
contribute significantly to the disproportionate rate of
imprisonment of Aboriginal adults and juveniles in WA.
A number of the Commission’s proposals are therefore
aimed at addressing apparent bias and disadvantage in
WA’s criminal justice system.22

CONCLUSION

In the past two decades there have been some positive
changes in the legal landscape of Indigenous affairs in
Australia. Not least of these is the 1992 High Court
decision in Mabo v Queensland (No 2)23 which recognised
a form of Indigenous native title to land. More recently
the spotlight has been on problems of entrenched
Indigenous disadvantage, with governments adopting
a new partnership approach to improving the living
conditions of Australia’s Indigenous peoples. These
domestic changes have been accompanied by a dedicated
focus on rights of Indigenous peoples at the international
level as we enter the Second International Decade of the
World’s Indigenous Peoples.

The Commission’s discussion paper therefore enters
the public imagination at a time when Australian
governments are perhaps more willing to address the
fundamental issue of their relations with Indigenous
peoples. However, the cumulative effect of government
policies since colonisation has taken its toll on Aboriginal
people and many have lost confidence that changes in
policy will result in tangible outcomes. The Commission
has heeded this message by proposing practical, workable
solutions to problems caused by the conflict of Aboriginal
customary laws and culture and WA law. The proposals
empower Aboriginal people to effect meaningful change
in their own lives under their own law, while ensuring
that outcomes of interaction with WA law are equal
to those enjoyed by non-Aboriginal Australians. It is
hoped that the findings of the Commission’s inquiry
and the strength and diverse coverage of its proposals
will stimulate a robust exchange on the potential for
recognition of Aboriginal customary law and culture not
only in WA, but throughout the nation.
Dr Tatum Hands is the Principal Project Writer for the Law Reform Commission of Western Australia’s Aboriginal Customary Laws Project. The author wishes to thank Kevin Williams, Danielle Davies and Victoria Williams for their comments on an earlier draft of this article.

1. Law Reform Commission of Western Australia (LRCWA), ‘Aboriginal Customary Laws – Project No. 94, Discussion Paper (December 2008)’. Because only very few Torres Strait Islanders reside in WA the Commission has preferred the term ‘Aboriginal’ rather than ‘Aboriginal and Torres Strait Islander’.

2. Ibid 50. The Commission also determined that these issues fell within its mandate as matters relevant to the views, aspirations and welfare of Aboriginal persons in Western Australia’. Ibid 20.

3. Ibid 55.


5. Ibid above n 1, 133–141 and Proposal 18.

6. Ibid 435–438. Although the Commission stresses that government should not seek to impose particular governance structures on Aboriginal communities, government departments should nonetheless provide support for Aboriginal communities seeking to design their own governance structures.

7. Ibid 422–423. See also Part II.

8. Ibid 423, Proposal 91.

9. The 2001 Census of Population and Housing reported an average of 3.6 persons (6.3 in remote areas) in Indigenous households as compared to 2.6 persons in non-Indigenous households.

10. For example, in a case-study of Roebourne commissioned by LRCWA Kathryn Tress reported that it was not unusual for between 17 and 20 people to live in a single house. E Tress, Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study, LRCWA, Project No 94, Background Paper No 6 (November 2003) 10. Newspaper reports and the Commission’s own consultations confirmed this observation.

11. Ibid, above n 1, 39–42. A recent report by the Equal Opportunity Commission of Western Australia (EOCWA) brings significant perspective to this problem and the problem of systemic discrimination in the public housing system in WA. See EOCWA, Finding a Place (December 2004).

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15. See, for example, proposals to recognize classificatory kin relations in relation to distribution of Aboriginal intestate estates (Proposal 62); provision for dependants (Proposal 65); cultural objections to autopsy (Proposal 58); prisoner attendance at funerals (Proposal 47); adoption (Proposal 67); and foster care and alternative child welfare placement (Proposal 88). Ibid.


17. See, for example, Ngapayu v The Queen (1980) 30 ALR 37.

18. Ibid above n 1, 234. Proposal 35. See also 241–248 (dealing with police interrogations) and 401–406 (dealing with interpreters and evidence of Aboriginal customary law).

19. Ibid 95.


21. Ibid.

22. Ibid, see, for example, Proposal 18 (establishment of community justice groups); Proposal 19 (Aboriginal courts); Proposals 28–28 (Improvement of bail); Proposals 28–33 (customary law and cultural considerations in relation to sentencing); Proposal 36 (Aboriginal customary law in decision to prosecute); Proposal 43 (Diversionary schemes for Aboriginal youth); Proposals 44–48 (Police interview procedures and admissibility); Proposal 77 (evidence); and Proposals 78–80 (Improvement in court procedure and use of Interpreters).


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