

Project 94 - Aboriginal customary laws

Launch of the Final Report into Aboriginal Customary Laws (Friday 27 October 2006, Perth)

Tom Calma, Acting Race Discrimination Commissioner,
Human Rights and Equal Opportunity Commission

Good afternoon ladies and gentleman.

I would like to begin by acknowledging the Noongar people on whose land we are today and pay my respects to their elders. The recent recognition of the Noongar as traditional owners of this land sets a significant context for the launch of the Western Australian Law Reform Commission Report on Aboriginal Customary Laws. The recognition of Noongar native title through Australian law is the most powerful confirmation possible that as a society they possessed, and continue to possess, well-developed systems of law and custom.

I would also like to acknowledge Attorney General, Mr Jim McGinty, Gillian Braddock SC (Chairperson of the Commission), Chief Justice, Wayne Martin, Professor Mick Dodson and Ms Beth Woods, Aboriginal Special Commissioners on this Project, members of the Aboriginal community, the Commission, the judiciary, and all of you here today.

It is an honour to launch this authoritative and comprehensive Report. The bank of knowledge in Western Australia is richer for its existence. It is only through this kind of in-depth and evidence-based research that we Aboriginal and Torres Strait Islander peoples can advocate our systems of law on equal footing with Australian systems of law. This is one important reason why the production of this Report is very significant for Aboriginal people in Western Australia.

This Report builds a bridge of knowledge for black and white people, explaining the interaction of Aboriginal law and justice systems with the wider legal system in all of its contexts. From this Report, we know for example that customary law governs day-to-day communication; it determines who marries who; it defines ceremonial relationships; the guardianship of children; it sets out the rules for community governance; funeral roles and burial rights. Customary law covers all aspects of life. It therefore has a powerful role to play across all areas of daily life, and across all areas of the legal system – be it civil, criminal, family law or less formal processes.

Through 131 recommendations this Report identifies ways to improve the interface between Aboriginal customary law and the Western Australian justice system.

I commend this work as an excellent information resource that enriches our understanding.

There are two key features to the report that I want to highlight briefly this afternoon.

First, it outlines a framework for action to implement the Report recommendations so that customary law can become a living part of the Western Australian Justice system

And second, it provides a mechanism to monitor this implementation through the recommendation for the establishment of an Office of the Commissioner for Indigenous Affairs.

Too often we see excellent reports and research shelved, never acted upon, and never informing practice.

It is an unfortunate fact that the findings of the comprehensive 1986 Australian Law Reform Commission report on Aboriginal Customary Law have not been implemented in a substantial way in any Australian jurisdiction.

I hope that here in Western Australia there will be a real commitment to action in addressing the matters raised in this report.

I note that the Report has an appendix detailing the relevant agency or agencies with responsibility to enact each recommendation. This is something that my Office recommended in its submission to the WA Law Reform Commission to ensure transparency within government about who is accountable for progressing individual recommendations – hopefully within a holistic and coordinated approach.

The identification of line agency responsibility provides an inbuilt system for implementation directing relevant government departments to appropriate actions, and breaking up what would otherwise appear to be a daunting task of implementing 131 recommendations.

It might seem tedious to talk about implementation, but I can assure you, this is where the action is. The process of implementation will make the fine words of this document live, and importantly, it is where Aboriginal people will feel any impact of the six years of work that has gone into this Report's research and production.

This Report is also an important step in the implementation of human right obligations, not the least, because of its importance for our self determination, but also because it adds mechanisms that facilitate the right for Aboriginal people to practice and enjoy our culture.

It would be great to see WA leading the way in an implementation process that sets a benchmark for other governments. I can see that the right preconditions are in place for this to happen.

This leads me to the second point. The establishment of the Office of the Commissioner for Indigenous Affairs in WA is the cornerstone of success for the implementation of this Report.

In April this year I made a submission to the WA Law Reform Commission contributing a human rights perspective to the development of this Report. One of my recommendations was that representation and participation mechanisms be established so that Aboriginal people can participate and contribute in the development of policy that affects us. Since the abolition of Aboriginal and Torres Strait Islander Commission (ATSIC) in 2004, few formal processes currently exist that offer Aboriginal and Torres Strait Islander peoples this opportunity.

I am therefore very pleased that Recommendation 3 of this Report advocates for the establishment of an independent Indigenous Commission that will monitor the implementation of this Report, evaluate its progress, and contribute Indigenous perspectives to policy in WA. While Government departments have a role in policy formulation and service and program delivery, they are not in the best position to impartially monitor and evaluate their own progress.

The establishment of the Office of the Commissioner for Indigenous Affairs will ensure that Indigenous people speak on Indigenous matters in Western Australia. It will mean that there will be Indigenous voices to correct the perception that family violence and abuse is somehow condoned through Aboriginal customary law. As we know, there are many matters that require the input of Indigenous voices today. It is of deep concern to me that too often current commentary on Indigenous affairs locally, nationally and internationally, lacks our voices, our perspectives and our input.

An Aboriginal Commissioner will be in a position to educate the key institutions of our society – the judiciary, the bureaucracy, the Parliament, and others - about customary law and how it can play a powerful and positive influence in communities where it is practiced. In fact, most people do not understand that customary law is a comprehensive system of governance and order that successfully regulates many different aspects of Indigenous peoples' lives.

An Indigenous Commissioner will also be able to have input into the development of policy. Self determination requires our direct participation in shaping the institutions that govern us. For too long Indigenous peoples have been administered and governed, or part administered and governed, by others.

And an Indigenous Commissioner will be able to provide the stewardship to assist and guide Indigenous peoples in Western Australia to better take back control of their own lives and wellbeing.

To finish, I want to remind everyone what is at stake and what this report represents.

First, we have to acknowledge that Indigenous people have not been well served by the Australian legal system. The historical and social aspects of Indigenous peoples' involvement in the criminal justice and care and protection systems are well known, as are the statistics. Indigenous peoples are over-represented in all areas of the

criminal justice system including juvenile justice. These statistics have always been significantly higher in WA than national averages.

Traditional western approaches to law and order have not made inroads into addressing Indigenous over-involvement in the criminal justice system; indeed systemic discrimination occurring within western legal system has exacerbated the problems. It is also misconceived to believe that justice can be delivered without Indigenous engagement, participation and representation.

This report acknowledges this reality head on, and in a way that does not shy away from its complexity.

Second, I want to remind you of the words of the Council for Aboriginal Reconciliation. In their Roadmap to Reconciliation they provided four national strategies to achieve reconciliation. One of these strategies related to the recognition of Indigenous rights. It read as follows:

Not since 1986 has there been a comprehensive examination of the ability of the Australian law to accommodate the law of Aboriginal and Torres Strait Islander peoples. Many of the recommendations of that Australian Law Reform Commission Report into Aboriginal Customary Law have not been pursued. In the intervening period, however, there have been significant developments in common law and legislative arrangements, most notably through native title, that have provided greater recognition of the law making responsibilities of Aboriginal and Torres Strait Islander communities and their ability to be accommodated within the Australian legal system.

Greater discussion must occur on the extent to which Aboriginal and Torres Strait Islander law can be recognised under Australian law and accommodated in individual circumstances. Particularly consideration should be given to community justice procedures, sentencing options and methods of alternative dispute resolution. Legislation that will allow for the appropriate recognition of Aboriginal and Torres Strait Islander laws and customs should receive consideration in all Australian jurisdictions. The Council for Aboriginal Reconciliation recognises the role and importance of customary law practices with Aboriginal and Torres Strait Islander communities. [1]

So this report is also, fundamentally, about reconciliation – about how we acknowledge and respect our Indigenous peoples, and what sort of partnership we are willing to enter into with them.

It cannot be repeated often enough that a legal system must reflect the people it serves if it is to gain their confidence. We need to be assured through transparent processes and structures, that in its day to day operation, the legal system understands and respects our cultures, our heritage, and our histories.

This Report ensures that there are no excuses for representing Aboriginal customary law in WA in simplistic and superficial terms. It gives the courts, the media, and all Western Australians a resource that can be used to dispel myths. It also provides us – Indigenous peoples – with support to stand up to the critics that will discredit our customs and law as inferior.

The maintenance and integration of Aboriginal customary law is an essential part of taking charge of our own destinies. This Report is a positive step to make this happen. I commend it to you.

Thank you.

footnote 1: Council for Aboriginal Reconciliation, Recognising Aboriginal and Torres Strait Islander Rights - Ways to implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights, page 5,
austlii.law.uts.edu.au/au/other/IndigLRes/car/2000/9/