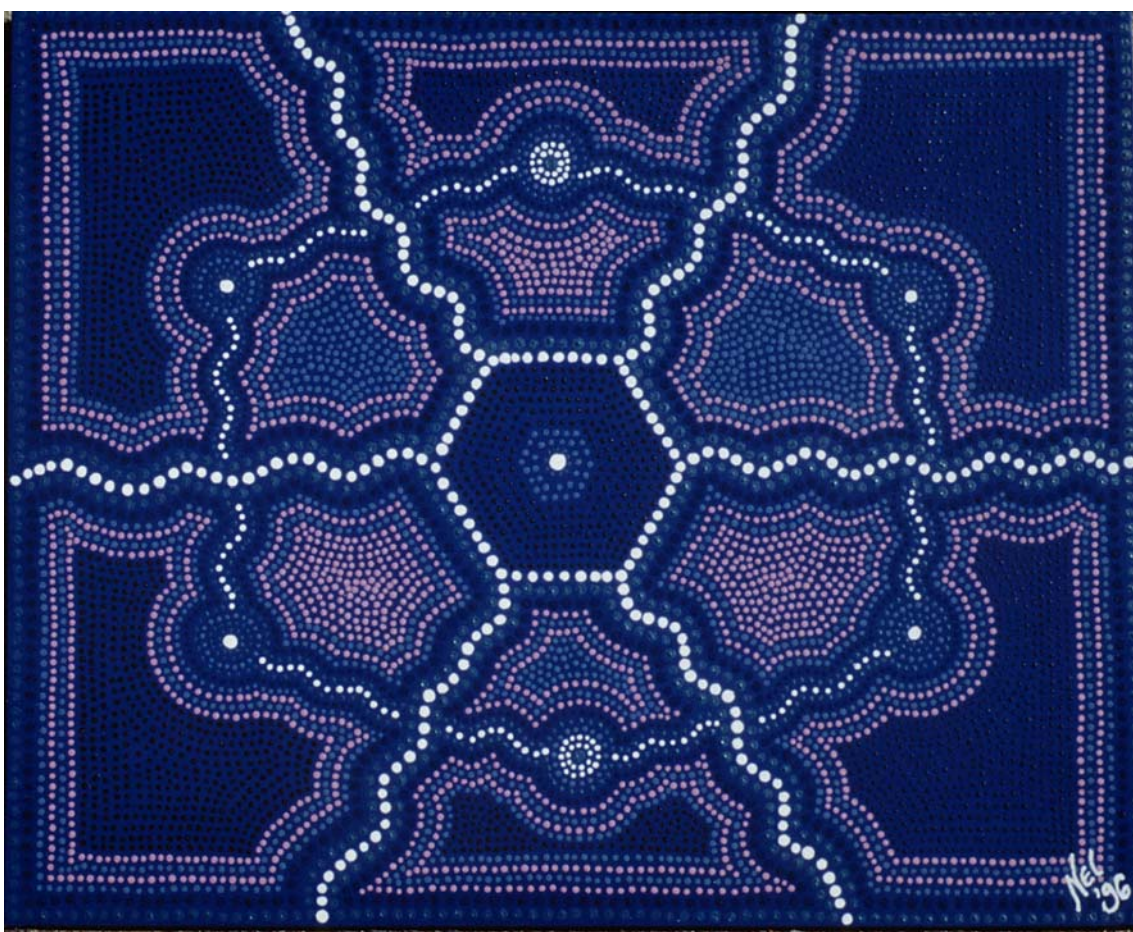


Aboriginal Benchbook for Western Australia Courts

Second Edition



Stephanie Fryer-Smith

TABLE of CONTENTS

Chapter One: Introduction

| | | |
|-------|--|------|
| 1.1 | Introduction | 1:1 |
| 1.2 | Overview | 1:3 |
| 1.3 | Royal Commission into Aboriginal Deaths in Custody | 1:4 |
| 1.3.1 | Background..... | 1:4 |
| 1.3.2 | Findings | 1:4 |
| 1.3.3 | Recommendations..... | 1:5 |
| 1.3.4 | Postscript: Aboriginal Deaths in Custody 1990 – 2006 | 1:6 |
| 1.4 | Legal Definitions of “Aboriginal” | 1:7 |
| | References/Further Reading | 1:10 |

Chapter Two: Aspects of Traditional Aboriginal Australia

Summary of Chapter Two

| | | |
|-------|--|------|
| 2.1 | Extent of Survival of Traditional Aboriginal Society | 2:1 |
| 2.2 | Overview of Traditional Aboriginal Society | 2:2 |
| 2.2.1 | Early Occupation | 2:2 |
| 2.2.2 | “Hunter-Gatherer-Cultivators” | 2:2 |
| 2.2.3 | Languages | 2:4 |
| 2.3 | Aboriginal Spirituality | 2:5 |
| 2.3.1 | The Dreaming | 2:5 |
| 2.3.2 | Totems | 2:6 |
| 2.3.3 | Connection with Land | 2:8 |
| 2.4 | Aboriginal Social Organisation..... | 2:9 |
| 2.4.1 | Language Groups | 2:9 |
| 2.4.2 | Smaller Sub-Groups: Local Descent Groups, Bands, Families..... | 2:9 |
| 2.4.3 | Inter-Group Relationships..... | 2:10 |
| 2.4.4 | Social Classification (Skin Groups)..... | 2:11 |
| 2.5 | The Kinship System | 2:14 |
| 2.5.1 | Classificatory Kinship..... | 2:14 |
| 2.5.2 | Kinship Avoidance | 2:15 |
| 2.6 | Aboriginal Culture and Customs | 2:16 |
| 2.6.1 | Senior Men and Women | 2:16 |
| 2.6.2 | Secular Authority and Decision-Making..... | 2:17 |
| 2.6.3 | Reciprocity | 2:18 |
| 2.6.4 | Medicine Men and Sorcerers..... | 2:18 |
| 2.6.5 | Visual Art, Literature, Songs and Dancing..... | 2:19 |
| 2.7 | Aboriginal Ceremony and Ritual | 2:21 |
| 2.7.1 | The Function of Ceremony and Ritual..... | 2:21 |
| 2.7.2 | Initiation into Adulthood | 2:21 |

| | | |
|-------|---|------|
| 2.7.3 | Betrothal and Marriage | 2:22 |
| 2.7.4 | Death, Mourning and Burial | 2:23 |
| 2.8 | Aboriginal Customary Law | 2:25 |
| 2.8.1 | The Law is both Spiritual and Secular | 2:25 |
| 2.8.2 | Dispute Resolution | 2:26 |
| 2.8.3 | Customary Offences | 2:26 |
| 2.8.4 | Punishment of Offences | 2:27 |
| | References/Further Reading | 2:29 |

Chapter 3 : Aspects of Contemporary Aboriginal Australia

Summary of Chapter Three

| | | |
|-------|---|------|
| 3.1 | Aboriginal Demography | 3:1 |
| 3.1.1 | Migration to Urban Areas | 3:1 |
| 3.1.2 | Overview of Australia's Aboriginal Population | 3:1 |
| 3.1.3 | Health | 3:2 |
| 3.1.4 | Education | 3:3 |
| 3.1.5 | Employment | 3:3 |
| 3.1.6 | Stressors | 3:4 |
| 3.2 | Some Features of Contemporary Aboriginal Culture | 3:5 |
| 3.2.1 | Aboriginal Culture in Urban Areas | 3:5 |
| 3.2.2 | Survival of Aboriginal Languages | 3:6 |
| 3.2.3 | Use of Names | 3:6 |
| 3.3 | Aboriginal and Anglo-Australian Cultural Values | 3:8 |
| 3.3.1 | Apparent Differences in Aboriginal and Anglo-Australian Cultural Values | 3:8 |
| | References/Further Reading | 3:11 |

Chapter Four: Aboriginal People in Western Australia

Summary of Chapter Four

| | | |
|-------|--|-----|
| 4.1 | Demographic Data | 4:1 |
| 4.1.1 | Aboriginal Population/Households: 2006 Census Data | 4:1 |
| 4.1.2 | Other Data from the 2006 Census | 4:3 |
| 4.2 | The Criminal Justice System | 4:4 |
| 4.2.1 | Overview of the Crime Rate | 4:4 |
| 4.2.2 | Rates of Aboriginal Participation in the Criminal Justice System | 4:4 |
| 4.3 | Aboriginal Policy and Services | 4:7 |
| 4.3.1 | Aboriginal Justice Agreement | 4:7 |
| 4.3.2 | Other Policies and Support Services | 4:7 |
| 4.4 | Traditional Language Regions and Groups | 4:9 |
| 4.4.1 | Language Regions and Groups | 4:9 |

| | | |
|-------|--|------|
| 4.4.2 | Survival of Aboriginal Languages | 4:14 |
| 4.5 | Legislative Measures 1886 – 2008 | 4:16 |
| | References/Further Reading | 4:18 |

Chapter Five: Aspects of Contemporary Aboriginal Australia

Summary of Chapter Five

| | | |
|-------|--|------|
| 5.1 | Aboriginal Languages and Dialects | 5:1 |
| 5.1.1 | Survival of Aboriginal Languages | 5:1 |
| 5.1.2 | Features of Aboriginal Languages..... | 5:1 |
| 5.1.3 | Example of an Aboriginal Language: <i>Ngaanyatjarra</i> | 5:2 |
| 5.2 | Modern Aboriginal Languages and Dialects | 5:5 |
| 5.2.1 | Kriol and Torres Strait Creole | 5:5 |
| 5.2.2 | Aboriginal English | 5:5 |
| 5.3 | Communication Styles and Barriers | 5:6 |
| 5.3.1 | Characteristics in Communication within Aboriginal Society | 5:6 |
| 5.3.2 | Cultural Barriers to Effective Communication | 5:7 |
| 5.3.3 | Specific Language Difficulties | 5:9 |
| 5.4 | Communicating Effectively with Speakers of Aboriginal English..... | 5:11 |
| 5.4.1 | Suggested “Do’s” | 5:11 |
| 5.4.2 | Suggested “Don’ts” | 5:13 |
| | Chapter Five References/Further Reading | 5:15 |

Chapter Six: Pre-Trial Matters

Summary of Chapter Six

| | | |
|-------|---|------|
| 6.1 | Bail | 6:1 |
| 6.1.1 | Difficulties for Aboriginal People in Respect of Bail, RCIADIC and LRCWA Recommendations..... | 6:1 |
| 6.1.2 | Difficulties Experienced in Obtaining Bail: the <i>Bail Act 1982</i> | 6:3 |
| 6.1.3 | Particular Hardships of Detention for Aboriginal Persons | 6:4 |
| 6.1.4 | The <i>Bail Amendment Act 2008 (WA)</i> | 6:5 |
| 6.1.5 | The “Exceptional Circumstances” Requirement for Bail in Serious Cases..... | 6:6 |
| 6.1.6 | Bail and Customary Punishment Considerations | 6:6 |
| 6.1.7 | Bail and the <i>Cross-Border Justice Act 2008 (WA)</i> | 6:11 |
| 6.2 | Fitness to Plead | 6:12 |
| 6.2.1 | Physical Impairment | 6:12 |
| 6.2.2 | Cultural or Language Barriers | 6:13 |
| 6.3 | Interpreters..... | 6:16 |
| 6.3.1 | The Right to an Interpreter..... | 6:16 |
| 6.3.2 | Interpreting - Practical Difficulties | 6:16 |
| 6.3.3 | Calls for Accredited Aboriginal Interpreter Training Programs | 6:21 |

| | |
|--|------|
| Appendices to Chapter Six | 6:23 |
| Appendix A Offices of the Aboriginal Legal Service of Western Australia (Inc.) | 6:23 |
| Appendix B Aboriginal Court Officers | 6:24 |
| Appendix C Test for Whether an Aboriginal Interpreter is Required | 6:25 |
| Appendix D Aboriginal Interpreting Services in Western Australia..... | 6:27 |

Chapter Seven: Criminal Proceedings

Summary of Chapter Seven

| | |
|---|------|
| 7.1 Representation and Appearance | 7:1 |
| 7.1.1 Representation by a person who is neither a lawyer nor an articulated clerk | 7:1 |
| 7.1.2 Appearance by video/audio link..... | 7:1 |
| 7.2 The Jury | 7:3 |
| 7.2.1 Adverse Publicity | 7:3 |
| 7.2.2 Change of Trial Venue..... | 7:4 |
| 7.2.3 Selection of Jurors | 7:5 |
| 7.2.4 Gender Composition of Juries | 7:6 |
| 7.2.5 Aboriginal Members of Jury Panels | 7:6 |
| 7.3 Pleading to the Charge | 7:8 |
| 7.3.1 Understanding the Charge/Plea | 7:8 |
| 7.4 Opening Remarks to Jury | 7:9 |
| 7.4.1 Mildren Directions | 7:9 |
| 7.5 Evidence | 7:11 |
| 7.5.1 Vulnerable Witnesses: Special Provisions | 7:12 |
| 7.5.2 Female Witnesses | 7:13 |
| 7.5.3 Child Witnesses | 7:14 |
| 7.5.4 Exclusion of Persons from Proceedings | 7:15 |
| 7.5.5 Gender-Restricted Evidence..... | 7:15 |
| 7.5.6 Evidence of Husbands and Wives..... | 7:15 |
| 7.5.7 Aboriginal Language Patterns | 7:16 |
| 7.5.8 Evidence in Narrative Form | 7:16 |
| 7.5.9 Cross-Examination of Aboriginal Witnesses..... | 7:17 |
| 7.5.10 Restriction of Publication of Proceedings (Including Names of Persons) | 7:18 |
| 7.6 Confessions and Admissions..... | 7:19 |
| 7.6.1 Entitlements of Arrested Persons and Suspects | 7:19 |
| 7.6.2 Admissibility of Confessional Statements..... | 7:21 |
| 7.6.3 The <i>Anunga</i> Guidelines | 7:23 |
| 7.6.4 Application of the <i>Anunga</i> Guidelines in Western Australia | 7:24 |
| 7.7 Defences..... | 7:28 |
| 7.7.1 Consent (Customary Law) | 7:28 |
| 7.7.2 Duress (Customary Law) | 7:28 |
| 7.7.3 Provocation..... | 7:29 |
| 7.7.4 Honest Claim of Right..... | 7:30 |

| | |
|---|------|
| Appendices to Chapter Seven..... | 7:31 |
| Appendix A Contact Details of Aboriginal Court Officers (s 48 AAPAA) | 7:31 |
| Appendix B Notes on Use of Video and Audiolinks in Court – the Hon Justice Jenkins | 7:32 |
| Appendix C Comments on Criminal Proceedings by the Hon Justice Murray .. | 7:35 |
| Appendix D Comments on Criminal Proceedings by the Hon Justice Templeman | 7:35 |
| Appendix E Examples of Directions to Jury: her Honour Judge Yeats | 7:36 |
| Appendix F Comments on Criminal Proceedings by Magistrate Langdon | 7:38 |
| Appendix G Comments on Criminal Proceedings by Peter Collins of ALSWA . | 7:39 |

Chapter Eight: Sentencing

Summary of Chapter Eight

| | |
|--|------|
| 8.1 Introduction | 8:2 |
| 8.1.1 Aboriginal Customary Concepts of Criminal Justice..... | 8:2 |
| 8.1.2 International Law | 8:3 |
| 8.1.3 Equality Before the Law | 8:5 |
| 8.1.4 RCIADIC Recommendations | 8:5 |
| 8.1.5 LRCWA Recommendations | 8:6 |
| 8.2 Imprisonment as a Sentence of Last Resort | 8:8 |
| 8.2.1 Law and Policy | 8:8 |
| 8.3 Aboriginality | 8:9 |
| 8.3.1 Aboriginality and Sentencing | 8:9 |
| 8.4. Aggravating Factors..... | 8:10 |
| 8.4.1 Domestic Violence | 8:10 |
| 8.4.2 Offences Against Children | 8:12 |
| 8.4.3 Cultural Attitude to Familial Relationships | 8:13 |
| 8.5. Mitigating Factors..... | 8:14 |
| 8.5.1 Facts Existing Only by Reason of Ethnicity | 8:14 |
| 8.5.2 Circumstances Underlying Alcohol/Substance Abuse | 8:16 |
| 8.5.3 Emotional Stress | 8:18 |
| 8.5.4 Cultural Dislocation | 8:19 |
| 8.5.5 Effect of Removal from Family | 8:20 |
| 8.5.6 Socio-Economic Factors..... | 8:21 |
| 8.5.7 The Impact of Imprisonment..... | 8:22 |
| 8.5.8 Customary Punishment | 8:25 |
| 8.5.9 The Wishes of the Aboriginal Community | 8:30 |
| 8.5.10 The Impact of Traditional Belief | 8:31 |
| 8.6 Sentencing: Other..... | 8:35 |
| 8.6.1 The Principles in <i>R v Fernando</i> | 8:35 |
| 8.6.2 <i>Dangerous Sexual Offenders Act 2006 (WA)</i> | 8:39 |
| 8.6.3 Section 16A (2A) and (2B) <i>Crimes Act 1914 (Cth)</i> | 8:40 |
| 8.7 Aboriginal Courts | 8:41 |
| 8.7.1 Aboriginal Courts in Western Australia..... | 8:41 |

| | |
|--|------|
| Appendices to Chapter Eight..... | 8:43 |
| Appendix A Comments on Sentencing – Hon Justice Murray | 8:43 |
| Appendix B Comments on Sentencing and Sentencing Remarks - Hon Justice Owen | 8:44 |
| Appendix C Comments on Sentencing – Hon Justice Templeman..... | 8:48 |
| Appendix D Sentencing Remarks - Hon Justice McLure | 8:49 |

FOREWORD

The first *Aboriginal Benchbook for Western Australian Courts* was launched in May 2002. At that time, Aboriginal prisoners in Western Australia made up more than 30 per cent of the prison population and were imprisoned at almost 13 times the rate of non-indigenous prisoners.¹ Since then the rate of imprisonment of Indigenous persons in Western Australia has dramatically increased. Since October 2006, and despite being estimated to be 3.8 per cent of the State's population,² Indigenous prisoners have comprised over 40 per cent of the prison population.³ In 2007, the rate of imprisonment of Indigenous adults was more than 27 times the non-indigenous adult rate.⁴ It is of note that the rate of over-representation of Aboriginal people in Western Australian prisons has now reached the same level that applied prior to the Report of the Royal Commission into Aboriginal Deaths in Custody in 1991.⁵

I have said before that I believe that the gross over-representation of Aboriginal people in the criminal justice system of Western Australia remains the greatest challenge facing our system.⁶

The question is: what do we do about this challenge? It needs to be borne in mind what purpose imprisonment serves. Recently, in a public lecture, the President of the Western Australian Court of Appeal, Justice Steytler, considered the objectives and effectiveness of sentencing, with particular reference to imprisonment.⁷ The President suggested that increased prison terms have often no discernable impact on crime rates;⁸ that the solution to offending lies 'to a large extent outside the purview of the courts';⁹ and that imprisonment only sometimes, but not usually, leads to rehabilitation of the offender.¹⁰ The President also noted that while imprisonment can protect the community while offenders are imprisoned, much surer long term protection would be secured by rehabilitating them.¹¹ The President highlighted, however, that the other sentencing objective of retribution (or denunciation), is achieved by imprisonment and is important to the victim and often to the community.¹² He noted the need for the legislature and courts to respond to community outrage over the conduct of offenders; apart from anything else to avoid the real risk of people taking matters into their own hands.¹³ This prompted the President to comment: 'We need to decide how far we want to go in satisfying this need for retribution or revenge. What kind of society do we want to be?'

The stark reality is that the rate of recidivism for non-Aboriginal prisoners in Western Australia is 40 per cent; for Aboriginal prisoners in Western Australia it is 70 per cent.¹⁴ Imprisonment appears to be a particularly ineffective tool if measured with reference to protecting the community from crime. The State's Special Adviser on Indigenous Affairs, Lieutenant General (Retired) John Sanderson, has also reported that Indigenous participation in the Justice and

¹ Australian Bureau of Statistics, *Prisoners in Australia 2002*, 4517.0, 2002, p 12.

² Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, 4705.0, 2007, p 18.

³ Department of Corrective Services, *Monthly Graphical Report, June 2008*, p 4.

⁴ Australian Bureau of Statistics, *Prisoners in Australia 2007*, 4517.0, 2007, p 18.

⁵ *Aboriginal Benchbook for Western Australian Courts*, 1st ed, 2002, p 4:12.

⁶ Law Week Address by the Hon Chief Justice of Western Australia Wayne Martin, May 2007, p 12 (www.supremecourt.wa.gov.au/publications/pdf/Law_Week_Address_05052008.pdf).

⁷ President of the Court of Appeal Christopher Steytler, 'Sentencing in the Criminal Justice System', Vista Public Lecture Series 2008, 23 April 2008 (www.sat.justice.wa.gov.au/_files/Sentencing_in_the_Criminal_Justice_System_Presented_by_Justice_Steytler.pdf).

⁸ *ibid*, p 17.

⁹ *ibid*, p 20.

¹⁰ *ibid*, p 21.

¹¹ *Ibid*, p 25.

¹² *ibid*.

¹³ *ibid*.

¹⁴ Productivity Commission, *Overcoming Indigenous Disadvantage Key Indicators 2007 Report*, 2007, Table 9A.2.2 – Number and proportion of prisoners with known prior adult imprisonment under sentence, by gender and State/Territory, 30 June 2006.

Corrective systems now absorbs 'approximately half of the total State expenditure on Indigenous Affairs'.¹⁵

The gross over-representation of Aboriginal people in the criminal justice system of this State challenges our notions of equality before the law, the purpose of imprisonment, and the benefits derived from the considerable resulting financial and other costs. At the same time, however, there is a need to respond appropriately to the challenge that offending behaviour, particularly family violence and child abuse, poses. Denunciation of such conduct – whether perpetrated against Aboriginal or non-Aboriginal women and children – may call for the imprisonment of Aboriginal as much as other offenders.

The original Aboriginal Benchbook, and this second edition, were commissioned by the National Indigenous Cultural Awareness Committee of the Australian Institute of Judicial Administration, responding to the grave judicial and community concerns about the over-representation of Aboriginal persons in Australia's criminal justice systems. The Benchbook was informed by the recommendation of the Royal Commission into Aboriginal Deaths in Custody that judicial officers participate in appropriate cross-cultural training and development programs so that contemporary Aboriginal society and customs were understood in the context of the historical and social factors contributing to contemporary Aboriginal disadvantage. That project was a valuable and important one; it is one which is even more critical now in light of the increasing rates of Aboriginal overrepresentation in the criminal justice system. This updated and considerably extended edition of the Aboriginal Benchbook furthers that project. It remains imperative that judicial officers' own cultural heritage not work an injustice against those who do not share it.

It is also important that while the denunciation of serious offences by Aboriginal people is equally as important as it is for other offenders, we need to remain alive to alternatives that may in fact be more effective in achieving the other aims of sentencing: deterrence, rehabilitation, and protection of the community. This Benchbook contributes to our understanding of why alternatives which draw upon Aboriginal communities, families and culture may be more effective in meeting those ends.¹⁶ It also contributes to our awareness of the existing extensive body of law which has developed to recognise the continuing importance of Aboriginal communities, families and culture in legal proceedings involving Aboriginal people.

Finally I would like to congratulate and thank all those involved in the preparation of this second edition of the Benchbook, and in particular Associate Professor Stephanie Fryer-Smith, Dean International, Curtin Business School, Curtin University, for her outstanding contribution. I would also like to acknowledge the continuing commitment to this project by the Australian Institute of Judicial Administration and the very welcome support of the Western Australian Department of the Attorney General.

The Hon Wayne Martin
Chief Justice of Western Australia

¹⁵ Lieutenant General (Retired) John Sanderson, Special Adviser on Indigenous Affairs, Letter to the Premier, 19 June 2007.

¹⁶ For example, refer to the preliminary evaluation of circle sentencing in NSW (I Potas, J Smart, G Brignell, B Thomas & R Lawrie, *Circle Sentencing in New South Wales - A review and evaluation*, Monograph 22, Judicial Commission of NSW, October 2003) and of the Shepparton and Broadmeadows Koori Courts in Victoria (R Kirby, 'Koori Courts - A View from Victoria' (presentation), 3rd National Indigenous Justice CEO Forum, Brisbane, 21-22 November 2007).

ACKNOWLEDGMENTS

I wish to thank the following people for their kind support in the development of the *Aboriginal Benchbook for Western Australian Courts, Second Edition*:

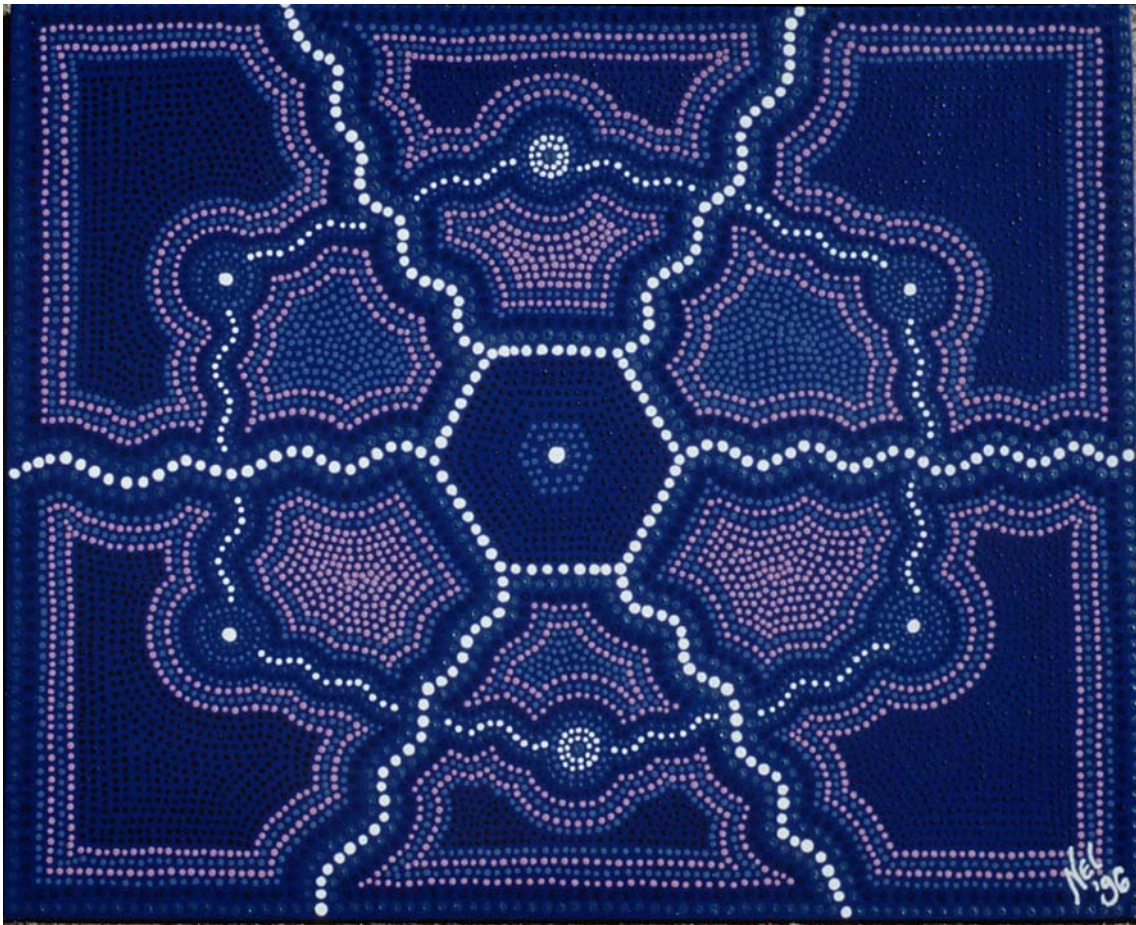
- The Hon Wayne Martin, Chief Justice of Western Australia
- The Hon J A McGinty BA BJuris (Hons) LLB JP MLA, Attorney-General for Western Australia
- The Hon Justice M Murray, Supreme Court of Western Australia
- The Hon Justice N Owen, Supreme Court of Western Australia
- The Hon Justice A Templeman, Supreme Court of Western Australia
- The Hon Justice G Miller, the Supreme Court of Western Australia
- The Hon Justice L Jenkins, the Supreme Court of Western Australia
- His Honour R Mazza, District Court of Western Australia
- His Honour K Sleight, District Court of Western Australia
- Ms L Woods, Deputy Chief Magistrate
- Dr K Auty, SM
- Ms L Langdon, SM
- Mr M Flynn, SM
- Professor G Reinhardt, Executive Director, AIJA
- Mr R Cock QC, Director of Public Prosecutions for Western Australia
- Professor G Crockett, Curtin Business School
- Dr J Rhoads, National Native Title Tribunal
- Mr P Bowen, National Native Title Tribunal
- Mr C Walley, Centre for Aboriginal Studies, Curtin University of Technology
- Mr V Pickett, Community Liaison Officer, Supreme Court of Western Australia
- Ms D Bracknell, Judge's Associate, District Court of Western Australia
- Members of the National Indigenous Cultural Awareness Committee of the AIJA

The second edition of the *Aboriginal Benchbook for Western Australian Courts* was produced with the generous and substantive support of a number of key people. Mr Tom Scutt, Ms Annette Fox and Ms Mary Moffatt of the Office of the Director of Public Prosecutions for Western Australia, and Mr Peter Collins and Ms Tonia Brajcich of the Aboriginal Legal Service of Western Australia provided valuable research support and critical commentary. My colleagues from the Curtin Business School, Dr Roberta Cowan and Dr Kim Benjamin, also provided invaluable research assistance. I am grateful to Dr Jeannine Purdy, Senior Research Officer for the Chief Justice of Western Australia, for her scholarly contributions and incisive editing suggestions.

My special thanks to Justice Robert French, Judge Mary Ann Yeats and my family.

Stephanie Fryer-Smith
Perth, July 2008

Chapter One: Introduction



Chapter One: Introduction

CONTENTS

| | | |
|-----|--|------|
| 1.1 | Introduction | 1:1 |
| 1.2 | Overview | 1:3 |
| 1.3 | Royal Commission into Aboriginal Deaths in Custody | 1:4 |
| | 1.3.1 Background..... | 1:4 |
| | 1.3.2 Findings | 1:4 |
| | 1.3.3 Recommendations..... | 1:5 |
| | 1.3.4 Postscript: Aboriginal Deaths in Custody 1990 – 2006 | 1:6 |
| 1.4 | Legal Definitions of “Aboriginal” | 1:7 |
| | References/Further Reading..... | 1:10 |

NOTE

The author acknowledges that the indigenous inhabitants of Australia descend from many hundreds of distinct and diverse culture groups. Accordingly, the use of the generic adjective "Aboriginal" in the Benchbook may be criticised. However, the employment of a collective term cannot be avoided, and the word "Aboriginal" rather than "Indigenous" has been used throughout the Benchbook upon the recommendation of Aboriginal advisers to the author.

CHAPTER ONE

Introduction

The first edition of the *Aboriginal Benchbook for Western Australian Courts* was published by the Australian Institute of Judicial Administration (AIJA) in 2002. The Benchbook was commissioned by the National Indigenous Cultural Awareness Committee of the AIJA in response to grave concerns held by the judiciary about the continuing over-representation of Aboriginal persons in Australian criminal justice systems. Those grave concerns, which are shared by the legal profession and the broader community, are reflected in domestic and international law.

Recommendation 96 of the *Royal Commission into Aboriginal Deaths in Custody: National Report*¹⁷ (RCIADIC) was also a key driver for the development of the first edition of the Benchbook. Recommendation 96 proposes the participation by judicial officers in appropriate cross-cultural training and development programs, which programs “explain contemporary Aboriginal society, customs and traditions” in a context which emphasises of the historical and social factors contributing to contemporary Aboriginal disadvantage.

The objectives of the first edition of the Benchbook were first, to provide a practical resource for judicial officers presiding over criminal proceedings involving Aboriginal persons in Western Australia; and secondly, to create a template Benchbook for adaptation in other Australian jurisdictions. To those ends, the Benchbook contained descriptive materials of a cross-cultural nature, and provided an overview of relevant legal principles in respect of pre-trial matters, criminal proceedings and sentencing in the Western Australian context.

During the years 2000 to 2006 the Law Reform Commission of Western Australia (LRCWA) undertook a detailed inquiry into all areas of Aboriginal customary laws in Western Australia, with the exception of native title and matters addressed under the *Aboriginal Heritage Act 1972* (WA). The LRCWA consulted widely with Aboriginal and non-Aboriginal people, groups and organisations throughout Western Australia. In its Discussion Paper¹⁸, published in December 2005, the LRCWA made 93 proposals which it considered “could lead to the principled recognition of Aboriginal customary laws in such a manner as would also address Aboriginal disadvantage in many areas of life in Western Australia”¹⁹. The following September, in *Aboriginal Customary Law: Final Report*²⁰, the LRCWA made 131 recommendations for the reform of certain Western Australian laws, and certain policies and practices of Western Australian Governmental agencies. Those recommendations sought “not only to empower Aboriginal people by creating an environment where Aboriginal people can build and exercise their capacity to make decisions that affect their everyday lives, but also to bring respect to Aboriginal people, law and culture.”²¹

The judicial, professional and community concerns which prompted the development of the first edition of the Benchbook have not abated: far from it²². The grossly disproportionate rate of Aboriginal participation in the criminal justice system has not diminished during the past six years. A number of significant reports, including *Putting the Picture Together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in*

¹⁷ E Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report* Vols. 1-11, AGPS, Canberra, 1991 (www.austlii.edu.au/au/other/IndigLRes/rciadic) (Accessed 5 July 2008)

¹⁸ Law Reform Commission of Western Australia *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) (www.lrc.justice.wa.gov.au/094-DP.html) p 191. (Accessed 9 July 2008).

¹⁹ LRCWA, Project No 94 (September 2006) (www.lrc.justice.wa.gov.au/094-FR.html) p vii (Accessed 9 July 2008)

²⁰ LRCWA, Project No 94 (September 2006) (www.lrc.justice.wa.gov.au/094-FR.html). (Accessed 9 July 2008)

²¹ LRCWA, *Aboriginal Customary Laws: Final Report* Project No 94 (September 2006) (www.lrc.justice.wa.gov.au/094-FR.html) p 38. (Accessed 9 July 2008)

²² The Hon Wayne Martin, Chief Justice of Western Australia, “The State of Justice: The Truth About Crime and Sentencing”, Law Week Address, 7 May 2007.

(http://www.supremecourt.wa.gov.au/publications/pdf/Law_Week_Address_05052008.pdf). (Accessed 7 July 2008)

*Aboriginal Communities*²³ (the Gordon Report), "*Little Children are Sacred*"²⁴ and *Overcoming Indigenous Disadvantage: Key Indicators 2007*²⁵ have highlighted the social, cultural and economic marginalisation of Aboriginal people, and the decline of traditional cultural authority, which lie at the heart of Aboriginal offending. It is notorious that in 2007 the alarming incidence of dysfunction, domestic and child abuse and suicides in Aboriginal communities in the Kimberley region of Western Australia (and in other parts of northern Australia) prompted emergency Governmental intervention to protect the women and children in those communities, and to prosecute perpetrators of abuse. The continuing high Aboriginal crime rate, the contents of wide-ranging reports and the unprecedented Governmental interventions in Aboriginal communities clearly signal the urgent need for all Australians to strive for Aboriginal societal, economic and cultural gains.

Against that background, the second edition of the Benchbook was developed to extend and update the materials contained in the first edition. Accordingly, it provides broad descriptions of traditional and contemporary Aboriginal society, culture, language and law; it suggests ways of addressing the language and communication issues which can arise in court proceedings involving Aboriginal people; and it discusses relevant legal principles relating to pre-trial and criminal proceedings and sentencing. The Benchbook also incorporates references, where appropriate, to the LRCWA's *Aboriginal Customary Laws: Final Report* and its earlier Discussion Paper. As with the first edition, Western Australian judicial officers have kindly provided comments, examples of sentencing notes and other materials for inclusion in the Benchbook.

An Overview of the contents of each Chapter of the Benchbook is set out on the following page.

This Benchbook is intended primarily for judicial officers have been appointed to courts exercising criminal jurisdiction in Western Australia during the past five years. Such officers may have had little, if any, involvement in criminal proceedings involving Aboriginal people prior to their appointment. However, it is also hoped that the Benchbook will be of broader interest within the judiciary and the legal profession.

Finally, and consistent with the approach of the LRCWA in its *Aboriginal Customary Laws: Final Report*, the Benchbook seeks to demonstrate the extent to which the Western Australian legal system has the capacity, where appropriate, to recognise the significance of Aboriginal law and culture within the context of Anglo-Australian criminal proceedings.

²³ S Gordon, K Hallahan, D Henry (2002), Department of Premier and Cabinet, Western Australia.

²⁴ Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, 2007.

²⁵ Steering Committee for the Review of Government Service Provision, Productivity Commission, 2007, Canberra.

1.2

OVERVIEW

The Benchbook is intended as a practical resource for judicial officers presiding over criminal proceedings involving Aboriginal persons by providing materials relating to:

- the key findings and recommendations of the 1991 *Royal Commission into Aboriginal Deaths in Custody: National Report*²⁶; and recent data relating to Aboriginal deaths in custody. The meaning of the word “Aboriginal” for legal purposes is considered: (*Chapter One, Introduction*);
- the broad features of early Aboriginal occupation of Australia, traditional Aboriginal language groups, Aboriginal languages, social organisation, culture, spirituality, ritual, art and law: (*Chapter Two, Aspects of Traditional Aboriginal Australia*);
- features of contemporary Aboriginal Australia, including Aboriginal migration to urban areas, survival of language and culture; current demographic data. Apparent differences in the cultural values of Aboriginal and non-Aboriginal Australians are identified: (*Chapter Three, Aspects of Contemporary Aboriginal Australia*);
- current demographic data relating to Aboriginal people in Western Australia; statistics evidencing the continuing over-involvement of Aboriginal people in the criminal justice system; and background factual information including the names and locations of the many Aboriginal language groups in Western Australia: (*Chapter Four, Aboriginal People in Western Australia*);
- the linguistic and conceptual features of Aboriginal languages, such as *Ngaanyatjarra*; by identifying cross-cultural barriers to effective communication; and by suggesting strategies for communicating effectively with speakers of Aboriginal English: (*Chapter Five, Language and Communication*);
- issues which might affect Aboriginal accused persons in pre-trial proceedings including bail, fitness to plead; and interpreters. The *Appendix* contains information relating to the Aboriginal Legal Service of Western Australia (Inc.); Aboriginal Liaison Officers; a test for determining whether an Aboriginal interpreter is required and information about the availability and location of Aboriginal interpreters in Western Australia: (*Chapter Six, Pre-Trial Matters*);
- the conduct of criminal proceedings in respect of Aboriginal accused persons and witnesses. The discussion includes matters relating to representation, pleas of guilty, juries, evidence; confessions and admissions and defences. The *Appendix* includes comments from Western Australian judicial officers about criminal proceedings involving Aboriginal people and provides examples of directions to juries in trials involving Aboriginal accused persons: (*Chapter Seven, Criminal Proceedings*);
- the concept of “Aboriginality” in sentencing and the operation of sentencing principles in respect of Aboriginal offenders. Particular focus is placed upon imprisonment as a sentence of last resort, aggravating factors and mitigating factors including the circumstances underlying alcohol and substance abuse, the impact of imprisonment, cultural dislocation, racial conflict and the infliction of customary punishment. The *Appendix* contains comments relating to sentencing practices provided by Western Australian judicial officers and extracts from judicial sentencing remarks: (*Chapter Eight, Sentencing*).

²⁶ RCIADIC (www.austlii.edu.au/au/other/IndigLRes/rciadic).

1.3

ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

1.3.1 Background

During the early 1980s the grossly disproportionate number of Aboriginal deaths in police or prison custody created intense community concern. In January 1988 a Royal Commission inquiry commenced into the deaths in custody of 44 Aboriginal persons. Subsequently the inquiry was widened to incorporate a wide-ranging investigation into Aboriginal involvement in the Australian criminal justice system. Ultimately the circumstances of the deaths in custody of 99 Aboriginal persons were examined and reported upon. Thirty three of those 99 deaths had occurred in Western Australia.

1.3.2 Findings

The *Royal Commission into Aboriginal Deaths in Custody: National Report* (RCIADIC), released on 9 May 1991, contained key findings²⁷, including that:

- it could not be asserted that abuse, neglect or racism were common elements in each of the deaths which had been investigated. However, in many cases “system failures” or the absence of due care had contributed to the deaths;
- Aboriginal people do not die in custody at a greater rate than do non-Aboriginal people. However, Aboriginal people come into custody at a rate which is “overwhelmingly different” from that of the general community; For example, in Western Australia, Aboriginal people were 43 times more likely to be in police custody; and 26 times more likely to be in prison custody, than non-Aboriginal persons;
- The most significant cause of Aboriginal over-representation in the criminal justice system was the continuing disadvantage experienced by Aboriginal persons within the broader society. Eighty-eight of the 99 Aboriginal persons who had died in custody were men whose average age was 32 years. In addition, of those 99 persons:
 - 83 were unemployed at the time of detention;
 - only 2 had been educated to secondary school level;
 - 43 had been removed from their families by the State;
 - 74 had been in trouble with the law before the age of 20;
 - 43 had been detained for drunkenness just prior to their last custody²⁸.

The Royal Commissioner commented:

“Their deaths were premature. The circumstances of their deaths were extremely varied. One cannot point to a common thread of abuse, neglect or racism that is common to these deaths. However, an examination of the lives of the ninety-nine shows that facts associated in every case with their Aboriginality played a significant and in most cases dominant role in their being in custody and dying in custody.”²⁹

²⁷ RCIADIC, Vol 1, Chapter 1 (www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/)

²⁸ RCIADIC, Vol 1, Chapter 1 (www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/11.html para 1.2.17 (Accessed 6 July, 2008)

²⁹ RCIADIC, Vol 1, Chapter 1 (www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/7.html) para 1.1.1. (Accessed 6 July, 2008)

The Royal Commissioner placed particular emphasis upon the devastation which had been wrought upon Aboriginal societies by British colonisation and the imposition of post-colonial laws and practices. The legacy of those laws and practices was systemic Aboriginal socio-economic disadvantage, disempowerment and cultural fragmentation. It appeared that an inevitable consequence was early, and repeated, contact by many Aboriginal persons with the criminal justice system.

1.3.3 Recommendations

RCIADIC contained 339 recommendations for Commonwealth and State Governments. The recommendations included reforms to the policing, criminal justice, juvenile justice and custodial systems. Other recommendations focused on Aboriginal empowerment and self-determination. RCIADIC Recommendations relevant to the conduct of criminal proceedings included:

- *Recommendation 96:* That judicial officers and persons who work in the court service and in the probation and parole services whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development programme, designed to explain contemporary society, customs and traditions. Such programmes should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should, wherever possible, participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.
- *Recommendation 100:* That Governments should take more positive steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant numbers of Aboriginal people appear before the courts.
- *Recommendation 104:* In discrete or remote communities sentencing authorities should consult with Aboriginal authorities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities. Further, that subject to preserving the civil and legal rights of offenders and victims, such consultation should in appropriate circumstances relate to sentences imposed in individual cases.
- *Recommendation 108:* That it be recognised by Aboriginal Legal services, funding authorities and courts that lawyers cannot adequately represent clients unless they have adequate time to take instructions and prepare cases, and that this is a special problem in communities without access to lawyers other than at the time of court hearings.

The Australian Institute of Criminology (AIC) has published an annotated bibliography of reports published between 1992 and 2000 which describe the extent to which the RCIADIC Recommendations have been implemented³⁰. Among those reports are *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody*³¹ and the *Government of Western Australia 2000: Implementation Report*³².

³⁰ P Garfoot, *Annotated Bibliography* (<http://www.aic.gov.au/research/dic/bibliography.html>)

³¹ R Harding, R Broadhurst, A Ferrante, N Loh Hawkins Press, Leichhardt, 1995.

³² Indigenous Affairs Department, Western Australian Government, June 2001. See also E Marchetti *Critical Reflections Upon Australia's Royal Commission into Aboriginal Deaths in Custody* [2005] MqLJ 6.

1.3.4 Postscript: Aboriginal Deaths in Custody 1990-2006

In 1991 the Royal Commissioner commented:

“The conclusions are clear. Aboriginal people die in custody at a rate relative to their proportion which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community.”³³

In December 1992 the AIC also established the National Deaths in Custody Monitoring and Research Program. In October 2000 the AIC reported that in the decade 1990 - 2000, a total of 909 persons had died in all forms of custody in Australia. One hundred and sixty-two of those 909 persons (almost 18%) were Aboriginal³⁴. The largest number of Aboriginal deaths in custody (21 or 24% of all deaths in custody) occurred in 1995. In August 2005 Commonwealth funding for the Deaths in Custody Watch Committees in each State ceased.

In each of 2005 and in 2006, a total of 54 people died in all forms of custody in Australia, 13 fewer than in 2004. The total number of Aboriginal deaths in custody in 2005 was 15 (28%) compared with 13 (24%) in 2006³⁵. As at 30 June 2006 Australia's estimated resident Aboriginal population was 517,000 persons (or 2.5% of the total population)³⁶. The continuing grossly disproportionate rate of Aboriginal deaths in custody confirms the currency of the comments made by the Royal Commissioner in 1991: namely that Aboriginal people die in custody at a rate relative to their proportion which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community.

The Royal Commissioner emphasised the importance of reconciliation between Aboriginal and non-Aboriginal Australia, affirming that “reconciliation demands a level playing field, a negotiation based upon mutual respect and an acceptance of equality.” The process of reconciliation would demand “a very strong commitment to the elimination of that Aboriginal social, economic and cultural disadvantage which is the basic reason for the disproportionate number of Aboriginal men and women in custody, the deaths of some of them and the setting up of this Royal Commission.”³⁷

³³ RCIADIC, Vol 1, Chapter 1, www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/12.html para 1.3.3. (accessed 6 July 2008)

³⁴ L Collins and J Mouzos 'Australian Deaths in Custody and Custody-Related Police Operations 2000, *Trends & Issues in Crime and Criminal Justice*, October 2001, No 217, Australian Institute of Criminology, Canberra, p 1.

³⁵ Australian Bureau of Statistics, *Year Book Australia, 2008*, 1301.0, Table 13.32(www.abs.gov.au).

³⁶ ABS, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, 15 August 2007, 4705.0, p 4, (www.abs.gov.au). (Accessed 30 June 2008)

³⁷ RCIADIC, Vol 1, Chapter 1, (www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/23.html) para 1.9.1. (Accessed 6 July 2008)

1.4

LEGAL MEANINGS OF THE WORD “ABORIGINAL”

In 1788, upon the acquisition of sovereignty over the colony of New South Wales by the British Crown, the Aboriginal occupants of the continent became British subjects, governed by colonial laws. Since colonisation, Australian courts have consistently rejected arguments that Aboriginal people are not subject to that law³⁸. The claim that Aboriginal sovereignty survived the acquisition of sovereignty by the British Crown has also been rejected³⁹. However, Aboriginal customary law survives to inform the law of native title⁴⁰, and its relevance to legal proceedings - principally criminal proceedings - is the subject of discussion in this Benchbook⁴¹.

Under the colonial regimes, questions arose as to whether the descendants of unions between Aboriginal people and settlers were to be regarded as “Aboriginal” for certain defined (invariably restrictive) purposes such as the entitlement to vote. Thus, a person’s status as “Aboriginal” or non-Aboriginal became a matter of great significance for administrative purposes. During the period 1788-1984, more than 700 laws were enacted which expressly or incidentally affected the rights and status of Aboriginal people⁴². Ostensibly, many were enacted for the protection and advancement of Aboriginal people: the long title of the now infamous *Aborigines Act 1905* (WA) was “An Act to make provision for the better protection and care of the Aboriginal inhabitants of Western Australia”.

The dictionary definition of “Aboriginal” includes “first or earliest as far as history or science gives record....used both of the races and natural features of various lands”⁴³. In all Australian jurisdictions early statutory definitions focused on descent, the relevant criterion being quantum of blood. Thus, terms such as “full-blood”, “half-caste” and “quadroon” were frequently employed. This approach appears to reflect the view that if a person were to be predominantly of non-Aboriginal descent, that person was not “Aboriginal”. Numerous books and articles have documented the elaborate tests which were devised to test “bloodline”: it has been asserted that such tests demonstrate more about the psychology of racism than they do scientific matters⁴⁴.

In the latter half of the twentieth century a broader approach emerged. In *Ofu-Kolai v The Queen*⁴⁵ the High Court held that “racial origin or derivation” was the relevant measure of determining whether a person came within a racial group⁴⁶. Their Honours commented that “at the edges of racial classification there is an uncertainty of definition”⁴⁷. In *Re Bryning (Dec’d)*⁴⁸, Lush J commented that the meaning of the words “Aborigine and “Aboriginal” varied in everyday usage. In his Honour’s view, when those words were used “to describe a general body of persons, without adjectives and without contrasting words or phrases”⁴⁹ they did not refer to persons of pure Aboriginal descent, and had not done so for many years.

³⁸ See *R v Murrell* (1836) 1 Legge 72; *R v Wedge* [1976] 1 NSWLR 581; *Re Phillips: Ex parte Aboriginal Development Commission* (1987) 13 FCR 384; *R v Walker* [1989] 2 Qd R 79; *Walker v New South Wales* (1994) 182 CLR 45.

³⁹ *Coe v Commonwealth* (1979) 53 ALJR 403. Compare the position in the United States, where subordinate indigenous sovereignty in the form of “domestic dependent status” was recognised in a series of the decisions of the Supreme Court in the mid-nineteenth century, most notably *Worcester v Georgia* 31 US 530; 6 Pet 515 (1832).

⁴⁰ See *inter alia Mabo v Queensland (No 2)* 175 CLR 1; s 253 *Native Title Act 1993* (Cth).

⁴¹ See Chapters Six (Pre-Trial Matters), Seven (Criminal Proceedings) and Eight (Sentencing).

⁴² J McCorquodale *Aborigines and the Law: A Digest* Australian Studies Press, Canberra, 1987.

⁴³ The Oxford English Dictionary, Second Edition, Vol 1, Clarendon Press, Oxford, 1989.

⁴⁴ H McRae et al *Indigenous Legal Issues* LBC Information Services, Second Ed, 1997, p 72.

⁴⁵ (1956) 96 CLR 172.

⁴⁶ *Ofu-Kolai v The Queen* (1956) 96 CLR 172 at 176 per Dixon CJ, Fullagar and Taylor JJ.

⁴⁷ *Ofu-Kolai v The Queen* (1956) 96 CLR 17 at 175 per Dixon CJ, Fullagar and Taylor JJ.

⁴⁸ [1976] VR 100.

⁴⁹ *Re Bryning (Dec’d)* [1976] VR 100 at 103

In *Commonwealth v Tasmania*⁵⁰ the High Court declared that Aboriginal persons from Tasmania are members of the “Aboriginal race” for the purposes of s 51(xxvi) of the Australian Constitution. Deane J expressed the view that definitions relating to race (which term his Honour applied to Australian Aboriginal people collectively) have “a wide and non-technical meaning”⁵¹. His Honour continued:

“By ‘Australian Aboriginal’ I mean in accordance with what I understand to be the conventional meaning of the term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as an Aborigine.”⁵²

Deane’s J definition contains three criteria which have been used widely for administrative purposes since 1967: Aboriginal descent, self-identification as Aboriginal and community acceptance as Aboriginal. Those criteria are embedded in the definition of “person of Aboriginal descent” for the purposes of the *Aboriginal Affairs Planning Authority Act 1972* (WA):

“**person of Aboriginal descent:** any person living in Western Australia who is wholly or partly descended from the original inhabitants of Australia who claims to be an Aboriginal and who is accepted by such in the community in which he lives.”

In *Attorney-General (Commonwealth) v State of Queensland*⁵³ (*Attorney-General’s Case*) the Full Court of the Federal Court considered the meaning of the word “Aboriginal” in Letters Patent which had been issued to inquire into the deaths in police custody of certain “Aboriginal and Torres Strait Islanders” in Queensland⁵⁴. The Full Court concluded that in the particular context of the proceedings the word “Aboriginal” should be given its vernacular meaning. Jenkinson J stated that in order to be “Aboriginal” a person must have “at least a real possibility of descent” from the people who had occupied Australia before colonisation⁵⁵. Spender J stated that once a person has been established to be “non-trivially” of Aboriginal descent, that person is Aboriginal⁵⁶. French J concluded that, for the purposes of the proceedings, the fact of Aboriginal descent was sufficient. His Honour also expressed the view that the definition formulated by Deane J in the *Tasmanian Dams Case* was not exhaustive⁵⁷.

The statutory definition of the term “Aboriginal person” as “a person of the Aboriginal race of Australia” (which is contained in a number of statutes⁵⁸) was examined by Drummond J in *Gibbs v Capewell*⁵⁹. His Honour held that Aboriginal descent is an essential, but not necessarily a sufficient, condition of Aboriginality for the purposes of that definition. Drummond J concluded that the requisite degree of Aboriginal descent depends upon the circumstances of each case: a small degree of descent, coupled with genuine self-identification or communal recognition, might suffice⁶⁰.

In *Wolf v Shaw*⁶¹ Merkel J, examining the same statutory definition, approved the view expressed by Drummond J in *Gibbs v Capewell* that descent alone is not sufficient to establish Aboriginality.

⁵⁰ (1983) 158 CLR 1.

⁵¹ *Commonwealth v Tasmania* (1983) 158 CLR 1 at 273-274.

⁵² *Commonwealth v Tasmania* (1983) 158 CLR 1 at 274.

⁵³ (1990) 94 ALR 515.

⁵⁴ At first instance it had been held that the death of a man who was of partly Aboriginal genetic descent, but of European appearance, could not be the subject of inquiry pursuant to those Letters Patent.

⁵⁵ *Attorney-General’s Case* (1990) 94 ALR 515 at 517.

⁵⁶ *Attorney-General’s Case* (1990) 94 ALR 515 at 524.

⁵⁷ *Attorney-General’s Case* (1990) 94 ALR 515 p 539.

⁵⁸ For example, s 3 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); s 2 *Aboriginal Councils and Associations Act 1976* (Cth); s 3 *Aboriginal Education (Supplementary Assistance) Act 1989* (Cth). The latter two enactments expressly include persons of Torres Strait Islander descent in the definition of “Aboriginal”. Compare s 3(1) *Racial Discrimination Act 1975* (Cth) and s 253 *Native Title Act 1993* (Cth) which contain separate definitions of “Aboriginal” and “Torres Strait Islander”.

⁵⁹ (1995) 128 ALR 577. The provision in question was s 4(1) *Aboriginal and Torres Strait Islander Act 1989* (Cth) (now repealed).

⁶⁰ *Gibbs v Capewell* (1995) 128 ALR 577 at 581-585.

⁶¹ (1998) 83 FCR 113.

Commenting that inflexible notions of Aboriginal identity are inappropriate, Merkel J stated that the determination of whether a person is Aboriginal depends upon the application of the factors of descent, self-identification and communal recognition of that person to the facts of a particular case⁶².

The decisions of the Federal Court briefly discussed above indicate that genetic descent, albeit small, is essential to a person being considered “Aboriginal” where that term is defined very broadly⁶³. The extent to which self-identification and communal affiliation might also need to be established depends upon the facts of each case, and the legal context in which the question of Aboriginality arises.

Legislative definitions and judicial pronouncements in relation to Aboriginal identity have been criticised on the grounds *inter alia* that they obstruct the cause of Aboriginal self-determination and legitimise unwarranted intervention in Aboriginal affairs⁶⁴. The use of the word “Aboriginal” has been criticised as being inaccurate, racist and controlling⁶⁵. However, it appears that if measures of positive discrimination are to be effected in respect of Aboriginal persons, judicial pronouncements upon Aboriginal identity cannot be avoided⁶⁶.

⁶² *Shaw v Wolf* (1998) 83 FCR 113 at 118-122.

⁶³ Note the view of French J in *Attorney-General's Case* (1990) 94 ALR 515 at 539.

⁶⁴ C Cunneen ‘Judicial Racism’ in S McKillop (ed) *Aboriginal Justice Issues: Proceedings of a Conference Held 23-25 June 1992*, Australian Institute of Criminology, Canberra, 1992.

⁶⁵ M Mansell, quoted in H McRae et al *Indigenous Legal Issues* LBC Information Services, Second Ed, 1997, pp 71-72.

⁶⁶ See also Australian Law Reform Commission *The Recognition of Aboriginal Customary Law*, Report No 31, AGPS, Canberra, 1986 (www.austlii.edu.au/au/other/alrc/publications/reports/31/) at paras 88-97; S Yeo ‘The Recognition of Aboriginality by Australian Criminal Law’ in G Bird, G Martin and J Nielsen *Majah: Indigenous Peoples and the Law* The Federation Press, Sydney, 1996. Matters relating to Aboriginal identity are discussed *inter alia* in J Sabbioni, K Shaeffer and S Smith (eds) *Indigenous Australian Voices: A Reader* Rutgers University Press, New Brunswick, New Jersey, 1998; D Oxenham, J Cameron, K Collard, P Dudgeon, D Garvey, M Kickett, J Roberts and J Whiteway *A Dialogue on Indigenous Identity: Warts 'n' All* Gunada Press, Curtin Indigenous Research Centre, 1999; De Plevitz L and Croft L ‘Aboriginality Under the Microscope: The Biological Descent Test in Australian Law’ [2003] *QUT LJJ* 7; Connell R ‘Who is an Aboriginal Person: *Shaw v Wolf* [1998] *ILB* 49; McRae H ‘The Criminal Justice System and the Construction of Aboriginality’ *Law in Context* 17(1) 1999: 148-166.

REFERENCES/FURTHER READING

- Australian Law Reform Commission *The Recognition of Aboriginal Customary Law*, Report No 31, AGPS, Canberra, 1986 (www.austlii.edu.au/au/other/alrc/publications/reports/31/)
- E Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report* Vols. 1-11, AGPS, Canberra, 1991 (www.austlii.edu.au/au/other/IndigLRes/rciadic/)
- Behrendt L "Aboriginal Urban Identity: Preserving the Spirit, Protecting the Traditional in Non-Traditional Settings" *Australian Feminist Law Journal*, v. 4, March 1995: 55-61
- C Cunneen 'Judicial Racism' in S McKillop (ed) *Aboriginal Justice Issues: Proceedings of a Conference Held 23-25 June 1992*, Australian Institute of Criminology, Canberra, 1992.
- S Gordon, K Hallahan, D Henry, D (2002) *Putting the Picture Together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (Gordon Report) Department of Premier and Cabinet, Western Australia
- "Little Children are Sacred" Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, 2007
- M Hoey and M Flynn 'The Royal Commission: 10 Years On' (4) 2001 *Alternative Law Journal* 196
- Indigenous Affairs Department *Government of Western Australia 2000: Implementation Report* June, 2001
- Judicial Commission of NSW *Equality Before the Law: Bench Book*, Sydney, 2006 (www.jc.nsw.gov.au/benchbks/equality/)
- Law Reform Commission of Western Australia *Aboriginal Customary Law: Final Report* Project 94. (September 2006) (www.lrc.justice.wa.gov.au/094-FR.html).
- E Marchetti *Critical Reflections Upon Australia's Royal Commission into Aboriginal Deaths in Custody* [2005] MqLJ 6
- H McRae et al *Indigenous Legal Issues* Lawbook Co, Third Ed, 2003
- J McCorquodale *Aborigines and the Law: A Digest* Australian Studies Press, Canberra, 1987
- J Nielsen 'Images of the 'Aboriginal': Echoes from the Past (1988) 11 *Australian Feminist LJ*.
- *Overcoming Indigenous Disadvantage: Key Indicators 2007* Steering Committee for the Review of Government Service Provision, Productivity Commission, 2007, Canberra
- D Oxenham, J Cameron, K Collard, P Dudgeon, D Garvey, M Kickett, J Roberts and J Whiteway *A Dialogue on Indigenous Identity: Warts 'n' All* Gunada Press, Curtin Indigenous Research Centre, 1999
- D Palmer and D Groves 'A Dialogue on Identity, Intersubjectivity and Ambivalence' (2000) 1 (2) *Balayi: Culture, Law and Colonialism*
- H Reynolds *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Ringwood Victoria, 1981
- Supreme Court of Queensland *Equal Treatment Benchbook*, 2005 (www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf)
- S Yeo 'The Recognition of Aboriginality by Australian Criminal Law' in G Bird, G Martin and J Nielsen *Majah: Indigenous Peoples and the Law* The Federation Press, Sydney, 1996.