

That, at the earliest opportunity, the Western Australian government introduce into Parliament a Bill to amend the Constitution to effect, in s 1, the recognition of the unique status of Aboriginal peoples as the descendants of the original inhabitants of this state. The provision should also acknowledge Aboriginal peoples as the original custodians of the land, acknowledge their continuing spiritual, social, cultural and economic relationship with lands and waters in Western Australia, and acknowledge the special contribution that Aboriginal peoples have made to this state.

The Commission commends the provisions of s 1A of the Victorian *Constitution Act 1975* as precedent for the drafting of a similar provision for Western Australian's Constitution.

This constitutional respect for Aboriginal peoples, rather than just for Aboriginal customary laws, is something that Aboriginal people told the Commission they wanted. The Commission has also found a number of ways to recognise Aboriginal customary laws in all areas of Western Australian law which do not involve Aboriginal people having to write their law down or tell it to someone who shouldn't know it. The Commission hopes that the combination of constitutional respect for Aboriginal people and legislative, administrative and judicial recognition of Aboriginal customary laws and culture will make a real difference to how Aboriginal people are treated in Western Australia.

Have your say ...

The Law Reform Commission of Western Australia wants to hear your opinion about the proposals discussed in this document.

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Law Reform Commission
of Western Australia

ABORIGINAL CUSTOMARY LAWS PROJECT

Constitutional Change

February 2006

During the Commission's consultations across Western Australia, Aboriginal people frequently stated that they wished for constitutional change. Aboriginal people wanted government to show its respect for Aboriginal law and culture by changing the foundation of Western Australian law.

Although the Western Australian government has no power to change the Commonwealth Constitution (which applies to the whole of Australia), it can change Western Australia's Constitution. The Commission has considered two different ways of bringing greater recognition to Aboriginal law and culture through change to the Western Australian Constitution.

Constitutional acknowledgement of Aboriginal people as 'first Australians'

Victoria is currently the only state in Australia to acknowledge the unique status of Aboriginal people as 'first Australians' in its Constitution. Victoria has added a new foundational section which:

- acknowledges that the colony of Victoria was established without proper consultation, recognition or involvement of the Aboriginal people of Victoria;
- acknowledges that Aboriginal people are the original custodians of the land on which the colony was established;
- recognises that Aboriginal people have a unique status as descendants of Australia's first people;
- recognises that Aboriginal people have a spiritual, social, cultural and economic

relationship with their traditional lands and waters; and

- recognises that Aboriginal people have made a unique and irreplaceable contribution to the identity and wellbeing of Victoria.

The provision does not give Aboriginal people any more legal rights, but it does show respect for Aboriginal people and acknowledges Aboriginal people's special relationship with the land and waters. When this constitutional change was introduced in Victoria, the Aboriginal and Torres Strait Islander Social Justice Commissioner commented how important it was for Aboriginal people to be recognised at the constitutional level. This was exactly what Aboriginal people in Western Australia told the Commission when it consulted with Aboriginal communities.

Constitutional recognition of Aboriginal customary law as a distinct 'source of law'

The other type of constitutional change that the Commission looked at was making Aboriginal customary law a separate source of law in the Western Australian Constitution. This has been raised as a possibility in the Northern Territory.

The Commission found that recognising Aboriginal customary law as a source of law would mean that Aboriginal customary law would have to be written down. This goes against the Aboriginal way of passing the law down through generations by initiation, ceremonial knowledge and stories. The Commission was concerned that if Aboriginal customary law was written down, people who

should not know the law would be able to see it. The Commission was also concerned that if Aboriginal customary law was written down it would become subject to control and interpretation by non-Aboriginal people and by government.

The Commission's proposal to change the Western Australian Constitution

Because the Commission respects the secret nature of some aspects of Aboriginal customary law and does not want Aboriginal people to lose control over their own laws, it has rejected constitutional recognition of Aboriginal customary law as a 'source of law'. The Commission thinks that Aboriginal people in Western Australia will benefit more from constitutional recognition of their unique status as descendants of the original inhabitants of Western Australia and as original custodians of the land and waters of Western Australia.

The Commission calls this 'reconciliatory recognition' because it is an important and essential step to achieving reconciliation between Aboriginal and non-Aboriginal people and government in Western Australia.

The Commission has looked at where this recognition should go in the Constitution. Some people have suggested that it be part of the preamble to the Constitution, but the Commission thinks it is too important for this. The Commission has proposed that a new section 1 be inserted into the Western Australian Constitution which follows the type of provision that is in the Victorian Constitution. The proposal to government is in the following words: