

ABORIGINAL CUSTOMARY LAWS PROJECT

Inheritance

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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- make the court application process much easier than it currently is;
- allow for persons who are in a classificatory kin relationship with the deceased under the deceased's customary law to apply to inherit any property in the event that no person of entitlement can be found under the *Administration Act*;
- make sure that any kin who were dependent upon the deceased person for financial assistance or housing have a right to claim from the deceased's estate;
- recognise traditional Aboriginal marriages and any children of those marriages;
- remove the existing bias toward male relatives found in the current scheme; and
- remove the potentially offensive definition of 'Aboriginal person' in the AAPA Act.

The Commission has also asked people to comment on whether courts should accept a relaxed standard of proof in deciding whether an Aboriginal person whose birth was not registered has the right to inherit the deceased person's property.

Making a will

The best way to ensure that Aboriginal customary laws relating to distribution of property upon death are observed by Western Australian law is to make a will. In a will you can say what you want done with your property when you die, what obligations you want to pass on under customary law or kinship rules, and even where you want to be buried.

The Commission wants to encourage Aboriginal people to make wills so that when they die their customary law is respected the way they want it to be. The Commission has therefore proposed that an education strategy be put in place to tell Aboriginal people how to make a will and to help them in this process.

Distribution of property upon death

When a person dies leaving personal property, money, land or other things, that property is subject to Western Australia's succession laws. Succession laws deal with the distribution of property upon death and include laws relating to wills and inheritance, intestacy (where a person dies without leaving a will) and financial support for family members who were dependent on the deceased. As part of its Aboriginal customary laws project the Commission has looked at whether there are any conflicts between customary law and Western Australian law in this area and whether Western Australian law can be improved to help Aboriginal people.

Aboriginal customary law

The Commission's consultations and research found that customary laws that determine what should happen with a person's property when they die are still practised by some Aboriginal people today. In Western Australia customary law differs from community to community. In some communities customary law says that personal property should be destroyed or burned when a person dies, and in others it says that it should be given to certain kin or that the Elders should decide who the property goes to.

Application of customary law also depends on the sort of property being dealt with. For example, traditionally land, sacred emblems, designs and songs were owned by the whole community. Usually a single individual could not own these things so they were not often subject to customary laws that govern what happens to property after a person dies.

Western Australian law

Under the laws of Western Australia when an Aboriginal person dies (and that person has not made a will which directs who their property should go to) the distribution of their property is undertaken by the Public Trustee. The property will be given to the deceased person's immediate family in accordance with the hierarchy set out in the *Administration Act 1903 (WA)*. If no spouse, de facto spouse or immediate blood relative (such as children, parents, sisters or brothers) can be found then the distribution scheme under the *Aboriginal Affairs Planning Authority Act 1972 (WA)* (the AAPA Act) is applied. The AAPA Act says that property can go to a customary law spouse, the children of a traditional Aboriginal marriage or the parents of the deceased.

Although the AAPA scheme was set up to give recognition to traditional Aboriginal marriages and customary laws of distribution it has been widely criticised. In particular, the emphasis remains on lineal relationships such as parents, spouse and children (reflecting a non-Aboriginal notion of kinship) rather than the broader range of relatives that are considered to be someone's mother, father, wife, husband, sister or brother under Aboriginal kinship rules (classificatory kin). It also favours distribution of property to male relatives. Another important criticism is that the scheme discriminates against Aboriginal people because they are not permitted to apply to distribute the property of their deceased relative – the Public Trustee must do that.

The Public Trustee has also reported some special difficulties faced by Aboriginal people in proving their entitlements under the *Administration Act*. One of these difficulties is that many Aboriginal people born prior to 1970 did not have their births registered so they can't always prove their relationship to the person that has died.

Reform of Western Australian law governing Aboriginal intestacy

In practice, the AAPA scheme does not seem to cause too many problems for Aboriginal people. This is because the Public Trustee has to be aware of a death of an Aboriginal person before it is applied. This will only happen if the family or someone else tells the Public Trustee or if the Public Trustee already had dealings with the deceased person.

In many cases kin are able to distribute the property of a deceased person in accordance with customary law and without any government interference. There is also scope under the *Administration Act* for kin to claim up to \$6,000 cash held in banks without the need to apply to the court. The Commission has proposed that this amount be increased which will mean that where the deceased did not have a lot of money in the bank, there might not be a need to apply to the court. While distribution of real property (that is, land or houses) and stocks or shares will generally require a court order, it is acknowledged that such things were never a part of customary law and would therefore not be likely to create conflict between customary law and Western Australian law.

The Commission has proposed changes to Western Australian laws to fix the problems that Aboriginal people face when they do have to get a formal court order to distribute property of a deceased relative. The Commission also wanted to make some changes that will recognise Aboriginal customary law and kin relationships. The Commission's proposals will:

- enable the family of an Aboriginal person who has died without leaving a will to apply to the court to distribute the property of the deceased;