

# Chapter One: Introduction

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## CHAPTER ONE

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# Introduction

The Aboriginal Cultural Awareness Benchbook (Benchbook) is an initiative of the National Indigenous Cultural Awareness Committee of the Australian Institute of Judicial Administration. The Benchbook purports to respond to judicial concerns about Aboriginal<sup>1</sup> accused persons, witnesses and convicted offenders who become embroiled in the criminal justice system. Those concerns are shared by the broader community and are underscored by principles of international law.

### 1.1

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#### SCOPE OF THE BENCHBOOK

This Benchbook is a pilot project and its scope is necessarily limited. Chapters Six, Seven and Eight discuss matters relating to pre-trial procedures, criminal proceedings and sentencing respectively. The discussion focuses upon the criminal jurisdiction of the Supreme Court of Western Australia and of the District Court of Western Australia. It is hoped that the contents of those Chapters will prove helpful to judicial officers presiding in all Western Australian criminal courts.

It is hoped, further, that the material of a more general nature which is contained in Chapters One – Five of the Benchbook will prove useful to judicial officers presiding in non-criminal proceedings involving Aboriginal persons in Western Australia.

It should be noted that the Benchbook is an experimental “work in progress”. It does not purport to be exhaustive of the many complex issues which arise in relation to Aboriginal involvement within the Western Australian criminal justice system.

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<sup>1</sup>In this Benchbook, unless otherwise indicated, the word “Aboriginal” is used as a synonym for “Indigenous” and includes, where applicable, persons from the Torres Strait Islands.

## 1.2

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### OBJECTIVES OF THE BENCHBOOK

The objectives of the Benchbook are twofold. First, it seeks to assist judicial officers in criminal proceedings involving Aboriginal persons in the following specific ways:

- (1) In Chapter One (Introduction): by providing background information relating to the 1991 *Royal Commission into Aboriginal Deaths in Custody: National Report*<sup>2</sup>; the formation of the National Indigenous Cultural Awareness Committee of the Australian Institute of Judicial Administration; and that Committee's resolution to develop the Benchbook. Legal definitions of "Aboriginal" are briefly considered.
- (2) In Chapter Two (Aspects of Traditional Aboriginal Australia): by describing certain features of early Aboriginal occupation of Australia, traditional Aboriginal languages groups, languages, social organisation, culture, spirituality, ritual, art and law.
- (3) In Chapter Three (Aspects of Contemporary Aboriginal Australia): by providing a short overview of certain features of contemporary Aboriginal Australia, including Aboriginal migration to urban areas and demographical data. Possible differences in the cultural values of Aboriginal and non-Aboriginal Australians are identified.
- (4) In Chapter Four (Aboriginal People in Western Australia): by providing background information of specific relevance to Western Australia including the names and location of the many Aboriginal language groups<sup>3</sup>, and a brief note of relevant Western Australian legislation. Continuing Aboriginal over-involvement in the Western Australian criminal justice system is briefly canvassed and the role of the Aboriginal Justice Council is outlined.
- (5) In Chapter Five (Language and Communication): by describing the linguistic and conceptual features of *Ngaanyatjarra*, a Western Australian Aboriginal language; by identifying possible barriers to effective communication between Aboriginal and non-Aboriginal persons; and suggesting strategies for improved communication with speakers of Aboriginal (Non-Standard) English.
- (6) In Chapter Six (Pre-Trial Matters): by identifying issues which might affect Aboriginal accused persons in pre-trial proceedings. Such issues include committal proceedings; judicial bail; fitness to plead (pursuant to the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) and at common law) and interpreting Aboriginal languages.

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<sup>2</sup> E Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report* Vols. 1-11, AGPS, Canberra, 1991.

<sup>3</sup> In this Benchbook the term "language group" is used in preference to alternatives such as "culture group", "clan" or "tribe".

The *Appendix to Chapter Six* contains information relating to the Aboriginal Legal Service of Western Australia (Inc.); statutorily-appointed Aboriginal Court Officers; and the availability and location of Aboriginal interpreting courses and Aboriginal interpreters in Western Australia.

- (7) In Chapter Seven (Criminal Proceedings): by examining the operation of criminal proceedings in respect of Aboriginal accused persons and witnesses. The discussion includes matters relating to pleas of guilty; changes of plea; the operation of s 49 *Aboriginal Affairs Planning Authority Act 1972* (WA); juries; the evidence by children and vulnerable witnesses; expert evidence; identification evidence; and confessions and admissions, including a discussion of the Anunga Guidelines.

The *Appendix to Chapter Seven* contains judicial comments from Western Australian judges; comments from the Director of Public Prosecutions for Western Australia; submissions from the Aboriginal Legal Service of Western Australia (Inc) and examples of judicial directions to juries in trials involving Aboriginal accused persons.

- (8) In Chapter Eight: Sentencing: by examining the notion of “Aboriginality” in sentencing and the operation of sentencing principles in respect of Aboriginal offenders. Particular focus is placed upon proportionality, imprisonment as a sentence of last resort, domestic violence and mitigatory factors. Mitigatory factors are numerous and include circumstances underlying alcohol and substance abuse, the impact of imprisonment upon Aboriginal persons, physical and mental impairment, cultural dislocation, racial conflict and the infliction of customary punishment.

The *Appendix to Chapter Eight* contains commentary from Western Australian judges and extracts from sentencing remarks in respect of Aboriginal offenders.

The second objective of the Benchbook is to serve as a Model or template for adaptation and application in other Australian criminal jurisdictions. Since the Benchbook is very much an experimental work, such adaptations may well reflect different approaches and emphases.

The Benchbook is published in a “looseleaf” form to facilitate the insertion of personal notes and/or other materials.

**IMPORTANT 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 open to criticism. However, the employment of a collective term cannot be avoided, and the word “Aboriginal” has been used upon the recommendation of Aboriginal advisers to the Benchbook.

Further, the author (a non-Aboriginal person) acknowledges that the discussion of matters relating to Aboriginal society, culture and law by a non-Aboriginal person is contentious. The purpose of including the material contained in Chapters Two – Five of the Benchbook is to create a heightened awareness in the judiciary of Aboriginal socio-cultural factors which might impact upon the conduct of legal proceedings. The writer apologises for any offence which unwittingly may be caused to Aboriginal persons in the writing of those Chapters, or in any other part of the Benchbook.

## 1.3

### ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

#### 1.3.1 Background

During the early 1980s the grossly disproportionate rate and number of Aboriginal deaths in police or prison custody created widespread community concern. The circumstances surrounding many of those deaths proved a catalyst for the formation of groups such as the National Committee to Defend Black Rights. Intense lobbying for the holding of a parliamentary inquiry commenced, widely supported by bodies such as Amnesty International. On 11 August 1987 the Prime Minister announced that a Royal Commission into Aboriginal Deaths in Custody (Royal Commission) would be undertaken, and in January 1988 investigations into the deaths in custody of 44 Aboriginal persons commenced.

Those investigations continued for more than three years. During that period the mandate of the Royal Commission was broadened to incorporate a wide-ranging inquiry into Aboriginal involvement in Australian criminal justice. 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 eleven-volume *Royal Commission into Aboriginal Deaths in Custody: National Report*<sup>4</sup> (Final Report) was released on 9 May 1991. The key findings of the Royal Commissioner, Elliott Johnston QC, were summarised in Volume One of the Final Report. Those key findings included the following:

- (1) It could not be asserted that abuse, neglect or racism were common elements in each of the deaths investigated<sup>5</sup>. However, in many cases “system failures” or the absence of due care had contributed to the deaths<sup>6</sup>.
- (2) Aboriginal people do not die in custody at a greater rate than do non-Aboriginal people<sup>7</sup>. However, Aboriginal people come into custody at a rate which is “overwhelmingly different” from that of the general community<sup>8</sup>. 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<sup>9</sup>.
- (3) The most significant cause of Aboriginal over-representation in the criminal justice system was the constantly disadvantaged position of

<sup>4</sup> E Johnston QC, Final Report, n 2.

<sup>5</sup> E Johnston QC, Final Report, n 2, Vol. 1, p 1.

<sup>6</sup> E Johnston QC, Final Report, n 2, Vol. 1, p 3.

<sup>7</sup> E Johnston QC, Final Report, n 2, Vol. 1, p 6.

<sup>8</sup> E Johnston QC, Final Report, n 2, Vol. 1, p 6.

<sup>9</sup> E Johnston QC, Final Report, n 2, Vol. 1, p 2.

Aboriginal persons within the broader society. The investigations had revealed that 88 of the 99 Aboriginal persons who had died in custody 88 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 custody<sup>10</sup>.

The Royal Commissioner commented:

“An examination of the lives of the 99 shows that facts associated in every case with their Aboriginality played a significant and in most cases a dominant role in their being in custody and dying in custody.”<sup>11</sup>

The Royal Commissioner concluded that the enduring legacy of British colonisation and post-colonial laws and practices was systemic Aboriginal socio-economic disadvantage, disempowerment and cultural fragmentation. It appeared that an inevitable consequence of that legacy was early, and repeated, contact by many Aboriginal persons with the criminal justice system.

### 1.3.3 Recommendations

The Final Report contained 339 recommendations for Commonwealth and State Governments. The recommendations included reforms to the criminal justice, juvenile justice and custodial systems. Other recommendations focused on policing, Aboriginal empowerment and self-determination<sup>12</sup>. Recommendations relating to criminal proceedings included:

- 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<sup>13</sup>.
- 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<sup>14</sup>.
- 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

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<sup>10</sup> E Johnston QC, Final Report, n 2, Vol. 1, p 5.

<sup>11</sup> E Johnston QC, Final Report, n 2, Vol. 1, p 1.

<sup>12</sup> An examination of those recommendations is outside the scope of this Benchbook.

<sup>13</sup> E Johnston QC, Final Report, n 2, Vol. 3, p 80.

<sup>14</sup> E Johnston QC, Final Report, n 2, Vol. 3, p 85.

prepare cases, and that this is a special problem in communities without access to lawyers other than at the time of court hearings<sup>15</sup>.

Of particular relevance for present purposes is Recommendation 96, which provides:

“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.”<sup>16</sup>

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<sup>15</sup> E Johnston QC, Final Report, n 2, Vol. 3, p 91.

<sup>16</sup> E Johnston QC, Final Report, n 2, Vol. 3, p 79.

## 1.4

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### IMPLEMENTATION OF RECOMMENDATION 96

#### 1.4.1 AIJA National Indigenous Cultural Awareness Committee

In early 1992 a representative of the Commonwealth Attorney General approached the Australian Institute of Judicial Administration (AIJA) to discuss methods of implementing Recommendation 96 of the Final Report. Justice Paul Seaman described the response of the AIJA in the following terms:

“The Council of the AIJA was unanimous that we should try to assist in [the implementation of Recommendation 96] and it seems to me that the reason for doing so is quite simple. The Royal Commission conducted the most in-depth consideration of the position of Aboriginal people in relation to the justice system which has ever been undertaken. In the light of its report and the having regard to the history of our treatment of the Aboriginal people over the last two centuries and their grossly disproportionate numbers in Australian prisons, the court system cannot ignore the one recommendation which is specifically directed to it.”<sup>17</sup>

In April 1992 a formal agreement was entered into whereby the AIJA received funding to facilitate the delivery of cultural awareness programs to the judiciary. At the same time a National Aboriginal Cultural Awareness Committee (Committee) was formed, convened by Justice Paul Seaman. In 2001 the name of the Committee was changed to “National Indigenous Cultural Awareness Committee”.

#### 1.4.2 The Benchbook Project

At a meeting held on 22 April 1999 the Committee discussed the possibility of developing a Benchbook to assist the judiciary in the conduct of trials involving Aboriginal people. Subsequently the Hon Justice French of the Federal Court of Australia developed guidelines for the contents of a Benchbook. In November 1999 her Honour Judge Yeats of the District Court of Western Australia, Convenor of the Committee, advised the principal judicial officer in each Australian jurisdiction of the Committee’s intention to develop a Model Benchbook.

On 26 July 2000 the Committee approved the form of a Draft Template for a Model Benchbook based upon the criminal jurisdictions of the Supreme of Western Australia and the District Court of Western Australia. With the permission of the Hon David K Malcolm AC CJCWA, Chief Justice of Western Australia, and his Honour Kevin J Hammond, the Chief Judge of the District Court of Western Australia, that Template was made available to members of the Western Australian judiciary for comment. In the subsequent development of the Benchbook, members of the Western Australian judiciary have generously assisted the author by providing commentary on draft Chapters.

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<sup>17</sup> The Hon Justice P Seaman *A National Aboriginal Cultural Awareness Program: Working with Aboriginals and Torres Strait Islanders* Paper presented to the Thirteenth Annual Conference of the AIJA, Fremantle, 13-14 August, 1994 (at 4).

## 1.5

### POSTSCRIPT: ABORIGINAL DEATHS IN CUSTODY 1990 - 2000

Numerous bodies monitor the implementation of the recommendations contained in the Final Report. Those bodies include the Deaths in Custody Watch Committee in each State; the Australian Institute of Criminology (AIC) and the Aboriginal and Torres Strait Islander Commission. In June 2001 the Western Australian Government published *Government of Western Australia 2000: Implementation Report*<sup>18</sup>, which reported upon the extent to which recommendations made in the Final Report had been implemented to date<sup>19</sup>.

In October 2001 the AIC reported that in the decade 1990 - 2000, a total of 909 persons died in all forms of custody in Australia. One hundred and sixty-two of those 909 persons (almost 18%) were Aboriginal<sup>20</sup>.

The AIC also noted that in 2000, a total of 91 persons had died in all forms of custody, compared with 65 persons in 1990, and 85 persons in 1999. The most frequent cause of deaths in custody was by hanging, as it has been for 17 of the 21 years that such data has been collected. Young adult males feature disproportionately in the figures: in 2000 just under 50% of the deaths which occurred in custody were of persons aged between 25 and 34 years<sup>21</sup>. Seventeen (or 18.6%) of the 91 persons who died in custody in Australia in 2000 were Aboriginal<sup>22</sup>.

In 2000, 16 of the 91 deaths in custody occurred in Western Australia. Five (almost one-third) of those 16 persons were Aboriginal<sup>23</sup>. Yet Aboriginal persons comprise less than 3% of Western Australia's total population<sup>24</sup>.

It is self-evident that the words of the Royal Commissioner remain as relevant in 2002 as they were in 1991:

"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."<sup>25</sup>

<sup>18</sup> Indigenous Affairs Department, June 2001.

<sup>19</sup> See also *Review of the New South Wales Government Implementation of the Royal Commission into Aboriginal Deaths in Custody* (New South Wales, September 2000).

<sup>20</sup> 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. The forms of custody referred to are police, prison and juvenile detention. Of the 91 deaths, 2 persons died in juvenile detention 70% died in prison custody, and the remainder (almost 30%) died in police custody.

<sup>21</sup> L Collins and J Mouzos, n 20, at 2.

<sup>22</sup> L Collins and J Mouzos, n 20, at 2.

<sup>23</sup> L Collins and J Mouzos, n 20, at 2. One died in police custody; four died in prison custody.

<sup>24</sup> Australian Bureau of Statistics *Census of Population and Housing: Aboriginal and Torres Strait Islander People, Western Australia, 1996*, 2035.5.

<sup>25</sup> E Johnston QC, Final Report, n 2, Vol. 1, at 6.

## 1.6

### LEGAL DEFINITIONS OF “ABORIGINAL”

On 26 January 1788 English law was received and applied in the “settled” colony of Botany Bay in New South Wales pursuant to the legal fiction of *terra nullius*<sup>26</sup>. A pattern of colonial “settlement” and consequent imposition of English law was repeated in the establishment of the other Australian colonies during the succeeding decades.

The Aboriginal occupants became British subjects, governed by colonial laws. Since that time Australian courts have rejected any argument that Aboriginal people are not subject to the imposed law. They have also rejected any claim that Aboriginal sovereignty survived the acquisition of sovereignty by the British Crown<sup>27</sup>. However, Aboriginal customary law survives to inform the law of native title<sup>28</sup>, and its relevance to criminal proceedings is the subject of discussion in this Benchbook<sup>29</sup>.

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 people<sup>30</sup>. 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”<sup>31</sup>. 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 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 matters<sup>32</sup>.

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<sup>26</sup> According to principles of eighteenth century national and international law, territory which was *terra nullius* (i.e. territory “belonging to no-one”, or whose inhabitants were “uncivilised”) could be acquired by settlement. Upon the establishment of the colony of New South Wales all the laws of England, so far as they were applicable to the circumstances of the colony, immediately came into force. See the discussion by Brennan J in *Mabo v Queensland (No 2)* 175 CLR 1 at 32-38.

<sup>27</sup> *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).

<sup>28</sup> See *inter alia Mabo v Queensland (No 2)* 175 CLR 1; s 253 *Native Title Act 1993* (Cth).

<sup>29</sup> See Chapters Six (Pre-Trial Matters), Seven (Criminal Proceedings) and Eight (Sentencing).

<sup>30</sup> J McCorquodale *Aborigines and the Law: A Digest* Australian Studies Press, Canberra, 1987.

<sup>31</sup> The Oxford English Dictionary, Second Edition, Vol 1, Clarendon Press, Oxford, 1989.

<sup>32</sup> H McRae et al *Indigenous Legal Issues* LBC Information Services, Second Ed, 1997, p 72.

In the latter half of the twentieth century a broader approach became apparent. In *Ofu-Kolai v The Queen*<sup>33</sup> the High Court held that “racial origin or derivation” was the relevant measure of determining whether a person came within a racial group<sup>34</sup>. Their Honours commented that “at the edges of racial classification there is an uncertainty of definition”<sup>35</sup>.

In *Re Bryning (Dec’d)*<sup>36</sup>, Lush J took judicial notice of the fact that very few Aboriginal people of full blood remained in Australia. His Honour continued:

“In this country, in everyday usage, the meaning of the words “Aborigine” and “Aboriginal” varies. In contrast with the word “half-caste” as in the old statutes, they undoubtedly mean a man of the full blood, but when used to describe a general body of persons, without adjectives and without contrasting words or phrases, I do not think that they have had this meaning for many years.”<sup>37</sup>

In Western Australia the *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPAA) provides for -

“...the establishment of an Aboriginal Affairs Planning Authority, a Commissioner for Aboriginal Planning and an Aboriginal Affairs Advisory Council for the purpose of providing consultative and other services and for the economic, social and cultural advancement of persons of Aboriginal descent in Western Australia, to repeal the *Native Welfare Act 1963*, and for incidental and other purposes.”

The term “person of Aboriginal descent” is defined for the purposes of the statute in s 4 AAPAA:

“**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.”

That 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. The fourth criterion is residence in Western Australia.

It appears that there has been little judicial discussion of the statutory definition of “person of Aboriginal descent”.

The few authorities appear to focus upon the element of descent. In *Smith v Grieve*<sup>38</sup> Burt J stated:

“[The appellant] is, he says, ‘a full-blood Aboriginal’ and so is an ‘Aboriginal’ within the meaning of that word as defined by s 4 of the Act.”<sup>39</sup>

<sup>33</sup> (1956) 96 CLR 172.

<sup>34</sup> *Ofu-Kolai v The Queen*, n 33, at 176 per Dixon CJ, Fullagar and Taylor JJ.

<sup>35</sup> *Ofu-Kolai v The Queen*, n 33, at 175 per Dixon CJ, Fullagar and Taylor JJ.

<sup>36</sup> [1976] VR 100.

<sup>37</sup> *Re Bryning (Dec’d)*, n 36, at 103.

<sup>38</sup> [1974] WAR 193 at 194 per Burt J.

<sup>39</sup> *Smith v Grieve*, n 38, p 194.

In *McArthur v Eastman*<sup>40</sup> Ipp J stated:

“The learned Magistrate fully appreciated that the appellant was a person of Aboriginal descent. She remarked that she knew ‘he’s a full-blood Aboriginal’ (sic).”<sup>41</sup>

In *Winder v Milner*<sup>42</sup> Jackson CJ considered that one-quarter bloodline was sufficient for the purposes of the statute:

“The appellant, it appears, is a quarter caste aboriginal native and as such it was assumed in the court below, and may be assumed here, that he came within the definition of s.4 of the Aboriginal Affairs Planning Authority Act 1972.”<sup>43</sup>

It may be that for the purposes of s 4 AAPAA a very small amount of biological descent is required: see the discussion *inter alia* in *Attorney-General (Queensland) v State of Queensland*<sup>44</sup> (below).

It appears that, in practice, the other elements of s 4 AAPAA (residence in Western Australia, self-identification and community acceptance) are non-contentious<sup>45</sup>. In *Webb v R*<sup>46</sup> Malcolm CJ and Ipp J noted that it was “common ground” that the appellant was a person of Aboriginal descent<sup>47</sup>.

The meaning of “Aboriginal” for constitutional purposes was clarified in *Commonwealth v Tasmania*<sup>48</sup> (*Tasmanian Dams Case*). In the case the High Court made it clear that Aboriginal persons from Tasmania are members of the “Aboriginal race” for the purposes of s 51(xxvi) of the Australia 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”<sup>49</sup>. 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.”<sup>50</sup>

In *Attorney-General (Commonwealth) v State of Queensland*<sup>51</sup> (*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 Queensland<sup>52</sup>. 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

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<sup>40</sup> Unrep., Sup Ct WA, Ipp J, No 1080 of 1992, 29 September 1992.

<sup>41</sup> *Mc Arthur v Eastman*, n 40, at 6.

<sup>42</sup> Unrep., Sup Ct WA, Jackson CJ, Appeal No 158 of 1974, 3 April 1974.

<sup>43</sup> *Winder v Milner*, n 42, at 1.

<sup>44</sup> (1990) 94 ALR 515.

<sup>45</sup> See for example *Hart v Rankin* [1987] WAR 144 at 145 per Burt CJ; *Clinch v Atkins* (Unrep., WA Sup Ct, Jones J, No 106 of 1973, 19 November 1973) at 1.

<sup>46</sup> (1994) 13 WAR 257.

<sup>47</sup> *Webb v R*, n 46, per Malcolm CJ at 259; per Ipp J at 265.

<sup>48</sup> (1983) 158 CLR 1.

<sup>49</sup> *Tasmanian Dams Case*, n 48, at 273-274.

<sup>50</sup> *Tasmanian Dams Case*, n 48, at 274.

<sup>51</sup> (1990) 94 ALR 515.

<sup>52</sup> 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.

to be “Aboriginal” a person must have “at least a real possibility of descent” from the people who had occupied Australia before colonisation<sup>53</sup>. Spender J stated that once a person has been established to be “non-trivially” of Aboriginal descent, that person is Aboriginal<sup>54</sup>. 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 exhaustive<sup>55</sup>.

Section 4(1) *Aboriginal and Torres Strait Islander Act 1989* (Cth) (ATSIC Act) defines the term “Aboriginal person” as “a person of the Aboriginal race of Australia”<sup>56</sup>. In *Gibbs v Capewell*<sup>57</sup> Drummond J held that Aboriginal descent is an essential, but not necessarily a sufficient, condition of Aboriginality for the purposes of s 4(1) ATSIC Act. His Honour 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 suffice<sup>58</sup>. In *Wolf v Shaw*<sup>59</sup> Merkel J was also called upon to examine the definition of “Aboriginal person” in s 4(1) ATSIC Act. After an extensive discussion of Aboriginal sociology, his Honour concluded that inflexible notions of Aboriginal identity are inappropriate. Merkel J agreed with Drummond J in *Gibbs v Capewell* that descent alone is not sufficient. His Honour 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 case<sup>60</sup>.

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 in very broad terms<sup>61</sup>. 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. Arguably, the same reasoning may apply to the interpretation of s 4 AAPAA.

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 affairs. The use of the word “Aboriginal” has been criticised as being inaccurate, racist and controlling<sup>62</sup>. However, if measures of positive discrimination are to be effected in respect of Aboriginal persons it is difficult to see how judicial pronouncements upon Aboriginal identity can be avoided.

<sup>53</sup> *Attorney-General's Case*, n 51, at 517.

<sup>54</sup> *Attorney-General's Case*, n 51, at 523.

<sup>55</sup> *Attorney-General's Case*, n 51, p 539.

<sup>56</sup> This apparently circular definition is found *inter alia* in s 3 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); s 2 *Aboriginal Councils and Associations Act 1976* (Cth).

<sup>57</sup> (1995) 128 ALR 577.

<sup>58</sup> *Gibbs v Capewell*, n 57, at 581-585.

<sup>59</sup> (1998) 83 FCR 113.

<sup>60</sup> *Shaw v Wolf*, n 59, at 118-122.

<sup>61</sup> Note the view of French J in *Attorney-General's Case*, n 51, at 539.

<sup>62</sup> 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.

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## REFERENCES/FURTHER READING

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